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LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY. By John Fabian Witt. New York, N.Y.: Free Press. 2012. Pp. viii, 248. \$32.00

Reviewed by Marco Basile*

Lincoln's Code explores the ambitious project to codify the customary rules of warfare in the midst of the Civil War. General Henry Halleck and Secretary of War Edwin Stanton recruited the law professor Francis Lieber for the undertaking in the final days of 1862.¹ Lieber was already famous as the editor of the popular *Encyclopaedia Americana*.² And he was already inextricably tied to the Civil War: Two of his sons fought for the Union while a third fought and died for the Confederacy.³ But it was his wartime authorship of 157 articles regulating all aspects of war—from confiscation

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¹ JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 180, 229 (2012).

² See *id.* at 176.

³ *Id.* at 1, 193.

and collateral damage to prisoners of war and torture—that would secure his place in history as the creator of what became known as “Lieber’s Code.”⁴

John Fabian Witt, one of the country’s leading legal historians, suggests that the Code is better thought of as Lincoln’s because it facilitated emancipation.⁵ Before the Civil War, the United States’ controversial interpretation of international law prohibited the wartime confiscation of private property, including enslaved people, on land.⁶ But Lincoln and Lieber loosened this restraint on emancipation by rethinking the previously strict separation between the permissible means for fighting a war and the war’s objectives. Under Lincoln’s Code, a state could pursue most any means in war provided it was necessary to achieve the state’s ends.⁷ Thus, Lincoln and Lieber used their new rules as “weapon[s] for the achievement of Union war aims.”⁸

Witt argues that Lincoln’s pragmatic use of the laws of war to articulate and justify his wartime policies was part of a longer tradition in which the laws of war helped shape the way Americans thought and argued about their wartime conduct during the whole line of U.S. military engagements since the founding.⁹ The laws of war have provided a “language” for deliberating over the recurring wartime tension between the war’s objectives and the humanitarian desire to limit destruction.¹⁰ In American history, the balance between war aims and humanitarian restraints has been struck very differently. But the key message from *Lincoln’s Code* is that the laws of war have been central to striking that balance and, as a consequence, have helped shape the experience of thousands of soldiers, civilians, foreigners, and enslaved people.

Lincoln’s Code, then, is about the enduring significance of the laws of war in American history. It will not convince realists that the laws of war were dispositive for shaping Lincoln’s most important wartime policies. Nor will it convince skeptics that the laws

⁴ *Id.* at 231–34 (describing Lieber’s authorship of the Code); RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 1 (1983) (referring to the Code as “Lieber’s Code”).

⁵ WITT, *LINCOLN’S CODE*, *supra* note 1, at 8. Lincoln’s contemporaries ascribed the Code to Lincoln for the same reason. *Id.* at 246.

⁶ *Id.* at 70–72, 75–77.

⁷ *Id.* at 234–36.

⁸ *Id.* at 4.

⁹ *See id.* at 366, 370–71. The list of American military engagements is long. *See* RICHARD F. Grimmert, CONG. RESEARCH SERV., R41677, *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2010* (2011) (listing hundreds of U.S. military engagements). As George Herring writes in his definitive one-volume history of U.S. foreign relations, “few nations have had as much experience at war as the United States. Indeed, beginning with the American Revolution, each generation has had its war.” GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 1–2 (2008).

¹⁰ WITT, *LINCOLN’S CODE*, *supra* note 1, at 364.

of war played as significant of a role across all conflicts, especially those against nonwhites. But these are not positions that Witt sets out to topple. Witt instead seeks to understand how the laws of war have almost always been part of the conversations that shaped and legitimized the way war has been waged from the Revolution to the U.S.-Philippine War. He thus charts a messier middle way between contemporary international law enthusiasts who claim that the United States has recently broken a longstanding adherence to humanitarian restraints built into the laws of war and contemporary skeptics who argue that the laws of war have never mattered much in American history until only the past decade.¹¹ The stakes for this debate are over the legacy of the laws of war in the post-9/11 era. On Witt's account, today's enthusiasts for the laws of war present their role in American history as "a false idol" of humanitarian restraint, while the skeptics ignore their significance.¹² In rebutting the enthusiasts and the skeptics, Witt gestures toward a new approach to international law in American history that is less concerned with establishing or disestablishing the legitimacy or force of international law and more with the way people in the past drew on international law to think and argue about difficult moral predicaments during wartime. The result is a landmark volume in American legal history.

To achieve this reset in how we think about international law as American history, Witt, like his interlocutors, frames the history of the laws of war largely as one of continuity. He is attentive to changes in the logic and content of the laws of war, especially those wrought by Lincoln and Lieber, but what Witt ultimately finds most remarkable about these laws in American history is their endurance as a language for deliberation.¹³ However, as Witt himself hints at, American intentions when speaking this language changed dramatically. Future scholarship in keeping with Witt's deeply historical, rather than strictly doctrinal, approach to international law might trace this change more closely in order to strengthen our understanding of international law's past. In the late eighteenth century and early nineteenth century, Americans drew on the international laws of war because they were seeking recognition within the emerging international State system. By the Civil War and after it, the laws of war were deployed to hold a particular vision of the nation together and to exclude particular peoples, such as Indians and Filipinos, from that vision. This inward turn suggests a more discontinuous narrative for the laws of war in American history. Although Americans initially drew on the laws of war for outward-looking purposes,

¹¹ See *id.* at 5–6. On the former approach, what Witt calls "the declension theory," see John Fabian Witt, *The Dismal History of the Laws of War*, 1 U.C. IRVINE L. REV. 895, 897 (2011). See also, e.g., JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 327–329 (2008); DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 120 (1990). On the latter approach, what Witt calls "the novelty theory," see Witt, *supra*, at 898. See also, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129–30 (2007).

¹² WITT, *LINCOLN'S CODE*, *supra* note 1, at 6.

¹³ See *id.* at 370.

the laws became bound up in a more insular national project by the close of the nineteenth century.

Lincoln's Code is Witt's third book. His prizewinning first book, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2004), traced the contingent path that led from a boom in industrial injuries and deaths between the 1860s and 1920s to widespread experimentation in accident law out of which modern workmen's compensation emerged as only one of several plausible solutions. His lesser-known but equally important second book, *Patriots and Cosmopolitans: Hidden Histories of American Law* (2007), explored a series of vignettes in which American law's engagement with foreign and transnational issues was shaped and bounded by the sentiments and institutions comprising American nationalism. *Lincoln's Code* reflects the accomplishments of Witt's earlier work. It is as deeply attuned to the historical contingency of legal change as his first book and as powerfully attentive to the international and transnational dimensions of American legal history as his second book. The international turn within Witt's work reflects a broader international turn in the field of American legal history in general, as well as in the field of the American Civil War—both of which are emerging from a long period when international law, and Lieber's Code especially, were at the very margins of the field. Witt is at the forefront of this change. Although less explicitly methodological than Witt's first two books, *Lincoln's Code* was written on the foundation of a series of methodological articles, to be discussed below, on how to best approach international law, and the laws of war in particular, as rich historical phenomena, rather than as debating points over contemporary issues. *Lincoln's Code* marks Witt's anxiously awaited answer to his calls for a more genuinely historical approach to international law in America.

I. FROM THE ENLIGHTENMENT TO THE WATER CURE

Witt's central claim is that the laws of war are a "language" that "shaped the way men talked about war" from the Revolution to the Philippine-American War.¹⁴ Debates over the laws of war facilitated deliberation over the proper balance between permissible conduct to win the war and restraints to limit the war's violence. As Witt has written elsewhere, other historiographical approaches overlook the fact that the laws of war provided "a framework for moral contestation and debate about ends and

¹⁴ *Id.* at 364–65. Witt's position follows a common historical move to treat the way historical actors spoke about an activity as important for shaping how they acted without, however, implying that their activity was wholly determined by their language. See, e.g., WILLIAM H. SEWELL, JR., LOGICS OF HISTORY: SOCIAL THEORY AND SOCIAL TRANSFORMATION 336 (2005) (discussing the idea that language both constitutes and is defined by social practices).

means, a framework for conceptualizing and arguing about some of the gravest moments in American history.”¹⁵

Lincoln’s Code seeks to recover the laws of war as “a framework for ethical decision making.”¹⁶ The bulk of the book traces the prominence of the laws of war before the Civil War. During this period, the laws of war were indebted to the Enlightenment insofar as they maintained a distinction between war and crime—by which soldiers were immune from individual liability—as well as between the permissibility of the means of war and the justice of each side’s ends. By 1863, however, Lincoln and Lieber rethought these distinctions, a process that forced them to contemplate and debate the balance between the humanitarianism of an army’s means and the justice of its cause.

A. *Before the Civil War*

Witt begins by establishing that the laws of war were central to America’s founding. At that time, the customary laws of war, which had been shaped by the Enlightenment’s rejection of Christian theories of just war, adopted a neutral position toward each side’s purported ends and instead insisted on the same rules for each side.¹⁷ The founders wrote these rules into the Declaration of Independence and George Washington’s commission to head the Continental Army.¹⁸ Washington distributed Articles of War to his soldiers and required that they comport themselves with the Articles.¹⁹ Thomas Jefferson insisted on humane treatment of British prisoners during the Revolution (although he pursued inhumane policies against Britain’s Indian allies).²⁰ And the United States sent its chief statesman, Benjamin Franklin, to Europe during the war to conclude commercial treaties with potential allies that restated laws of war pertaining to maritime commerce.²¹

Conveniently for the aspiring nation, its professed commitment to the laws of war was tested only lightly. For the most part, the United States’ perceived interests usually overlapped with restraints on warfare given that the militarily weak state stood to benefit from them.²² During the Revolution, a first test started to emerge when public opinion began to clamor for destructive retaliation in the wake of violent Indian attacks organized by Britain.²³ But Washington’s sudden victory at Yorktown

¹⁵ Witt, *Dismal History*, *supra* note 11, at 911.

¹⁶ *Id.* at 368.

¹⁷ WITT, LINCOLN’S CODE, *supra* note 1, at 15–19.

¹⁸ *Id.* at 15.

¹⁹ *Id.* at 19–20.

²⁰ *Id.* at 28–29, 32.

²¹ *Id.* at 44–45.

²² *See id.* at 26–27, 51.

²³ *Id.* at 39–41.

in 1781 and Charles Cornwallis's subsequent surrender "pulled the American War of Independence back from the brink of indiscriminate destruction."²⁴ The War of 1812 therefore presented the first real "test[]" of the U.S. commitment to restraints on war.²⁵ (But presumably the serious threat of British retaliation again made the restraints palatable.) The United States passed the test, under Witt's evaluation, by committing to the humane treatment of prisoners of war, acknowledging truce flags, and otherwise complying with the laws of war.²⁶

As the War of 1812 showed, after the founding Americans continued to turn toward the laws of war to guide their conduct during military conflicts. In the antebellum period, the laws formed part of the training and practice in the country's new legal, military, and naval professions.²⁷ Maritime prize cases, which decided the legality under international law of captures by privateers commissioned by wartime states, comprised a large portion of the Supreme Court's docket.²⁸ And high-profile international controversies provoked major debates over the laws of war. For example, during his 1818 military campaign in Florida, then-General Andrew Jackson executed two British subjects suspected of conspiring with the Seminoles.²⁹ The ensuing congressional debate over the legality of the executions under the international laws of war marked "the longest debate ever to take place in the thirty-year history of the Congress."³⁰

The significance of the laws of war did not wane during the U.S.-Mexican War in the 1840s, but the conduct of the war led Americans to rethink the distinction between war and crime that had long been at the center of earlier conceptions of the laws of war. The United States had provoked Mexico into its war of conquest, but Uncle Sam nevertheless fought the war in its early stages under the usual restraints of the laws of war.³¹ The asymmetric nature of the war, however, soon put pressure on these restraints. U.S. soldiers pillaged Mexican towns, and Mexicans responded by turning to guerilla tactics, which led in turn to indiscriminate American retaliation.³² Amid this

²⁴ *Id.* at 43.

²⁵ *Id.* at 66.

²⁶ *See id.* at 67–68.

²⁷ *Id.* at 80–88.

²⁸ *See id.* at 81; *see also* David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U.L.J. 145, 147 (2008) ("Between February 1774 and February 1794 . . . cases arising from French privateering activities . . . accounted for roughly half of the Supreme Court caseload during this period.")

²⁹ WITT, LINCOLN'S CODE, *supra* note 1, at 98–99.

³⁰ *Id.* at 100. In response to accusations that Jackson violated the laws of war, he and his supporters deployed the moral rhetoric of international law to condemn Indian activity and thereby justify his violence. *Id.* at 96, 106.

³¹ *Id.* at 118; HERRING, *supra* note 9, at 199–200 (describing the origins of the war).

³² WITT, LINCOLN'S CODE, *supra* note 1, at 118–21.

destruction, General Winfield Scott sought to regulate the atrocious behavior of both his own soldiers and of the guerillas. His General Orders No. 20 established military commissions to try U.S. soldiers, and his General Orders No. 372 created “councils of war” with self-asserted jurisdiction over foreigners in foreign territory who had violated the laws of war, regardless of whether they were commissioned soldiers.³³ Scott thus “g[ave] life to the idea of the war crime.”³⁴ The Enlightenment’s version of the laws of war had separated war and crime under the theory that soldiers had to be immunized from criminal prosecution in order to ensure they would not choose endless fighting over eventually ending hostilities.³⁵ Scott’s General Orders Nos. 20 and 372 began to undo that distinction.

B. *The Lincolnian Moment*

It would take General Orders No. 100, which promulgated Lincoln’s Code, to unsettle the war-crime distinction for good.³⁶ The Code’s course was set by two legal positions taken by the Lincoln Administration in the early years of the war. First, Lincoln and his Secretary of State, William Seward, adopted a “mixed theory” toward the status of the Confederates.³⁷ For purposes of criminal law enforcement, the Lincoln Administration treated Southerners like criminals. But for purposes of the maritime blockade of Southern ports, the Administration treated the Confederacy like an independent state. It was virtually incoherent under international law that an entity might be both an independent state *and* a criminal organization, but Lincoln’s hand had been forced.³⁸ The Union had to shut off the Confederacy’s cotton export economy from British purchasers and the global economy. If Lincoln were to have treated Southerners only as criminals and closed the port as a criminal sanction, however, British violators of that sanction would have been subject to U.S. criminal law; Britain, the most powerful state in the world and constantly threatening to intervene in the war on behalf of the Confederacy, would not stomach such a move.³⁹ Lincoln treated the situation as if governed by the laws of war, then, but he refused to concede that Confederates were not criminals subject to prosecution for treason in any other context.

Second, in the face of a surge of guerilla warfare by Southerners, the Administration began to use functional, rather than formal, tests for determining combatants and noncombatants.⁴⁰ The pre-Code assignment went to Lieber, an extroverted and

³³ *Id.* at 123, 126.

³⁴ *Id.* at 130.

³⁵ *Id.* at 113.

³⁶ *Id.* at 237.

³⁷ *Id.* at 151.

³⁸ *Id.* at 146.

³⁹ *See id.* at 143–44.

⁴⁰ On the surge, *see id.* at 188–91.

energetic soldier-turned-professor who had emigrated from Prussia and gradually became one of the Lincoln Administration's chief advisers on military law, by virtue of a chance friendship with General Halleck.⁴¹ His approach was to stop emphasizing the formal distinction between soldiers who had been officially commissioned by the state and persons who had not been and to instead focus on the attributes of a combatant. For example, regardless of whether they had commissions, persons who were part of a stable group of fighters that had centralized command and the capacity to take prisoners would be considered combatants.⁴² At the same time, the Lincoln Administration determined that both combatants and noncombatants could be held accountable before military commissions for criminal activity.⁴³ The commissions tried approximately 4,000 individuals during the war.⁴⁴

The Lincoln Administration's approach to the blockade and irregular warfare muddied more than just the war-crime distinction. It also revealed a shift from the Enlightenment separation of the means and ends of war to the belief that the best way to limit war's destruction was to provide the means necessary for concluding it quickly.

Lincoln's commitment to a theory of military necessity crystallized in the second half of 1862 as he set upon his decision to emancipate those enslaved by the Confederacy. Witt argues that Lincoln made his decision after he met with his then-chief general, the heavy-footed George McClellan, whose orthodox approach to limited warfare must have been partly to blame, on Lincoln's account, for the disastrous recent failure of his march on Richmond.⁴⁵ The breakthrough moment in *Lincoln's Code* comes when Lincoln decides to abandon the paralyzing restraints that result from the moral neutrality of the Enlightenment approach to warfare. Lincoln determined that he had to take the necessary steps to win, without letting doubts about the moral certainty of his cause prevent him from doing so.⁴⁶ Lincoln's decision to adopt military necessity was therefore, on Witt's account, "morally momentous."⁴⁷

In a parallel process, Lieber had arrived at the same conclusion. *Lincoln's Code* describes an apparent paradox between Lieber's views and his role as the mastermind of the Lincolnian approach to war. The apparent paradox is that Lieber, the eventual author of the United States' first codified laws of war, was an ardent enthusiast of war, ever since he battled against Napoleon's forces in defense of his native Prussia.⁴⁸

⁴¹ *Id.* at 173–77, 187–88, 193.

⁴² *Id.* at 193–94.

⁴³ *Id.* at 266.

⁴⁴ *Id.* at 267.

⁴⁵ *See id.* at 208–12.

⁴⁶ *Id.* at 212–16.

⁴⁷ *Id.* at 219.

⁴⁸ *See id.* at 173–78.

But Witt identifies how Lieber's martial sensibilities were not, in fact, in tension with his desire to restrain war. Over the course of several years, which included a popular lecture series during the early years of the Civil War, Lieber developed what Witt labels his "sharp war thesis."⁴⁹ According to this thesis, the fiercer the war, the shorter and thus ultimately more humane it would be.⁵⁰ The main influence on Lieber was not the Enlightenment but Carl von Clausewitz, a critic of rules-based war.⁵¹ Long before most Americans would have access to the first American translation of Clausewitz, Lieber had devoured the original.⁵²

Lincoln and Lieber had thus both embraced a form of pragmatism in war. On their view, "rules were means, not ends."⁵³ Subject to only a few limits, any means were necessary so long as the destruction did not outstrip the necessity.⁵⁴ Witt links this approach to the tradition of American pragmatism that was also born out of the Civil War: "To paraphrase Oliver Wendell Holmes, Jr.," Witt writes, "the life of the laws of war has not been logic. It has been experience."⁵⁵ Lincoln and Lieber's laws of war were "weapon[s]" that were "part of [their] strategy for winning the war."⁵⁶ Accordingly, although their Code roughly followed orthodox rules for prisoners of war as well as restraints, based in "basic standards of humanity," against the use of poison and ruses, it mixed this orthodoxy with innovation elsewhere.⁵⁷ Noncombatants were not spared from justified destruction. Civilians could be starved

⁴⁹ *Id.* at 184.

⁵⁰ *Id.* at 184, 279.

⁵¹ *See id.* at 184–86; CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Paret eds. & trans., rev. ed. 1984).

⁵² WITT, LINCOLN'S CODE, *supra* note 1, at 185.

⁵³ *Id.* at 157.

⁵⁴ *Id.* at 218, 234.

⁵⁵ *Id.* at 369. Lincoln's pragmatism differed from the variety associated with Holmes and the tradition of American pragmatism. Pragmatists like Holmes embraced experimentation with ideas because they *abandoned* fixed principles, not, as was the case for Lincoln, because they *committed* to principles in the face of uncertainty. *Cf.* LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 3–4, 36–38 (2001) (describing how Holmes' experience in the Civil War led him to "lose his belief in beliefs").

⁵⁶ WITT, LINCOLN'S CODE, *supra* note 1, at 274; *see also id.* at 345. The use of laws of war as weapons is similar to the notion of "lawfare" in contemporary asymmetrical warfare. *See* Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146 (2008) (defining "lawfare" as "the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective"). "Lawfare" also took place prominently in U.S. prize courts from the 1790s to the 1820s. *See* Sloss, *supra* note 27 (describing how British consuls in the 1790s dragged their enemies' privateers before U.S. prize courts); Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 L. & HIST. REV. 245 (2012) (same, for Spanish consuls from 1816 to 1822).

⁵⁷ WITT, LINCOLN'S CODE, *supra* note 1, at 236–37; *see also id.* at 232–33.

and their towns bombarded.⁵⁸ And, in a move that shored up the legal basis for Lincoln's recent Emancipation Proclamation, private property on land was not immune from seizure.⁵⁹ The ultimate expression of the Code's logic of necessity was General William Tecumseh Sherman's March to the Sea, which sprung from the idea that making war hellish meant making it end quickly.⁶⁰

Lincoln's Code ran its course soon after the Civil War ended. Safe from the war's emergency, the Supreme Court reined in the federal government's martial power under the laws of war, which otherwise might have provided a basis for radical Reconstruction policies.⁶¹ And efforts to use military tribunals to try high-profile former Confederates fell apart amid shifting public opinion.⁶² But Witt strives to demonstrate in his book's final pages that the Code left important legacies. The Code diffused to Europe, where it influenced manuals on the laws of war as well as the 1899 Hague Convention.⁶³ Military commissions were instituted to try captives from the Indian wars that followed the Civil War. They were kangaroo courts, however, whose failure to protect Indians from undue violence was rationalized by a Code-inspired "confidence that the rules of civilized war no longer put undue restraints on the soldiers who sought to wage it."⁶⁴ And the Code may similarly have offered perverse support for the extraordinary violence inflicted upon Filipinos during the United States' conquest of the Philippines at the turn of the century.⁶⁵ Americans caught in a downward spiral of violence tortured Filipino insurgents with the so-called "water cure," even though the Code had expressly forbidden torture.⁶⁶ Witt suggests that the Code had "lost its way."⁶⁷ But as the book turns to instances where Americans pursued patently less just wars and more atrocious methods against nonwhites who were not their brothers, readers might wonder whether the Code ever had a way.

⁵⁸ *Id.* at 233.

⁵⁹ *Id.* at 233–34.

⁶⁰ *Id.* at 279.

⁶¹ *See id.* at 308–13; *Ex parte Milligan*, 71 U.S. 2 (1866) (holding that the President lacked wartime authority to try civilians in military tribunals outside the zone of war).

⁶² *See* WITT, LINCOLN'S CODE, *supra* note 1, at 301–04.

⁶³ *Id.* at 343, 349.

⁶⁴ *Id.* at 330–38.

⁶⁵ *Id.* at 358. On this violence and the conquest, *see generally* PAUL A. KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, & THE PHILIPPINES (2006).

⁶⁶ WITT, LINCOLN'S CODE, *supra* note 1, at 355–56, 358–59.

⁶⁷ *Id.* at 361.

II. INTERNATIONAL LAW AS HISTORY

A. *Beyond the Lawyer's Question*

Indeed, Witt captures moments in American history that demonstrate the limits of Lincoln's Code and the laws of war as signposts for moral action. The laws of war legitimized, rather than restrained, violence against nonwhite peoples in North America and the Philippines.⁶⁸ Americans excluded Indians from the protections provided by restraints on war, against the positions of several European legal authorities.⁶⁹ Americans also deployed their interpretation of the laws of war before the Civil War to protect their property in enslaved people by insisting that property on land could not be confiscated during wartime.⁷⁰ This resistance constituted what Witt labels the "humanitarian paradox" before the Civil War: the country embraced rules limiting the destruction of war, but it ensured that the protection of the most inhumane practices was part of those restraints.⁷¹ (Extending *Lincoln's Code* into the twentieth and twenty-first centuries might clarify to what extent this paradox is a historical relic.)

Witt's account also will not change realists' view that international law did not decisively constrain or shape Lincoln's most important wartime decisions.⁷² Lincoln implemented his blockade without conceding, as was required under the laws of war, that the Confederacy was an independent state in any context other than the blockade.⁷³ Moreover, now a relatively stronger naval power vis-à-vis the South, the North abandoned its long-held support of positions favorable to neutral parties, on whom the South sought to rely in evading the blockade.⁷⁴ The Supreme Court did not restrain the North's extensive use of military commissions until after the war because it had dodged the issue during the war by determining that it lacked jurisdiction over

⁶⁸ *Id.* at 337, 358.

⁶⁹ *Id.* at 92–93.

⁷⁰ *Id.* at 70–72, 75–77.

⁷¹ *Id.* at 77.

⁷² *Cf.* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 46–48 (2005) (describing the ways in which the laws of war failed to constrain the North's wartime policies).

⁷³ WITT, *LINCOLN'S CODE*, *supra* note 1, at 145–46.

⁷⁴ *See, e.g., id.* at 154–55 (describing how the United States embraced the doctrine of continuous voyage, to which it had once sternly objected, which held that a ship engaged in contraband trade with the enemy could not invoke the cloak of neutrality merely by stopping at a neutral port en route to its final destination); *id.* at 160, 223 (noting that the United States went back on its earlier resistance to international efforts to outlaw privateering); GOLDSMITH & POSNER, *supra* note 72, at 47 (explaining that the North sought to loosen the requirement that a blockade be "effective" before blockade runners could be liable to capture).

it.⁷⁵ But even if the Court had limited the military commissions during the war, it is doubtful that Lincoln would have complied given his defiance of Chief Justice Roger Taney's decision that his suspension of habeas corpus was unlawful.⁷⁶

As for the Emancipation Proclamation, the Code reflected the thought process that led Lincoln to set upon emancipation and helped legitimize it, but it is difficult to conclude that Lincoln would not have issued the Emancipation Proclamation without his Code. In fact, Lincoln issued his Preliminary Emancipation Proclamation in September 1862 before his 1863 Code.⁷⁷ As Witt acknowledges, Lincoln freed those enslaved by the Confederacy because he came to the decision that it was the only way to win the war, not because of his Code.⁷⁸ The Code was a *product* of the way in which Lincoln (and Lieber) engaged and rethought the laws of war as he decided upon emancipation, rather than being an external constraint that required emancipation.⁷⁹

These points about the Code's limits are true, but they are only tangential to, not dismissive of, Witt's thesis. Witt's question is not a lawyerly one. He does not ask whether the laws of war were dispositive for Lincoln's wartime policies. Neither is he interested in establishing or undermining their perceived legitimacy in the past. Rather, he asks how they were meaningful to Americans at different times and in different places. Accordingly, Witt shows that the humanitarian impulse in the laws of war not only did not restrain violence against nonwhites, but that their logic of necessity and retaliation provided an authoritative language for condemning Indian behavior and thereby legitimizing violence against them.⁸⁰ That said, it remains doubtful that the significance of this language was nearly as great as the racist and economic anxieties that drove territorial expansion in the antebellum period.⁸¹ And

⁷⁵ Compare *Milligan*, 71 U.S. at 2 (holding that it was unlawful for the federal government to try a civilian for treason in a military commission outside the zone of war when federal courts were open); with *Ex parte Vallandigham*, 68 U.S. 243 (1864) (finding that the Court lacked jurisdiction to review a military commission's proceedings).

⁷⁶ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861); see MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 10–11 (1991).

⁷⁷ See WITT, *LINCOLN'S CODE*, *supra* note 1, at 243.

⁷⁸ *Id.* at 211; see generally ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 206–47 (2010).

⁷⁹ Although Witt focuses on the process by which Lincoln decided to issue the Emancipation Proclamation, it should be remembered that Lincoln's actions were only one part of the emancipation story. Another necessary part was the actions of enslaved persons themselves, who placed pressure on the Southern slave system through flight and resistance and who made themselves available as crucial allies to Lincoln's wartime effort. See W.E.B. DU BOIS, *The Negro and Social Reconstruction*, in *AGAINST RACISM: UNPUBLISHED ESSAYS, PAPERS, ADDRESSES, 1887–1961* 103, 105–06 (Herbert Aptheker ed., 1985).

⁸⁰ See, e.g., WITT, *LINCOLN'S CODE*, *supra* note 1, at 93, 96, 106.

⁸¹ See THOMAS R. HIETALA, *MANIFEST DESIGN: AMERICAN EXPANSIONISM & EMPIRE* 11, 96–103 (rev. ed. 2003) (arguing that U.S. territorial expansion was driven by anxieties about

although the laws of war did not determine Lincoln's position on the blockade or emancipation, he and Lieber "wrestled" with the competing commitments that existed in the laws of war of justly winning the war and limiting its destruction.⁸² By 1863, they had thought through the means-ends distinction of the laws of war and developed a new Code to explain and justify the new balance they had struck between restraints on their methods and the perceived justice of their cause. Military commanders, soldiers, and lawyers then turned to that Code to justify (or proscribe) conduct that affected thousands of people.⁸³

Lincoln's Code therefore models a history of international law that explores its significance by showing how it was inextricably bound to society's broader political, economic, and cultural debates, rather than treating it separately as a phenomenon that could decisively determine the course of those debates or, in contrast, be determined by those debates.⁸⁴ The key premise is that law is not separate from the politics, economy, and culture that make up society.⁸⁵ One of the most enduring

racial uprisings and about threats posed by industrialization to the ideal of a white agrarian republic); Barbara Jeanne Fields, *Slavery, Race, and Ideology in the United States of America*, 181 *NEW LEFT REV.* 95, 114-15 (1990) (describing racist ideology as a central force of early American history insofar as it resolved the tension between republican aspirations and slavery); Walter Johnson, *The Racial Origins of American Sovereignty*, 31 *RARITAN* 50, 57-59 (2012) (suggesting that nineteenth-century American history be considered less as a process righting itself over time and more as a process by which sovereign white citizens deliberately sought to control the distribution of nonwhites over continental space).

⁸² See WITT, *LINCOLN'S CODE*, *supra* note 1, at 9.

⁸³ See *id.* at 368 (concluding that "[t]he laws of war do many things" and noting several specific examples). Although military actors might have acted similarly absent the Code, we cannot fully understand those actions without acknowledging that these actors invoked the Code to justify their actions and that it provided particular avenues for such justification and foreclosed others. That is, a general who drew on the Code only to legitimize his actions would still be constrained to behaving and speaking about his behavior in ways consistent with it. Cf. 1 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* xii-xiii (1978) (describing how political actors who wish to legitimate their actions are constrained by the normative language they choose to deploy).

⁸⁴ Cf. John Fabian Witt, *A Social History of International Law: Historical Commentary, 1861-1900*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 164 (David L. Sloss et al. eds., 2011) (advocating for a "social turn" in the history of international law). For another recent example of a similar approach, see ELIGA H. GOULD, *AMONG THE POWERS OF THE EARTH: THE AMERICAN REVOLUTION AND THE MAKING OF A NEW WORLD EMPIRE* (2012) (exploring the role of the law of nations in the American founding period in the context of broader social and political developments).

⁸⁵ See Witt, *Social History*, *supra* note 84, at 176 (observing that "law is embedded in society"); see generally *id.* at 179-86 (elaborating on this claim and its implications for future scholarship). The historical approach based on this premise has traditionally been called the "law and society" approach, but a recent conference of leading legal historians suggested that it is more properly the "law as..." approach given that "[l]aw and' scholarship perpetuates the idea that,

images of this idea is Lawrence Friedman's suggestion that "law . . . is a mirror held up against life. . . . A full history of American law would be nothing more or less than a full history of American life."⁸⁶ The insight that law is embedded in society is, of course, by no means novel. But, as Witt rightly argues, whereas the insight has dominated historical approaches to other areas of law, the same insight has not come to bear on the history of international law in the United States.⁸⁷ That history, as Witt pointed out in an important recent methodological article, has instead been dominated by an "insider doctrinal" approach through which lawyers study legal documents to recreate how earlier lawyers thought about doctrinal problems in an effort to establish the historical legitimacy of international law.⁸⁸ Moving beyond the "insider doctrinal" approach means showing how international law mattered in the lives of everyday people, rather than just to lawyers. New histories of international law in the nineteenth century, for example, might explore the ways how those most affected by international law, such as pirates, and enslaved people, drew on, evaded, ignored, and reinforced international law.⁸⁹

Unlike the classic, and critical, law-and-society histories of American law, however, Witt's approach seeks to pay as much attention to ideas as to material interests.⁹⁰ In

even though law is situated in society, law is distinct from society and can, or must, be studied in relation to it." Catherine L. Fisk & Robert W. Gordon, *Foreword: "Law As . . .": Theory and Method in Legal History*, 1 U.C. IRVINE L. REV. 519, 520 (2011).

⁸⁶ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 584 (3d ed. 2005).

⁸⁷ See WITT, *LINCOLN'S CODE*, *supra* note 1, at 369; Witt, *Social History*, *supra* note 84, at 177 (noting that the history of international law is "about a half-century" behind the state of legal history generally). For classic law-and-society accounts of American legal history, see, e.g., Friedman, *supra* note 86; MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

⁸⁸ Witt, *Social History*, *supra* note 84, at 166–77. The best example is the landmark volume of the history of international law in the United States of which the cited article is a (critical) contribution. See INTERNATIONAL LAW IN THE U.S. SUPREME COURT, *supra* note 84.

⁸⁹ See, e.g., LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES, 1400–1900*, at 112–20 (2010) (describing "pirates as lawyers" insofar as they took advantage of international law by seeking or forging commissions and by invoking defenses recognized by international law); Witt, *Dismal History*, *supra* note 11, at 909–10 (noting that enslaved people were "lawyering with their feet" when they ran away to British lines during the Revolution and War of 1812 insofar as they "[took] advantage of the sudden existence of jurisdictional maneuvers").

⁹⁰ See, e.g., FRIEDMAN, *supra* note 86, at 70–71 (describing "the idea that law was something people used to further their ends"); Horwitz, *supra* note 87, at 63–108 (arguing that economic growth was deliberately promoted in antebellum America through the legal system by limiting the types of economic activity that could constitute a nuisance and by shifting from a strict liability standard for torts to a negligence standard); HURST, *supra* note 87, at 9, 29 (noting the use of law to facilitate American expansion and economic development); see generally Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 59–67 (1984) (discussing these works as

contrast to Friedman's mirror analogy, Witt maintains that legal ideas do not merely reflect society but help shape it. Witt argued in his first book that disproportionate attention to material interests over ideas wrongly implies that interests determine the course of legal innovation.⁹¹ He stated there that a historian should instead be committed to retracing the accidental and contingent paths through which law developed as a result of multiple material and intellectual causes that cannot be disaggregated.⁹² In *Lincoln's Code*, Witt again tries to correct the course. The book opens with a clear statement that it is, above all else, about "[t]he *idea* . . . that the conduct of war can be constrained by law."⁹³ The book proceeds to pay attention to the ways in which the laws of war, as ideas, contributed to deliberation over wartime conduct. *Lincoln's Code* refuses to cynically dismiss historical actors' language and ideas and instead engages with these actors on their own terms and asks why they used the language and invoked the ideas that they did. "We know that law is made by human beings for human beings," Witt writes, but "[i]f the law of war were nothing but the condensed interests of particular constituencies at particular moments, it could not do the work that it does."⁹⁴ *Lincoln's Code* is therefore a response not only to doctrinal accounts of the history of international law that ignore international law's embeddedness in society but also to hardheaded realists who privilege material factors.⁹⁵ Witt's approach shows that ideas about the ends and means of war have almost always bore on wartime conduct.

Lincoln's Code is therefore largely a story of continuity. Although the logic and content of the laws of war changed from their Enlightenment version to their Lincolnian version, Witt emphasizes their endurance as a medium for deliberating over the recurring tension between winning the war and limiting its violence. He thus offers a third narrative about the laws of war in American history, in contrast to the just-so

examples of "evolutionary functionalism"). *But cf.* MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY*, at vii–ix (1992) (explaining a new appreciation for the significance of "cultural factors" and for multi-causal theories of explanation).

⁹¹ JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 8–9 (2004).

⁹² *Id.* at 210 (distinguishing the historian's approach to "questions of determinism and accident" from the approach of philosophers and physicists).

⁹³ WITT, *LINCOLN'S CODE*, *supra* note 1, at 1 (emphasis added).

⁹⁴ *Id.* at 369.

⁹⁵ *See id.* at 252, 364, 370 (directing his argument toward "skeptics" and "critics" of international law). For other approaches to legal history that have sought a middle ground between interests and ideas, *see, e.g.*, Gordon, *supra* note 90, at 101 (describing law as "relatively autonomous" insofar as it "can't be explained completely by reference to external political/social/economic factors"); James T. Kloppenberg, *Book Review: The Theory and Practice of American Legal History*, 106 *HARV. L. REV.* 1332, 1335–36 (1993) (suggesting "pragmatic hermeneutics" as a method of accounting for both the relative autonomy of a legal text and the context in which that text was produced).

stories that treat the laws of war either as paeans of humanitarianism that Americans steadfastly enforced or as ornaments that Americans consistently ignored. Witt falls somewhere in the messy middle. The laws of war were significant in American history, but only as a language for negotiating the treacherous and changing path between winning wars and limiting their violence.

A historical understanding of language requires paying attention to the intentions of those who spoke it.⁹⁶ And here is where the story Witt recovers about the continuity of the laws of war's significance invites a story of discontinuity about the role of international law in the United States.

B. *The Law of War's Inward Turn*

Americans shifted from invoking the laws of war out of an outward aspiration to join the international community to invoking them out of an inward aspiration to preserve a particular vision of national community. When it comes to how Americans have thought about their relation to the world and its laws, the history of the laws of war in American history might be thought of as a more discontinuous one, with a break in the nineteenth century.⁹⁷

Early American generations enforced international laws of war largely because they believed respecting them would aid their prospects for international recognition. As a growing body of scholarship on the international history of early America has demonstrated, the founding generation and subsequent ones were unwaveringly committed to securing international recognition and its attendant benefits under international law.⁹⁸ Witt adopts their view by acknowledging that “[t]he aim of the

⁹⁶ See generally Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

⁹⁷ It is surprising that Witt does not discuss how nationalism contributed to an inward turn in the laws of war because he had previously argued that American nationalism's institutions and deeply rooted sentiments have “bounded” the ways law developed in America. See JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 6–7, 10–11 (2007).

⁹⁸ See, e.g., DAVID ARMITAGE, *THE DECLARATION OF INDEPENDENCE: A GLOBAL HISTORY* (2007) (recovering the significance of the Declaration of Independence as a document of international law seeking to secure international recognition for the United States); David Golove and Daniel Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 980 (2010) (arguing that the Constitution's primary purpose was to equip the federal government with the power to meet its international obligations so that the country could “earn recognition as a sovereign on an equal footing” with European states); GOULD, *supra* note 84 (recasting the Revolution as a protracted effort to achieve treaty-worthiness in the eyes of Europe by demonstrating sovereignty over the emerging state's territory and the people on that territory).

Revolution was to establish the membership of the United States in the club of civilized nations.”⁹⁹ Joining the club entitled the United States to important international rights, such as non-interference from other states, neutral maritime shipping rights, and rights to conclude commercial treaties.¹⁰⁰ And, crucially, establishing and maintaining that membership required demonstrating the capacity and willingness to enforce the country’s obligations under treaties and customary international law.¹⁰¹ Those obligations, as Witt shows, included respect for the international laws of war.¹⁰²

Over the course of the nineteenth century, the story changes. As *Lincoln’s Code* demonstrates, during the Civil War, Northerners used the laws of war to preserve a particular vision of the nation, most notably by re-crafting them to help bring the South back into the Union. Indeed, it was Lincoln’s singular commitment to national union that drove his approach to the laws of war.¹⁰³ Outside the Civil War, nineteenth-century Americans deployed the laws of war to justify violence against Indians in the Southeast and West, Mexicans in the Southwest, and Filipinos overseas. The laws of war thereby became a means of exclusion as Americans shaped a particular vision of their nation that excluded these nonwhite peoples. The laws of war became more significant for inward-looking purposes, rather than outward-looking ones.

The use of the laws of war during the Civil War still had outward-looking dimensions. As the blockade episode demonstrated, the United States had to pay attention to how foreign states such as Britain perceived the United States’ behavior in terms of international legal norms. But the blockade episode also evidences the nationalist makeover the United States gave their commitment to the laws of war. The blockade was motivated solely by a desire to pressure the South into rejoining the Union. And, against international law, the North insisted that imposing a blockade did not require it to recognize the South as an independent state for any purpose other than the closing of Southern ports. Although the Confederacy perceived its conflict with the Union as an international one,¹⁰⁴ the Union did not. These were laws of war for a conflict between brothers about shaping what the nation would become.

⁹⁹ WITT, LINCOLN’S CODE, *supra* note 1, at 27.

¹⁰⁰ See Golove and Hulsebosch, *supra* note 98, at 936–37, 976–77.

¹⁰¹ See *id.* at 936; GOULD, *supra* note 84, at 2–3.

¹⁰² WITT, LINCOLN’S CODE, *supra* note 1, at 27.

¹⁰³ See *id.* at 238 (observing that it was Lincoln’s commitment to maintaining the Union that led him to a policy of emancipation, which he viewed as legally justified); Dorothy Ross, *Lincoln and the Ethics of Emancipation: Universalism, Nationalism, Exceptionalism*, 96 J. AM. HIST. 379, 388, 396 (Sept.2009).

¹⁰⁴ See STEPHANIE MCCURRY, CONFEDERATE RECKONING: POWER AND POLITICS IN THE CIVIL WAR SOUTH 83 (2010).

The inward turn in the laws of war maps onto a broader change during the nineteenth century in international law's role in American history. The most important development in international law in the nineteenth century was the network of treaties concluded between Britain and other maritime powers to suppress the Atlantic slave trade.¹⁰⁵ The United States had been one of the first countries to outlaw the Atlantic slave trade as a matter of domestic law, and in the 1820s it negotiated a slave trade treaty with Britain and nearly ratified it.¹⁰⁶ Over the next forty years, however, it became the fiercest resistor to the treaty regime.¹⁰⁷ During this time, the United States also reined in earlier efforts in the country to establish and expand universal jurisdiction over piracy on the high seas.¹⁰⁸ In private international law, American courts had initially relied on a range of eclectic approaches for resolving conflicts of law, one of which prominently emphasized American courts' obligation to apply foreign law in particular circumstances.¹⁰⁹ By the 1830s, however, American courts had rallied around the idea that the courts never had an obligation to privilege foreign law and therefore might do so only out of comity.¹¹⁰

A similar inward turn took place in the nineteenth century regarding American municipal law's relationship to the world beyond U.S. borders. In *Dred Scott*, Chief Justice Taney supported his infamous decision that Dred Scott had not been freed from slavery by virtue of his having lived in free territory by insisting that constitutional protections, such as the protection from deprivation of property without due process of law, extended into U.S. territories.¹¹¹ But by the close of the

¹⁰⁵ Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 78 BRITISH Y.B. INT'L L. 342, 342 (2007) (noting that the "move by Great Britain to suppress the slave trade was *the* issue with global implications during most of that century").

¹⁰⁶ See W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638–1870* 138–40 (1896); HUGH G. SOULSBY, *THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS, 1814–1862* 26–38 (1933).

¹⁰⁷ See DU BOIS, *SUPPRESSION*, *supra* note 106, at 141–50; SOULSBY, *supra* note 106, at 176.

¹⁰⁸ See, e.g., *United States v. Palmer*, 16 U.S. 610, 631 (1818) (holding that the 1790 Piracy Act, which granted power to the United States to punish "any person" who committed piracy "on the high seas," did not encompass crimes against foreigners on foreign ships). *But see United States v. Klinton*, 18 U.S. 144, 152 (1820) (broadening U.S. jurisdiction over piracy to include cases where defendants allegedly committed piracy "on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever"). On the Marshall Court's piracy jurisprudence, see generally ALFRED P. RUBIN, *THE LAW OF PIRACY* 139–71 (2d ed. 1998); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727 (1989).

¹⁰⁹ See SAMUEL LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* 30, 171 (1828).

¹¹⁰ See JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* 24, 36 (1834); PAUL FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 13 (1981).

¹¹¹ 60 U.S. 393, 449–50 (1856).

nineteenth century, the Supreme Court revised its position by announcing in the *Insular Cases* that the whole Constitution did not follow the flag into the United States' colonial possessions.¹¹² Even the Declaration of Independence was caught up in this inward-looking turn. Although it was created as a document of international law aimed primarily at achieving the United States' recognition "amongst the Powers of the Earth," by the Civil War it had been transformed into a nationalist creed about the United States' exceptional commitment to rights that we recognize it as today.¹¹³

III. CONCLUSION

Lincoln's Code is a pillar of the new history of international law in the United States. The book demonstrates that international law is American history, and that an understanding of one cannot be disentangled from the other. Witt's trailblazing approach to international law involves exploring not only narrow queries about its doctrine and force but also broader questions about the ways in which it has been meaningful in people's daily lives. Here, for example, Witt has captured the enduring role of the laws of war as a language for moral deliberation over wartime conduct. As a result, he undermines prevalent stories about the laws of war in American history. Contrary to the skeptical account of the laws of war's significance in American history before 9/11, Witt demonstrates their rather consistent role in wartime deliberations. And contrary to the optimistic portrayal of the laws of war as having consistently restrained violence, Witt shows a messier picture in which humanitarian constraints often lost out in moral deliberations or, even more subversively, were understood radically different than we might understand them today. *Lincoln's Code* will remind readers that we are capable of deliberation over the conduct of war—but not that we will always come to the right decision. It also invites further reflection on how Americans have drawn on the laws of war for radically different purposes, from seeking membership in the international community to excluding peoples from a particular vision of the nation. For those today who seek a closer alignment between the United States' policies on wartime conduct and the norms of the broader world, it merits attention that adopting the language of international law and shaping the intentions behind speaking that language present separate challenges.

¹¹² See *Downes v. Bidwell*, 182 U.S. 244, 282–83 (1901).

¹¹³ ARMITAGE, *supra* note 98, at 25–26, 96–97.