

# THE POWER TO WAGE WAR SUCCESSFULLY

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*A century ago and in the midst of American involvement in World War I, future Chief Justice Charles Evans Hughes delivered one of the most influential lectures on the Constitution in wartime. In it he uttered his famous axiom that “the power to wage war is the power to wage war successfully.” That statement continues to echo in modern jurisprudence, though the background and details of the lecture have not previously been explored in detail. Drawing on Hughes’s own research notes, this Article examines his 1917 formulation and shows how Hughes presciently applied it to the most pressing war powers issues of its day—namely, a national draft and intrusive federal economic regulation. Though critical to supporting American military operations in Europe, these were primarily questions about Congress’s domestic authority—not the sorts of interbranch issues that naturally come to mind today in thinking about “waging war.” This Article also shows, however, how Hughes struggled unsuccessfully to define when war powers should turn off or revert to peacetime powers. The story of Hughes’s defense of (and later worry about) expansive wartime powers in World War I sheds much light on present constitutional war powers and debates about them, including in the context of indefinite and sweeping wars against transnational terrorist groups.*

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#### INTRODUCTION

Shortly after 8:00 PM on September 5, 1917, Charles Evans Hughes addressed the participants of the American Bar Association's annual meeting at Saratoga Casino in Saratoga Springs, New York.<sup>1</sup> The former Supreme Court Justice had stepped down from the High Court to run for President in 1916 and narrowly lost the race to incumbent President Woodrow Wilson less than a year earlier.<sup>2</sup> Now, Hughes rose to the podium to deliver a powerful legal defense of the Wilson Administration's controversial wartime actions—actions taken in a global war from which Wilson had only recently campaigned to keep America out.<sup>3</sup>

Titled "War Powers Under the Constitution,"<sup>4</sup> the speech attracted nationwide attention.<sup>5</sup> The *New York Times* covered it on page one; "War Power Ample, Hughes Declares," ran the headline.<sup>6</sup> At this time, the

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1. Am. Bar Ass'n, Program of Meeting at Saratoga Springs, N.Y., 3 A.B.A. J. 305, 324 (1917).

2. 1 Merlo J. Pusey, Charles Evans Hughes 315–34, 362 (1951) (detailing the 1916 presidential nomination process and election).

3. See George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776*, at 404–07 (2008) (outlining Wilson's position against American involvement in the war and actions to bring the war to a close).

4. Charles E. Hughes, *War Powers Under the Constitution*, 40 Ann. Rep. A.B.A., 1917, at 232 [hereinafter Hughes, *War Powers Under the Constitution*].

5. Pusey, *supra* note 2, at 370.

6. *War Power Ample, Hughes Declares*, N.Y. Times, Sept. 6, 1917, at 1. Other newspapers reported on it at length as well. See, e.g., *American Bar Indicts Germany* for

United States was five months into its participation in the Great War—a conflict that had already destroyed much of Europe and extended to many other parts of the globe.<sup>7</sup> During those short months the United States had built from near scratch a massive army unlike any American force before it. In doing so, the federal government had assumed unprecedented powers over American society.<sup>8</sup>

It was in that address that Hughes famously proclaimed that “[t]he power to wage war is the power to wage war successfully”<sup>9</sup>—a line that continues to be quoted often by lawyers, judges, and scholars.<sup>10</sup> Hughes concluded the speech with rhetorical flourish:

It has been said that the constitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority. So, also, we have a *fighting* constitution.<sup>11</sup>

Yet Hughes’s address was not a political rallying speech.<sup>12</sup> It was, rather, a meticulously researched and lawyerly presentation that carefully elaborated these “fighting constitution” principles and assessed the Wilson Administration’s wartime challenges in light of them.

No single document from World War I better articulates the constitutional war powers framework that prevailed at that time among the legal and political elite and the application of that framework to the most

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Illegal Acts, N.Y. Trib., Sept. 6, 1917, at 3; German Methods of War Scored, S.F. Chron., Sept. 6, 1917, at 15. The speech was also widely distributed. For example, one major paper reprinted the entire speech in its Sunday opinion page later that week. Charles E. Hughes, War Powers Under the Constitution, St. Louis Post-Dispatch, Sept. 9, 1917, at 1, 11.

7. See John Keegan, *The First World War 376–77*, 401–02 (1998) (noting that while Wilson initially said America was “too proud to fight,” his view changed after a “succession of diplomatic affronts”); David M. Kennedy, *Over Here: The First World War and American Society 3–44* (1980) [hereinafter Kennedy, *Over Here*] (describing Wilson’s reluctance, from 1914–1916, to enter the war as overcome only by a combination of the Russian Revolution, the Zimmermann telegram, and the German U-boat attacks on U.S. ships).

8. See *infra* notes 152–155 and accompanying text (describing massive increase in size of military); see also *infra* notes 206–219 and accompanying text (describing wartime military, economic, and administrative enactments).

9. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 238.

10. See *infra* notes 17–29.

11. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 248.

12. In contrast, two days earlier the former Secretary of War and Secretary of State Elihu Root had delivered to the same audience a rousing defense of American efforts to defeat the German menace, including general statements that long-term defense of American democracy would require wartime compromises of peacetime liberties. Give War Alarm, Root Urges Bar, N.Y. Times, Sept. 4, 1917, at 1. Root’s remarks included presenting to the American Bar Association a set of patriotic resolutions. Transactions of the Fortieth Annual Meeting of the American Bar Association, 40 Ann. Rep. A.B.A. 19, 25–26 (1917) (reprinting Root’s statement).

pressing contemporary policy questions<sup>13</sup>—not questions about entering the war or how to fight it on the battlefield, but about Congress’s power to revamp relations between the national government and citizenry. These domestically focused questions arose both from changes in the nature of warfare and from changes in America’s role in world affairs.<sup>14</sup> Hughes’s “fighting constitution” speech is a vivid picture that captures not only the subject’s exquisite features but also its energetic actions in rapid motion.

There is some irony that Hughes’s voice—and in particular his axiom that “[t]he constitutional power to wage war is the power to wage war successfully”—would reverberate so influentially in war powers jurisprudence given that he never judged a major war powers case. He served first as an Associate Justice on the Supreme Court from 1910 to 1916 and then again as Chief Justice from 1930 to 1941.<sup>15</sup> These happened to be relatively peaceful, dry spells for significant war powers cases, with both of Hughes’s terms ending less than a year before the United States declared war.<sup>16</sup>

Yet Hughes’s war powers speech would echo loudly in subsequent jurisprudence.<sup>17</sup> As Chief Justice, Hughes himself would restate in dicta, in a 1934 case about a state mortgage law enacted to deal with Great Depression economic emergency, that the war power “is a power to wage war successfully.”<sup>18</sup> Highlighting some of that proposition’s evident dangers, the Supreme Court invoked Hughes’s statement of the war power in World War II cases upholding discriminatory government orders, including internment, imposed on Japanese Americans.<sup>19</sup> In 1948, the Supreme Court

13. Indeed, Congress took close notice of the speech, which was entered almost immediately into the House and Senate records. S. Res. 134, 65th Cong. (1917) (enacted); 55 Cong. Rec. 6886 (1917) (statement of Rep. Steele); 55 Cong. Rec. 6836 (1917) (statement of Sen. James).

14. See Michael S. Neiberg, *The Path to War: How the First World War Created Modern America* 7 (2016) (“[World War I] occurred precisely as Americans were debating the role that a newly powerful United States should play in the world.”).

15. See Pusey, *supra* note 2, at 271–81 (describing Hughes’s 1910 nomination); 2 *id.* at 648–63 (describing Hughes’s 1930 nomination).

16. To be sure, Hughes did have a few occasions to rule on marginal or tangential war powers issues. See, e.g., *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 326–28 (1936) (finding Congress’s war powers gave ample authority for the Wilson Dam project on the Tennessee River); *Sterling v. Constantin*, 287 U.S. 378, 394–404 (1932) (considering an allegation of property rights violations due to the Texas governor’s assertion of military emergency powers).

17. See, e.g., *United States v. City of Chester*, 144 F.2d 415, 418 (3d Cir. 1944) (quoting Hughes’s 1917 address in support of Congress’s authority to provide housing for individuals engaged in national-defense activities); *Weightman v. United States*, 142 F.2d 188, 191 (1st Cir. 1944) (quoting Hughes’s axiom in support of Congress’s authority to impose duties on conscientious objectors).

18. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

19. Most prominently, Chief Justice Stone recited it in his majority opinion upholding wartime curfews. *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). And in *Korematsu v. United States*, Justice Frankfurter quoted Hughes’s dictum from *Blaisdell* in his concurrence upholding the internment order. 323 U.S. 214, 224 (1944) (Frankfurter, J., concurring);

quoted Hughes's "fighting constitution" speech extensively in *Lichter v. United States*—so extensively it was as if the majority were reprinting the speech officially into the Supreme Court's records.<sup>20</sup> Relying again on Hughes's axiom, the Court held it to be within Congress's power to authorize recovery of excessive profits from government contractors of wartime goods.<sup>21</sup>

In the hundred years since the speech, the Executive Branch has frequently summoned Hughes's "power to wage war successfully" formulation, and the 1917 speech in which he issued it, to justify its actions. In World War II, for example, the Roosevelt Administration recited this line in defending its defense-industry price controls.<sup>22</sup> After that conflict and in the context of a budding Cold War, the U.S. Attorney General relied on the line in opining that universal military training programs would be constitutional.<sup>23</sup>

Much more recently, Hughes's axiom featured in the Bush Administration's Department of Justice, Office of Legal Counsel memoranda justifying the domestic use of military force against terrorists<sup>24</sup> and the use of military commissions to try certain terrorism suspects.<sup>25</sup> The Obama Administration cited it in contesting Guantanamo Bay–detainee

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see also Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *Yale L.J.* 489, 530 (1945) ("The war power is the power to wage war successfully, as Chief Justice Hughes once remarked. But it is the power to wage war, not a license to do unnecessary and dictatorial things in the name of the war power.").

20. 334 U.S. 742 (1948). One of several block quotes from Hughes's speech takes up two full pages of this opinion in the U.S. Reports. *Id.* at 780–82. Significant parts of the speech are also quoted in footnotes. *Id.* at 757 n.4, 767 n.9, 779 n.31.

21. *Id.* at 782–89.

22. See David Ginsburg, *Legal Aspects of Price Control in the Defense Program: A Presentation of the Views of the Office of Price Administration and Civilian Supply*, 27 *A.B.A. J.* 527, 528 (1941) (invoking Hughes's speech in support of major rearmament in the run-up to the U.S. entry to World War II). The Roosevelt Administration repeatedly invoked Hughes's 1917 speech in its presentations to the House Committee on Banking and Currency in defense of these price-control programs. See, e.g., *A Bill to Further the National Defense and Security by Checking Speculative and Excessive Price Rises, Price Dislocation, and Inflationary Tendencies, and for Other Purposes: Hearings on H.R. 5479 Before the H. Comm. on Banking and Currency, 77th Cong.* 64, 302, 316 (1941).

23. See *Authority to Establish System of Universal Military Training*, 1 *Op. O.L.C. Supp.* 17, 22 (1947) (quoting *Blaisdell*, 290 U.S. at 426).

24. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen. & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes, Gen. Counsel of the Dep't of Def., on *Authority for Use of Military Force to Combat Terrorist Activities Within the United States* 15 (Oct. 23, 2001), <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memomilitaryforcecebatus10232001.pdf> [http://perma.cc/9CUC-DETC].

25. *Legality of the Use of Military Commissions to Try Terrorists*, 25 *Op. O.L.C.* 238, 245 (2001).

habeas cases.<sup>26</sup> Although it has over time been invoked to support expansive *presidential* commander-in-chief authority,<sup>27</sup> the examination below shows that Hughes's original statement in 1917 of the "power to wage war successfully"<sup>28</sup> was about *Congress's* constitutional authority.<sup>29</sup>

This Article tells the neglected story of constitutional war powers and their exercise in the World War I period, as they were expounded, defended, and, later, criticized by Hughes. Part I examines Hughes's speech and draws on his personal research notes to elaborate what he meant by a "*fighting* constitution" that confers the "power to wage war successfully." That Part then investigates the relationship between Hughes's theory and the evolution in American military power and security needs. Prior to 1917, this notion that the American constitutional blueprint was designed for a highly adaptive war-making machine competed with several contrary visions. One alternative insisted that many constitutional constraints are simply not applicable in wartime.<sup>30</sup> Another held that constitutional constraints remained firmly and absolutely in place during wartime, despite difficulties they might pose for waging war effectively.<sup>31</sup>

Rejecting these alternatives, Hughes proffered a theory of war powers that expand in wartime to accommodate the ever-changing demands of national defense. Hughes by no stretch invented the core idea that constitutional powers must match unpredictable and evolving security exigencies;<sup>32</sup>

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26. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 6 n.2, In re Guantanamo Bay Detainee Litig., Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

27. See *infra* notes 364–366 and accompanying text (describing President Roosevelt's unilateralism); see also, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1364 (Fed. Cir. 2004) (invoking the Hughes axiom of the federal war power as the power to "wage war successfully" in support of the President's authority to make extraterritorial enemy property designations (quoting *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943))), cert. denied, 545 U.S. 1139 (2005); William G. Howell, *Wartime Judgments of Presidential Power: Striking Down but Not Back*, 93 Minn. L. Rev. 1778, 1788 (2009) (associating Hughes's statement with expansive theories of commander-in-chief powers); Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power to Wage War Successfully,"* 53 Drake L. Rev. 851, 894 (2005) ("Once the President is given legislative authority and appropriation, as he has, the Constitution allocates the war power to a Commander in Chief who can act with energy and dispatch.").

28. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 238, 248.

29. See *infra* notes 45, 74, 81–83 and accompanying text.

30. See *infra* notes 55–62 and accompanying text.

31. See *infra* notes 63–69 and accompanying text.

32. See, e.g., 2 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 1212 (1910) [hereinafter Willoughby, *Constitutional Law*] ("[C]onstitutional power . . . to declare and wage war, whether foreign or civil, carries with it the authority to use all means calculated to weaken the enemy and to bring the struggle to a successful conclusion."). Hughes cites this treatise in his 1917 speech, see Hughes, *War Powers Under the Constitution*, *supra* note 4, at 245, and his own hand-written research notes contain many references to it, see H. Jefferson Powell, *The President as Commander in Chief* 162–64

he credits Alexander Hamilton<sup>33</sup> for laying the idea's foundation in *The Federalist Papers*, for example, and President Lincoln for putting it into action during the Civil War—a conflict that generated many legal precursors to the specific powers Hughes discusses.<sup>34</sup> But Hughes both expanded on the theory and lent special political and intellectual credibility to this understanding at a time of simultaneous upheaval in constitutional law and in military technology and strategy.<sup>35</sup> By the end of the war there was little left of rival theories.<sup>36</sup>

Part II details Hughes's application of his general war powers framework to the sudden collision of, on the legal side, *Lochner*-era jurisprudence and cautious Progressive-era administrative development with, on the military side, the onset of "total war"<sup>37</sup> requiring complete economic

(2014) (discussing the constitutional axiom that the national government has all the powers needed to protect the Republic).

33. See Hughes, *War Powers Under the Constitution*, supra note 4, at 239.

34. See *id.* at 234–35; see also *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870) (“[T]he [war] power is not limited to victories in the field and the dispersion of enemy forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.”); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) (“Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success . . .”).

35. See David J. Barron, *Waging War: The Clash Between Presidents and Congress—1776 to ISIS* 221 (2016) (describing Hughes's special credibility on such matters); William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 *Am. J. Comp. L. Supplement* 389, 393 (1990) (calling Hughes's 1917 speech “[p]erhaps the most often-quoted assertion” of the view that constitutional powers should be interpreted to provide the government with whatever power is necessary to meet an emergency).

36. To be sure, a variant of the first alternative—arguing that the President's war and foreign affairs powers derive not from the Constitution but are instead inherent in the idea of sovereignty—continued to hold some sway into the mid-twentieth century. See *infra* note 81 (discussing Justice Sutherland's articulation of this view, expressed in *dicta* in *United States v. Curtiss-Wright*, 299 U.S. 304 (1936), and elsewhere).

37. Although the term “total war” did not enter popular usage until the Second World War, the term itself derives from the First. Historian Hew Strachan notes that

Georges Clemenceau's government talked in 1917 about *la guerre integrale* to indicate its intention of abandoning all restraint in mobilizing French society for war. In 1918, Léon Daudet published a summons to national mobilization called *La guerre totale*, in which he defined total war as the extension of the struggle into the realms of politics, the economy, commerce, industry, intellectual life, the law, and finance.

Hew Strachan, *Essay and Reflection: On Total War and Modern War*, 22 *Int'l Hist. Rev.* 341, 348 (2000) (footnote omitted); see also Ian F. W. Beckett, *The Great War 1914–1918*, at 242 (2001) (noting also that the German General Erich Ludendorff used the term “in his memoirs in 1919 and, again, in his polemic in 1935, *Der Totale Krieg*”).

This Article uses the term broadly—seeing total war as “imply[ing] the breakdown of the distinction between organized combat and the societies, economies, and political systems that support it”—while recognizing that “a compelling definition of the term . . . continue[s] to frustrate historians,” and noting that the debate whether World War I was itself “total” remains unresolved. Roger Chickering & Stig Förster, Introduction, *in* *The*

and social mobilization. In that context, the most salient aspects of war powers—expanded Article I legislative authority, loosened restrictions on congressional delegations of policy discretion to the executive branch, and accommodating interpretations of individual rights—were all oriented toward the national government’s *domestic* role. That Part examines in particular the application of Hughes’s axiom of successful war-waging to the most significant wartime legislative actions of that moment—namely, the massive national draft of an expeditionary army and the vast expansion of economic regulation and administration on the home front.

During the remainder of World War I, all three branches of government essentially embraced Hughes’s view. The military demands of modern warfare stretched the Constitution in new ways. There remained intense doctrinal and political debate about what specifically “the power to wage war successfully” meant in practice, but by the end of the war there was no longer any serious debate either that the Constitution’s provisions apply in wartime or that its substantive content would require substantial adaptation to defend the nation in modern war.<sup>38</sup>

Yet, having had his view vindicated during the long, drawn-out end to the war, Hughes began to harbor significant anxieties about the very legal developments he presaged and defended. Part III examines how those anxieties are reflected in a little-known case, *Commercial Cable Co. v. Burlison*, that Hughes litigated unsuccessfully before esteemed District Judge Learned Hand in New York.<sup>39</sup> Hughes’s comfort with vast war powers assumed—crucially—clear and workable delineations between peace and (temporary) war and that extensive war powers would retract upon victory. Hughes also assumed that the reasonable necessity of means to achieve war aims could be objectively measured. But Hughes witnessed an erosion of those assumptions during and after World War I, and they would be even further eroded around the time of his death after World War II. The *Burlison* episode and its aftermath show that Hughes’s formulation contains two key shortcomings: most obviously, the danger associated with the unbounded indeterminacy of “the power to wage war”; and more subtly but as important, how much its output depends on defining “success” in war.<sup>40</sup>

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Shadows of Total War: Europe, East Asia, and the United States, 1919–1939, at 3, 6–7 (Roger Chickering et al. eds., 2003).

38. See *infra* notes 247–255 and accompanying text (discussing the Supreme Court’s consistent validation of expansive World War I economic regulation and administration).

39. *Commercial Cable Co. v. Burlison*, 255 F. 99 (S.D.N.Y. 1919).

40. Not surprisingly, given its timing only a few months after the American war declaration, Hughes’s speech dedicates relatively little space to the outer limits of war powers. A sparse outline of the speech contained in his personal notes contains the underlined phrase “reasonably necessary.” Charles Evans Hughes, Outline of Argument 2 (unpublished document) (on file with the *Columbia Law Review*) [hereinafter Hughes, Outline], in Charles Evans Hughes Papers, 1914–1930, Columbia Univ. Rare Book & Manuscript Library, box 56 [hereinafter CEH Papers]. Notably, several pages of Hughes’s



This Article concludes that dissecting Hughes's century-old formulation and defense of our "fighting constitution" not only exposes much about the past but also about present debates over the scope of constitutional war powers. World War I rarely features in current discussions of war powers and their evolution, probably because it was formally declared by Congress and lacked the most excessive violations of civil liberties as measured against modern constitutional rights or the Second World War.<sup>41</sup> But it was the pivotal moment in American history when the legal space between national government powers in wartime and peacetime—different in degree and in kind from the Civil War, and validated by all three branches of government—reached its apex. This was the historical juncture of maximum differential between the federal government's exceptional war powers and its normal, peacetime powers.

Placing Hughes's theory in today's legal and strategic context thus reveals, perhaps surprisingly, that the stakes of modern war power debates are in many ways lower than often supposed. Today, many of the vast government powers that were in Hughes's era reserved for wartime—and not just military powers but economic regulatory powers, too—have become normalized; they are now regular features of our peacetime governmental landscape. Modern fixation on presidential unilateralism in military affairs overlooks the many other dimensions of the constitutional order in wartime that have shifted just as dramatically.

Current unease about the implications of indefinite and wide-encompassing war against nonstate terrorist threats like al Qaeda and the

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notes appear not in his own hand but in that of his research assistant, identified only as "S.S.G."

41. This comparison to World War II, in particular the policies directed at Japanese Americans discussed above, see *supra* note 19 and accompanying text, is not meant to dismiss the significant World War I restrictions on free expression. Most notably, after Congress passed the Espionage Act of 1917 and the Sedition Act of 1918—which criminalized attempts to interfere with or resist the war effort—the Wilson Administration aggressively prosecuted hundreds of cases against publishers and dissenters. See David M. Rabban, *Free Speech in Its Forgotten Years* 249–55 (1997) (describing the legislative history of the Espionage Act); see also Mark A. Graber, *Transforming Free Speech: The Ambiguous Legacy Civil Libertarianism* 75–76 (1991) (noting additionally that "[m]any states followed suit, passing new laws or enforcing older ones in ways that significantly curtailed radical critiques of American politics"); Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* 17–18 (1995) (noting "[t]housands of people were" imprisoned during the war "for comment no stronger than" the facts of *Frohwerk v. United States*, 249 U.S. 204, 207–08 (1919), wherein the defendant was convicted for publishing "twelve articles of small circulation that were favorable to Germany" and mildly promoted draft resistance). For a famous contemporary account deeply critical of the wartime restrictions, see Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 *Harv. L. Rev.* 932 (1919); see also G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 *Mich. L. Rev.* 299, 316–23 (1996) (discussing Chafee's defense of free speech). The issue of speech and dissent in World War I, and Hughes's view of it, is taken up further below. See *infra* notes 233–236 and accompanying text.

so-called Islamic State also often ignores revealing historical antecedents from previous eras of strategic change.<sup>42</sup> This new look at World War I, and the ways it dramatically reshaped relations between the national government and citizenry, shows that a war usually regarded as so legally ordinary—it was, after all, a declared war pitting one group of states against another—sheds light on today’s very unconventional wars against terrorists.

### I. OUR “FIGHTING CONSTITUTION”

Today the biggest constitutional war powers debates tend to revolve around interbranch questions, especially whether the President or the Congress has primary responsibility for the initiation of military action.<sup>43</sup> These are, in some sense, second-order questions. For most of our history, the much more significant legal debates centered on the first-order question of the overall scope of national government powers in wartime. Until the Korean War, followed by the Vietnam War and enactment of the 1973 War Powers Resolution, there was not much dispute that Congress held the keys with respect to going to war, even if the President had powers to use force on his own in certain, limited circumstances.<sup>44</sup>

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42. These anxieties, reflected in much modern scholarship and commentary, are discussed further below. See *infra* notes 407–414 and accompanying text.

43. See, e.g., Stephen M. Griffin, *Long Wars and the Constitution* 1 (2013) [hereinafter Griffin, *Long Wars*] (discussing the focus of modern war powers debates on unilateral presidential warmaking); John Yoo, *The Powers of War and Peace* 143–60 (2005) (discussing modern constitutional debates over presidential war initiation); Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* 51 (2013) (emphasizing war powers controversies about initiating conflict).

44. See, e.g., Raoul Berger, *War-Making by the President*, 121 U. Pa. L. Rev. 29, 66–67 (1972) (“The historical record . . . confirms the statement by the Senate Foreign Relations Committee [S. Rep. No. 90-797, at 24 (1967)] that ‘only since 1950 have Presidents regarded themselves as having authority to commit the armed forces to full scale and sustained warfare.’” (quoting S. Rep. No. 90-797, at 24 (1967))).

On Korea, see Griffin, *Long Wars*, *supra* note 43, at 31–35 (discussing the Korean War as “inaugurat[ing] a new era of ‘presidential wars’” because its legal authority was a “novel doctrine based centrally on the president’s Article II powers over foreign affairs and as commander in chief”); Arthur M. Schlesinger, Jr., *The Imperial Presidency* 127–76 (Mariner Books 2004) (1973) (“Korea beguiled the American government . . . into an unprecedented claim for inherent presidential power to go to war.”); Francis D. Wormuth et al., *To Chain the Dog of War: The War Power of Congress in History and Law* 28 (2d ed. 1989) (“Until 1950, no judge, no President, no legislator, no commentator ever suggested that the President had legal authority to initiate war.”).

On Vietnam, see Schlesinger, *supra*, at 177–207 (noting that Presidents Johnson and Nixon, in expanding and prosecuting the war, “almost came to see the sharing of power with Congress in foreign policy as a derogation of the Presidency” and “Congress, in increasing self-abasement, almost came to love its impotence”).

On the 1973 War Powers Resolution, see Michael J. Glennon, *Constitutional Diplomacy* 102–13 (1990) (describing the failure of the War Powers Resolution to effectively constrain

Hughes's speech highlights that the most contentious and consequential war powers questions of the First World War were not about the President's power to use military force, or even much about the President's powers at all. They were about the scope of Congress's legislative powers in waging wars once started.<sup>45</sup>

By way of context, World War I had broken out in Europe in July 1914.<sup>46</sup> For decades the major European states—Britain, France, Germany, Russia, Austria-Hungary, and the Ottoman Empire—had maintained a precarious peace based on a balance of power. But a web of alliances and

presidential behavior); Schlesinger, *supra* at 301–07, 433–35 (noting that the resolution has only heightened the interbranch dispute on when Presidents may use the military unilaterally).

To be sure, after World War I, there was a significant political debate about whether Congress's prerogatives with regard to initiating war still made resort to war *easy*. One result of that debate was a proposed constitutional amendment (the so-called “Ludlow Amendment”), which narrowly failed to pass Congress, that would have required a popular referendum to declare war prior to any congressional war declaration. See generally Walter R. Griffin, Louis Ludlow and the War Referendum Crusade 1935–1941, 64 *Ind. Mag. Hist.* 267, 273–85 (1968) (describing the congressional debate surrounding the Ludlow Amendment and noting how “the shift of a mere eleven votes would have turned defeat into at least a temporary victory for . . . the war referendum advocates”).

45. Scholarship on war powers was at this time very thin. This was in part due to the fact that the prior major American war, against Spain in 1898, had generated little constitutional controversy. See Clinton Rossiter, *The Supreme Court and the Commander in Chief* 41 (expanded ed. 1976) (1951) [hereinafter *Rossiter*]; *The Supreme Court and the Commander in Chief* (“The Spanish-American War certainly raised no controversies of any basic importance over presidential or congressional war powers . . .”).

The leading constitutional law treatise at the time was, as noted above, Westel Willoughby's *Constitutional Law of the United States*, and Hughes drew on that text in researching his 1917 speech. See *supra* note 32. Even Willoughby's chapter on “Military Law,” however, focuses mostly on constitutional limits to actions by military forces. See Willoughby, *Constitutional Law*, *supra* note 32, at 1190–227. His short section on “The Prosecution of War” contains a few sweeping statements with little explanation. See, e.g., *id.* at 1212 (“When dealing with the enemy all acts that are calculated to advance this end are legal.”); *id.* (“[T]he power to wage war enables the government to override in many particulars private rights which in time of peace are inviolable.”). A possible explanation can be found in a later chapter of Willoughby's, in which he describes his view of the general police power of the state.

[M]ore fundamental than the right of the private individual is the right of the public person, the State, and more important than the convenience or even the existence of the citizen are the welfare and life of the civic whole, and thus we find that, fundamentally, no system of political and legal philosophy, save that of pure anarchism, can start with the individual . . . [I]t is necessary that the State . . . should possess the power in all cases of need to subordinate private rights to public necessities. Thus every state has [among others,] the power . . . to compel them to serve in its armies . . . .

*Id.* at 1230.

46. The First World War has been exhaustively examined by historians for a century. Authoritative general histories of the war include Beckett, *supra* note 37; Keegan, *supra* note 7; see also Martin Gilbert, *First World War* (1994); Max Hastings, *Catastrophe 1914: Europe Goes to War* (2013).

plans for rapid military mobilization allowed a spark of conflict in the Balkans to drag all of Europe into a massive conflagration that drained its economies and killed millions of its soldiers in brutal trench warfare. By 1917, the United States was reluctantly pulled into the war on the side of Britain and France by, among other factors, German submarine assaults on American vessels.<sup>47</sup> Wilson requested from Congress a declaration of war against Germany on April 2, 1917, pledging not only to defend the United States from immediate aggression but also to prevent the war's future recurrence and make the world "safe for democracy."<sup>48</sup> Congress quickly obliged.<sup>49</sup>

Throughout his speech five months later, Hughes moved back and forth between a general theory of war powers and its specific application to the biggest legal questions at that time. This Part and the next therefore adopt a similar organization, first analyzing his general framework and then, in the following Part, exploring Hughes's treatment of particular government actions.

#### A. A "Fighting" Constitution

The central idea of the speech—that we have a "fighting constitution" that includes the "power to wage war successfully"<sup>50</sup>—might appear initially an obvious and indisputable choice about constitutional architecture. Quoting Justice Story, whose early-nineteenth-century constitutional *Commentaries* Hughes drew upon in researching his speech, Hughes argues in the opening paragraphs that these principles animated the design of the Constitution from the very start: "Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States."<sup>51</sup> According to Hughes's own reading of the Constitution's drafting history:

The framers of the constitution were under no illusions as to war . . . . In equipping the National Government with the needed authority in war, they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command.<sup>52</sup>

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47. See Herring, *supra* note 3, at 398–410; Keegan, *supra* note 7, at 402.

48. President Woodrow Wilson, Address to a Joint Session of Congress Requesting a Declaration of War Against Germany (Apr. 2, 1917), <http://www.presidency.ucsb.edu/ws/?pid=65366> [<http://perma.cc/49DA-AZR9>] [hereinafter, Wilson, Declaration of War Against Germany].

49. Act of Apr. 6, 1917, ch. 1, 40 Stat. 1 (enacted) ("That the state of war between the United States and the Imperial German Government . . . is hereby formally declared . . .").

50. Hughes, War Powers Under the Constitution, *supra* note 4, at 238, 248.

51. *Id.* at 232.

52. *Id.* at 238–39.

In a set of handwritten notes that appear to be a rough outline of Hughes's main points about "successful war" powers, he penciled that war is "not an experimental policy" but an endeavor that "must be won."<sup>53</sup>

The notion, however, that the Framers designed the Constitution to effectively wage and win any war the nation engaged in was, in fact, never so clear. Probably the most significant and long-running debate about war and American constitutional design is over this very question: Is the Constitution designed to be optimally capable of waging war, or does its system of checks and balances accept certain friction—even friction that dangerously undermines wartime effectiveness—as the price of safeguarding other values?<sup>54</sup>

Upon the United States' entry into the Great War, Hughes was debating two other major traditions that had held a significant place in American constitutional debates. One view saw war powers as exceptions to the Constitution, powers lying entirely outside the constitutional framework. Another view saw the Constitution as not merely applying to war powers but as designed to strictly constrain the particular means by which wars were to be waged. Hughes advanced a powerful alternative view, one that gained immediate traction in World War I and has triumphed ever since: The Constitution regulates war-waging, but many constitutional restraints must adapt in wartime to changes in the way wars are actually fought.<sup>55</sup>

The first view saw the Constitution as imposing few or no limits on how wars are waged. Hughes stated in the opening paragraph of his speech that one of his intended audiences was those "who in their zeal impatiently and without thought put the constitution aside as having no relation to these times."<sup>56</sup> If there were any legal constraints on waging war, they were extraconstitutional, such as the dictates of international law.<sup>57</sup> John Quincy Adams, for example, had argued in 1836 before the House of Representatives:

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53. Hughes, Outline, *supra* note 40, at 1.

54. Justice Frankfurter, addressing this debate, comes down firmly on the latter side. See *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*, 343 U.S. 579, 613–14 (1952) (Frankfurter, J., concurring) (arguing that despite the drawbacks the United States faces in wartime compared to authoritarian governments, "[i]t has not been our tradition to envy such governments").

55. These three views of war powers map onto typologies of more general views of emergency power and constitutionalism, though labels vary. See Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis* 9–12 (2006) (categorizing varying approaches to emergency law); Mark Tushnet, *Emergencies and the Idea of Constitutionalism*, in *The Constitution in Wartime: Beyond Alarmism and Complacency* 39, 39–40 (Mark Tushnet ed., 2005) (same); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *Yale L.J.* 1385, 1386–97 (1989) (same).

56. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 232.

57. See Martin S. Lederman, *If George Washington Did It, Does that Make It Constitutional?: History's Lessons for Wartime Military Tribunals*, *Geo. L.J.* (forthcoming

There are . . . two classes of powers, altogether different in their nature, and often incompatible with each other—the war power and peace power. The peace power is limited by regulations and restricted by provisions, prescribed within the constitution itself. The war power is limited only by the laws and usages of nations. The power is tremendous: it is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty, of property, and of life.<sup>58</sup>

Hughes's research notes for the speech contain several references<sup>59</sup> to William Whiting's treatise, *War Powers Under the Constitution*, the last edition of which was published in 1871. Whiting, who served during the Civil War as the lawyer to the War Department,<sup>60</sup> describes the Framers' intent to create a set of defined and limited powers for peacetime but constitutionally unlimited powers in wartime, emphasizing that the only remedy for abuse of the latter is to elect new leaders through the political process.<sup>61</sup> When the United States entered World War I in 1917, some members of Congress clung to this view.<sup>62</sup>

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2017) (manuscript at 46–47), <http://srrn.com/abstract=2840948> (on file with the *Columbia Law Review*) (discussing prominent view before and during the Civil War that when the federal government exercises its belligerent authorities, constitutional constraints are displaced by international laws of war). Professor Lobel describes this pre-Civil War view somewhat differently:

Emergency and normal times were counterposed, resulting in distinct legal regimes. . . . [encompassing] two spheres: normal constitutional conduct, inhabited by law [and] universal rules . . . ; and a realm where universal rules are inadequate to meet the particular emergency situation and where law must be replaced by discretion and politics.

Lobel, *supra* note 55, at 1388–90.

58. 12 Reg. Deb. 4038 (1836).

59. Charles Evans Hughes, *Military and the Constitution Notes 2* (1917) (unpublished document) (on file with the *Columbia Law Review*), in CEH Papers, *supra* note 40; Charles Evans Hughes, *War Powers—Are They Unlimited Under the Constitution? Notes* (1917) (unpublished document) (on file with the *Columbia Law Review*), in CEH Papers, *supra* note 40.

60. John Fabian Witt, *Lincoln's Code 205* (2012).

61. William Whiting, *War Powers Under the Constitution of the United States* 27 (43d ed., N.Y., Lee & Shephard 1871). During the Civil War, some Radical Republicans like Congressman Thaddeus Stevens and Senator Charles Sumner took a similar view with regard to the war against secessionist states. See James G. Randall, *Constitutional Problems Under Lincoln* 30–31 (1926) (“Extreme advocates of the war power held that the Constitution is not operative during such a crisis as the Civil War presented.”). For a critical take on Whiting's constitutional commentary, see Mark E. Neely Jr., *Lincoln and the Triumph of the Nation: Constitutional Conflict in the American Civil War* 80–85 (2011) (arguing Whiting's “slippery advocacy” contained “ideas [that] did hinge on very liberal construction of the Constitution—and ultimately not on the Constitution at all but on international law”).

62. Christopher May describes three contemporary Congressmen's views on the war power:

Another, more strict or formalistic view of constitutional war powers regarded limits as immovable or unbending, even in wartime.<sup>63</sup> This view is appealing if one assumes that constitutionally permissible means of waging war, even if firmly limited, are still ample enough to meet plausible security needs and removing those limits dangerously opens up the system to abuse.

During the War of 1812, then-Congressman Daniel Webster took this opposing perspective in rejecting a federal draft as beyond the limits of constitutional power (a debate taken up below<sup>64</sup>): “The tyranny of Arbitrary Government consists as much in its means as in its ends.”<sup>65</sup> A problem, Webster argued, with loosening restrictions on means to achieve even imperative ends is that it perversely rewards government mismanagement of the limited tools provided for in the Constitution.<sup>66</sup> The strict, formalistic view also features in the Supreme Court’s landmark 1866 *Ex parte Milligan* decision.<sup>67</sup> Denying that either the President or Congress could authorize military tribunals to prosecute civilians in Civil War areas in which the civilian courts were able to function properly, and further stating that only an actual invasion of American soil could permit a state of martial law,<sup>68</sup> the five-Justice majority in that case declared: “No doctrine, involving more pernicious consequences, was ever invented by the

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James Lewis of Illinois explained to the Senate in 1917 that “the Constitution, at this particular time, is more or less suspended . . .” Representative Courtney Hamlin of Missouri quoted *Miller’s* statement [78 U.S. (11 Wall.) 268, 305 (1871)] that “upon the exercise of these [war] powers no restrictions are imposed,” suggesting it was proof that the Court would not invalidate laws adopted under the war powers. Georgia’s Thomas Hardwick told his Senate colleagues in June 1917, “You can violate the Constitution . . . as much as you please and as often as your conscience will let you; there is no remedy for that, unless our Supreme Court will pluck up a little additional courage; there is . . . no redress for that except in the forum of conscience and morals.”

Christopher N. May, *In the Name of War: Judicial Review and the War Powers Since 1918*, at 20 (1989) (quoting 55 Cong. Rec. 4462 (1917) (statement of Sen. Hardwick); 55 Cong. Rec. 4459 (1917) (statement of Sen. Lewis); 55 Cong. Rec. 3888 (1917) (statement of Rep. Hamlin)). Indeed, May notes that outside Congress, some executive branch officials also believed that in war, “[t]he Fifth Amendment . . . does not operate against the exercise of the war power . . . . The courts are shut to suitors who would obstruct the Executive in the prosecution of the war.” *Id.* at 21 (quoting A. Mitchell Palmer, *The Great Work of the Alien Property Custodian*, 53 Am. L. Rev. 43, 55 (1919)).

63. See Randall, *supra* note 61, at 30–31 (contrasting these three main views of constitutional war powers during the Civil War period).

64. See *infra* section II.A.

65. Daniel Webster, Unpublished Speech (Dec. 9, 1814), in *The Letters of Daniel Webster* 56, 64 (C.H. Van Tyne ed., Greenwood Press 1st reprint. 1968) (1902).

66. *Id.* at 63 (“[W]henver the legitimate powers of the Constitution should be so badly administered as to cease to answer the great ends intended by them, such new powers may be assumed or usurped, as any existing administration may deem expedient.”).

67. 71 U.S. (4 Wall.) 2 (1866).

68. *Id.* at 127.

wit of man than that any of [the Constitution's] provisions can be suspended during any of the great exigencies of government."<sup>69</sup> The dangers of removing certain fixed limits to war powers are, this view holds, simply too great.

Hughes's approach, by contrast, placed war powers firmly inside the Constitution while denying all but a few absolute limits. On the one hand, he stressed that the government's war powers flow directly from the Constitution and, as such, are bound by it: "While we are at war, we are not in revolution. We are making war as a Nation organized under the constitution, from which the established national authorities derive all their powers either in war or in peace."<sup>70</sup> On the other hand, wartime constitutional bounds should (with some exceptions discussed below<sup>71</sup>) not be drawn absolutely. He specifically criticized the majority in *Milligan* as too doctrinaire in its line-drawing and insensitive to the particular circumstances of security emergencies.<sup>72</sup>

For Hughes, that the power to wage war meant the power to do so successfully implied that in wartime, constitutional powers—including delegations of authority from Congress to the President—were to be interpreted expansively and flexibly. At the same time, constitutional rights were to be interpreted accommodatingly, so as not to unduly interfere with successful prosecution of the conflict. Together these basic operations, he underlined in his outline notes, help form the "[g]enius of our institutions."<sup>73</sup>

1. *Wartime Powers*. — Although the Hughes axiom has clear implications for interpreting the President's commander-in-chief powers and the role of courts in adjudicating war powers questions, Hughes himself was focused on Congress's powers. The section of his speech titled "Power to Wage War Successfully" wraps up his outline of Congress's wartime authority, and he draws on constitutional drafting history and *The Federalist Papers* to conclude that "plenary power was given to Congress to wage war."<sup>74</sup> Hughes believed strongly in the need for an energetic wartime executive, but his main interest was legislative authority.

Hughes's expansive interpretation of legislative war powers flows directly from Article I's Necessary and Proper Clause: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in

69. *Id.* at 121.

70. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 232.

71. See *infra* section I.A.4 (describing Hughes's view that the Constitution's structural and procedural provisions are inflexible even in wartime).

72. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 245–46.

73. Hughes, *Outline*, *supra* note 40, at 2.

74. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 239.



any Department or Officer thereof.”<sup>75</sup> Because, Hughes argued, the Constitution expressly confers power to wage war—in the form of affirmative grants to Congress to declare war and build a military and by conferring on the President commander-in-chief powers, among other provisions<sup>76</sup>—the Necessary and Proper Clause greatly augments those other powers.<sup>77</sup> Hughes echoes Chief Justice Marshall’s foundational analysis in *McCulloch v. Maryland*, in which Marshall said that having given power to the government to, among other things, conduct war, the Constitution must also have conferred ample means to carry out those duties effectively.<sup>78</sup> Indeed, Hughes’s axiom can be read as a modern application of Marshall’s broad pronouncement that “[t]he power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.”<sup>79</sup> In autobiographical notes made years later, Hughes recalled his purpose as “pointing out the breadth of the essential powers” granted the federal government during wartime—powers that must be adapted to allow for victorious prosecution of war.<sup>80</sup>

By rooting these expansive powers in the Necessary and Proper Clause, in contrast to others who saw them as derived from extraconstitutional principles of sovereignty,<sup>81</sup> Hughes put Congress front and center

75. U.S. Const. art I, § 8, cl. 18.

76. See *id.* art. I, § 8; *id.* art. II, § 2; Charles Evans Hughes, Notes on Necessary and Proper Clause (n.d.) (unpublished document) (on file with the *Columbia Law Review*), in CEH Papers, *supra* note 40.

77. Hughes, War Powers Under the Constitution, *supra* note 4, at 239.

78. 17 U.S. (4 Wheat.) 316, 407–08, 421 (1819).

79. *Id.* at 407–08.

80. The Autobiographical Notes of Charles Evans Hughes 188 (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter Hughes, Autobiographical Notes].

81. A variant of this contrary view is articulated by Hughes’s contemporary, Justice Sutherland, who wrote—in dicta—for the Court in *United States v. Curtiss-Wright* that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.” 299 U.S. 304, 318 (1936). Rather, he argued, “[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.” *Id.*

Indeed, Justice Sutherland expressed this view multiple times. See, e.g., *United States v. Macintosh*, 283 U.S. 605, 622 (1931) (“From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law.”); George Sutherland, The Constitutional Power and World Affairs 70–91 (1919) (detailing his position that the war powers, although expressly granted in the Constitution to the national government, would be vested automatically in the national government by virtue of sovereignty); *id.* at 96–97 (“The power to declare war includes every subsidiary power necessary to make the declaration effective. . . . [T]he power to proceed to the last extremity [is] . . . a power that . . . admits of no limitations . . . except as such as are of a more vital character than the imperious necessity with which they compete . . .”).

and laid a doctrinal foundation for finding strict limits to war powers only in the most clear and unequivocal textual provisions elsewhere in the document. “The power of the National Government to carry on war is explicit and supreme,” he emphasizes, “and the authority thus resides in Congress to make all laws which are needed for that purpose.”<sup>82</sup> In other words, “to Congress in the event of war is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success,” though Hughes is careful to note that “this power is to be exercised without impairment of the authority committed to the President as Commander-in-Chief to direct military operations.”<sup>83</sup>

Hughes here appears especially influenced by Hamilton’s Federalist No. 23 and No. 26, which dealt with clothing the government in sufficient power to protect the nation.<sup>84</sup> References to these documents appear several times in Hughes’s research notes and handwritten outlines of the speech’s arguments.<sup>85</sup> His speech quotes the essays at length for the proposition that because threats to national safety are unpredictable and infinite, powers to combat these threats must not be tightly shackled, as well as the idea that impractical restraints on effective war-making will not withstand the political imperatives of security crises.<sup>86</sup>

2. *Wartime Delegation.* — For Hughes, expansive war powers were also to be allocated flexibly between the branches. In particular, restrictions on congressional delegation of policymaking authority and discretion to the President—which at the time were understood much more strictly than they are today—were to be relaxed. After discussing the President’s power to command military campaigns, Hughes remarks that the “power exercised by the President in time of war is greatly augmented, outside of his functions as Commander-in-Chief, through legislation of Congress increasing his administrative authority.”<sup>87</sup>

Late-nineteenth- and early-twentieth-century constitutional orthodoxy included strict delineation of legislative, executive, and judicial roles.<sup>88</sup> A corollary principle limited Congress’s authority to transfer its own policy-making functions to the President or his administration.<sup>89</sup> This would

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82. Hughes, War Powers Under the Constitution, *supra* note 4, at 239.

83. *Id.* at 239–40.

84. The Federalist Nos. 23, 26 (Alexander Hamilton).

85. See Hughes, War Powers Under the Constitution, *supra* note 4, at 239 (quoting Hamilton’s Federalist Nos. 23, 26); Hughes, Outline, *supra* note 40, at 1 (noting Hamilton’s Federalist No. 26).

86. See Hughes, War Powers Under the Constitution, *supra* note 4, at 239.

87. *Id.* at 240.

88. G. Edward White, *The Constitution and the New Deal 1937–1968* (2000) (“The powers given to the respective branches of the national government were not to be intermingled.”).

89. See *Field v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”); see also *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928) (upholding

later be known as the “nondelegation doctrine,”<sup>90</sup> but prior to World War I, jurisprudence in this area was scarce.

Hughes was concerned that normal rules limiting legislative delegations to the executive branch might impede effective war waging. During his earlier term as New York governor, he had wrestled with the proper role of delegation of industry regulation to commissions,<sup>91</sup> and during his years as Associate Justice of the Supreme Court, Hughes was pivotal in developing doctrine aimed at cabining reasonable, expert judgments of administrative agencies—most notably, regarding railroad rate-setting by the Interstate Commerce Commission.<sup>92</sup> He saw modern warfare as imposing new demands on the state that could only be met through vast administrative delegation:

War demands the highest degree of efficient organization, and Congress in the nature of things cannot prescribe many important details as it legislates for the purpose of meeting the exigencies of war. Never is adaptation of legislation to practical ends so urgently required, and hence Congress naturally in very large measure confers upon the President the authority to ascertain and determine various states of fact to which legislative measures are addressed.<sup>93</sup>

This was a temporary progressivism applied to waging war—a short-term retooling of government that would leverage expertise and administrative efficiency to solve problems based on security imperatives, not special interest politics.

Hughes generally venerated the role of courts in protecting the constitutional system’s integrity,<sup>94</sup> but in his speech, interestingly, it was only on this one issue—delegation—that he emphasized explicitly the importance of judicial responsibility.<sup>95</sup> “[O]f course,” he was careful to add,

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provisions in the Tariff Act that delegated certain rate-making functions to the President, only after finding that the statute provided clear criteria for setting those rates).

90. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 317–28 (2000) (tracing the doctrinal and intellectual history of the nondelegation doctrine).

91. See Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900–1940*, at 35–36 (2014) (noting that while Hughes held “the highest regard for the courts” he worried that “judicial review would transfer the ultimate responsibility for a regulatory decision from administrators . . . to generalist judges” (quoting Charles Evans Hughes, *Speech Before the Elmira Chamber of Commerce* (May 3, 1907), in *Addresses of Charles Evan Hughes, 1906–1916*, at 185 (2d ed. 1916))).

92. See *id.* at 36–43.

93. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 240.

94. See Ernst, *supra* note 91, at 28 (discussing Hughes’s emphasis on courts as guardians of liberty against the administrative state); 2 Pusey, *supra* note 2, at 692 (“Hughes felt a special responsibility upon the courts to safeguard this American [constitutional] heritage.”).

95. 2 Pusey, *supra* note 2, at 692–93.

“whether the limits of permissible delegation are in any case over-stepped always remains a judicial question.”<sup>96</sup>

Hughes’s wartime constitutional suppleness in entrusting policymaking authority to the President contrasts strikingly with his later peacetime stringency as Chief Justice. In the 1935 *Panama Refining Co.* case, he wrote for the Court in striking down part of the National Industrial Recovery Act (NIRA)—a major piece of the New Deal agenda—that delegated powers to regulate the petroleum industry for lack of sufficiently clear legislative criteria and standards.<sup>97</sup> While acknowledging in that context the need for some flexibility to deal with economic complexities, Hughes insisted that “the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.”<sup>98</sup> Later that year in *Schechter Poultry Corp. v. United States*, Hughes wrote again for the Court in invalidating other provisions of NIRA, this time regulating the poultry industry.<sup>99</sup> Hughes’s malleable approach to delegation doctrine in 1917 had, by 1935, shifted toward its prewar form.

3. *Wartime Rights.* — With regard to individual rights, Hughes also pushed for wartime flexibility. His speech focused on property rights and freedom of contract. This was, after all, still the *Lochner* era during which those rights were most salient.<sup>100</sup>

Referring to the guarantees of personal and property rights in the Fifth and Sixth Amendments, Hughes argued that while they are “[c]learly . . . normally and perfectly adapted to conditions of peace,” they “do not have the same complete and universal application in time of war.”<sup>101</sup> He rejected—as he did in the wartime powers context—the alternative positions that constitutional rights guarantees are simply suspended during wartime or that they remain rigid in application. Instead, he posited that those guarantees have some elasticity in wartime, stretching to meet security exigencies. Because the power to wage war successfully is not only “absolutely essential to the safety of the Nation” but also “explicitly conferred”—by virtue of the Necessary and Proper Clause combined

96. Hughes, *War Powers Under the Constitution*, supra note 4, at 241.

97. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

98. *Id.* at 421.

99. 295 U.S. 495, 537 (1935). Noting that the broad delegation was, in principle, “utterly consistent with the constitutional prerogatives and duties of Congress,” Hughes declared, however, that “Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.” *Id.* at 537–38.

100. See generally Barry Cushman, *Rethinking the New Deal 47–65* (1998) (discussing the economic-regulation jurisprudence of the New Deal era).

101. Hughes, *War Powers Under the Constitution*, supra note 4, at 243.

with other war and military provisions in the Constitution<sup>102</sup>—that power “is not destroyed or impaired by any later provision of the constitution or by any one of the amendments.”<sup>103</sup> To forestall that, the guarantees in the Bill of Rights “may all be construed so as to avoid making the constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard the common defence and the perpetuity of our liberties.”<sup>104</sup>

Hughes did not discuss any limits to this elasticity of wartime rights in his 1917 speech; neither do his pre-speech notes shed light on whether and how he would bound it. Curiously, when Hughes restated two decades later his “power to wage war successfully” axiom while writing for the Court in a Depression-era mortgage-rate case, he this time added an important and conspicuous caveat: “But even the war power does not remove constitutional limitations safeguarding essential liberties.”<sup>105</sup> Even this subsequent addition Hughes confined, though, to constitutional rights provisions (as well as grants of power) that “are specific, so particularized as not to admit of construction.”<sup>106</sup> In those cases—and the footnotes suggest he specifically had in mind at that time Fifth Amendment rights of due process and just compensation for property takings and Sixth Amendment trial rights<sup>107</sup>—he said simply (and perhaps too quickly) that “no question is presented.”<sup>108</sup>

Although we do not know whether he yet had it in mind for his 1917 address, Hughes incorporated in that subsequent caveat about wartime rights some of the absolutism of the formalists’ approach to war powers, but only for a narrow band of issues. Some very specific rights remain absolutely fixed even in wartime, whereas other rights—those that are open to varying interpretations—are presumably as flexible as necessary. In neither the speech nor his later dicta did Hughes address the possibility that absolute, specific rights might impede successful warfare or that constitutional concerns limited the elasticity of other rights.

4. *A Puzzle: Structural-Process Inflexibility.* — Hughes’s later distinction between specific and textually particularized rights—which remain fixed even in the context of war—and rights that are open to interpretation—

102. See *supra* notes 75–83 and accompanying text (describing Hughes’s interpretation of the Necessary and Proper Clause).

103. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 248.

104. *Id.*

105. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

106. *Id.*

107. In one *Blaisdell* footnote, Hughes cites the following cases: *United States v. Cohen Grocery Co.*, 255 U.S. 81, 88 (1921) (Fifth Amendment due process); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 155 (1919) (Fifth Amendment takings); *United States v. Russell*, 80 U.S. (13 Wall.) 623, 627 (1871) (same); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–27 (1867) (Sixth Amendment trial rights). *Blaisdell*, 290 U.S. at 426 n.5.

108. *Blaisdell*, 290 U.S. at 426.

which may not—helps partially answer a puzzle raised by his 1917 formulation of our “fighting constitution”: Why, according to Hughes, do some constitutional features naturally bend to wartime exigencies while others, especially constitutional processes related to the structure of government and exercise of some basic powers, do not? In wartime, government powers flex. Delegation principles flex. Rights flex. But certain constitutional processes related to government structure never bend. This strictly construed absolutism has an understated but crucial place in Hughes’s otherwise accommodationist theory.

This aspect of Hughes’s speech is easy to miss because it appears in a short section on “Other Provisions of the Constitution—Taxing Power.”<sup>109</sup> How to finance the war was initially a hot-button issue.<sup>110</sup> The Sixteenth Amendment, making possible an income tax,<sup>111</sup> was only four years old, and the choice of whether to fund the war through taxes or borrowing would have large distributional consequences.<sup>112</sup> Hughes may therefore have thought it necessary to speak to the issue.

Having argued throughout most of the speech that the size and shape of the national government’s power shifts dramatically in wartime, Hughes then, almost offhandedly, explained in this section:

It is manifest, at once, that the great organs of the National Government retain and perform their functions as the constitution prescribes. Senators and Representatives are qualified and chosen as provided in the constitution and the legislative power vested in the Congress must be exercised in the required manner.<sup>113</sup>

Wartime or peacetime, it does not matter; legislation still requires the same majority bicameralism and presidential signature to become law. “The President,” Hughes went on, “is still . . . elected in the manner provided . . .”<sup>114</sup> Even in the midst of war, whether a civil war or a world war, presidential terms last exactly four years. And, “[t]he judicial power of the United States continues to be vested,” whether in war or in peace, “in one Supreme Court and such inferior courts as Congress has

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109. See Hughes, *War Powers Under the Constitution*, *supra* note 4, at 241. “Taxation” is one of the few specific provisions that Hughes scribbled out in what appears to be his two-page outline of the speech. See Hughes, *Outline*, *supra* note 40, at 1.

110. Kennedy, *Over Here*, *supra* note 7, at 15–17.

111. U.S. Const. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

112. See Kennedy, *Over Here*, *supra* note 7, at 95–106 (“[T]he federal government would assume increased economic authority . . . Beyond that, little was certain. How would war revenues be raised? Would taxes bear more heavily on individuals or corporations?”).

113. See Hughes, *War Powers Under the Constitution*, *supra* note 4, at 241.

114. *Id.*

ordained.”<sup>115</sup> The punch line of this weighty discussion of fundamental constitutional design, however, comes back to taxes: The Constitution strictly dictates—“a requirement operative in war as well as in peace”—that taxes be geographically uniform throughout the United States.<sup>116</sup>

This feature of American wartime constitutionalism—that the interpretations of powers and rights expand or contract but some particular structural processes never change—is now so deeply embedded and well-practiced as to seem natural and essential. In the decades before World War I, however, some theorists questioned how well this structural rigidity functioned in crises. Writing after observing the American Civil War, British political essayist Walter Bagehot wrote, by way of comparison:

The American Government calls itself a Government of the supreme people; but at a quick crisis, the time when a sovereign power is most needed, you cannot *find* the supreme people. You have got a Congress elected for one fixed period, going out perhaps by fixed instalments, which cannot be accelerated or retarded—you have a President chosen for a fixed period, and immovable during that period: all the arrangements are for *stated* times. There is no *elastic* element, everything is rigid, specified, dated. Come what may, you can quicken nothing, and can retard nothing. You have bespoke your government in advance, and whether it suits you or not, whether it works well or works ill, whether it is what you want or not, by law you must keep it.<sup>117</sup>

As a political historian at the turn of the century, then-professor Woodrow Wilson had raised similar concerns about the rigidity of the American constitutional system to handle security crises and about the advantages of Cabinet government over executive–legislative separation: “[D]ivision of authority and concealment of responsibility are calculated to subject the government to a very distressing paralysis in moments of emergency.”<sup>118</sup> The difficulty, he advised, “is of a sort to be felt at all times, in seasons of tranquil rounds of business as well as at moments of sharp crisis; but in times of sudden exigency it might prove fatal.”<sup>119</sup>

World War I tested these structural critiques. Soon after the war began in Europe in July 1914, Britain and France adopted far-reaching changes to their parliamentary structures and mechanisms of governance

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115. Id. at 241–42.

116. Id. at 242.

117. Walter Bagehot, *The English Constitution* 79–80 (Cornell Univ. Press 1966) (1867).

118. Woodrow Wilson, *Congressional Government: A Study in American Politics* 186 (Dover Publ’ns 2006) (1885).

119. Id. at 283; see also Lindsay Rogers, *The Constitutional Difficulties of American Participation*, 112 *Contemp. Rev.* 32, 32 (1917) [hereinafter Rogers, *Constitutional Difficulties*] (“In waging war the United States labours under certain difficulties in addition to those common to all democracies.”).

to meet wartime demands.<sup>120</sup> In Britain, for instance, the Defence of the Realm Act (DORA) not only enabled the restriction of certain civil liberties,<sup>121</sup> but it also elevated the role of the cabinet and subordinated Parliament.<sup>122</sup> British government authority became more centralized as a result, and wartime legislative changes proposed by the cabinet raced through Parliament unamended almost instantaneously.<sup>123</sup>

Nothing of the sort happened in the United States. “In the United States the rigidity of a written Constitution, maintained during the war,” insisted the distinguished American legal scholar and commentator Lindsay Rogers in 1919, “prevents political rearrangements so far-reaching” as Britain’s formal adjustments to separation of powers.<sup>124</sup> As a wartime President, Woodrow Wilson wielded considerable sway over Congress by virtue of his political influence and appeals to public patriotism.<sup>125</sup> Wilson also took an expansive view of his inherent presidential

120. See generally Clinton Rossiter, *Constitutional Dictatorship* 91–116, 135–70 (1948) [hereinafter Rossiter, *Constitutional Dictatorship*].

121. Defence of the Realm Consolidation Act 1914, 5 Geo. 5 c. 8, § 1(c) (Eng.) (enabling the cabinet to issue regulations designed “to prevent the spread of false reports or reports likely to cause disaffection”). Through this and other sections of the Act, the cabinet limited free speech, conducted searches and seizures without warrants, and imposed curfew. See Beckett, *supra* note 37, at 245–48, 272 (describing the variety of state intervention undertaken via DORA).

122. See Rossiter, *Constitutional Dictatorship*, *supra* note 120, at 154.

123. *Id.* at 156; see also Beckett, *supra* note 37, at 245–48 (“The House of Commons gave up its right to scrutinise naval and military estimates and [Prime Minister] Asquith made no statement on the progress of the war in the House until March 1915.”).

124. Lindsay Rogers, *Presidential Dictatorship in the United States*, 231 *Q. Rev.* 127, 127 (1919) [hereinafter Rogers, *Presidential Dictatorship*]. Rogers was one of a group of scholars during this era who thought about crisis government, trying to answer the question of whether democracies or dictatorships were more effective in crises. See generally Richard C. Clark, *Presidential Emergency Powers: The Contribution of Lindsay Rogers*, 20 *Presidential Stud. Q.* 13, 15–29 (1990) (summarizing Rogers’s arguments and conclusions “on the problem of emergency powers in a democracy”); Lindsay Rogers, *Making a Democratic Government Effective in Crisis*, 19 *Proc. Acad. Pol. Sci.* 66 *passim* (1941) (contrasting the use of executive war powers in the United States and United Kingdom during World War I); see also Walter LaFeber, *The Constitution and United States Foreign Policy: An Interpretation*, 74 *J. Am. Hist.* 695, 709 (1987) (“[P]erhaps nothing more discredited the role of democracies, representative assemblies, and constitutional restraints on foreign policy than the world war itself.”).

In 1918, some opposition members of Congress pushed a War Cabinet bill that would have granted power over management of the war to a trio of three distinguished citizens. This bill drew constitutional objections for, among other things, interfering with the President’s commander-in-chief powers and was soundly defeated. See James Miller Leake, *The Conflict over Coordination*, 12 *Am. Pol. Sci. Rev.* 365, 370–73 (1918) (discussing constitutional objections to the War Cabinet bill); see also Editorial, *Vicious and Unconstitutional*, *N.Y. World*, Feb. 5, 1918, at 6 (quoting Hughes’s war powers speech in criticizing the War Cabinet bill as unconstitutional).

125. See Rogers, *Presidential Dictatorship*, *supra* note 124, at 131–32 (discussing the passage of the Selective Draft Act as an example of how the war “naturally gave the presi-



authority, so he began exercising some wartime economic powers and organizing executive branch administrative boards and commissions even before Congress authorized him to do so.<sup>126</sup> Still, in the period leading up to Hughes's speech, Congress took about a month to debate and pass versions of the emergency Food and Fuel Control Act and the Selective Service Act,<sup>127</sup> both of which are discussed below.<sup>128</sup> This was certainly fast by peacetime legislation standards, but slow compared to the British and French wartime parliamentary systems.<sup>129</sup> Whatever expanded authority Congress had to enact them, these laws had to work their way through long-established legislative processes in each house.

As with certain rights but not others, Hughes credits the inflexibility of American constitutional structures mostly to certain pieces of unambiguous text: "[A]part from the provisions fixing the framework of the Government, there are limitations which by reason of their express terms or by necessary implication must be regarded as applicable as well in war as in peace."<sup>130</sup> As a lawyerly distinction, the emphasis on textual clarity versus ambiguity holds some appeal, but it is not a very satisfying justification of this important feature of our "fighting constitution." Hughes jumps

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dential office a prestige and a chance of leadership far greater than when only domestic issues were to the fore").

126. See Harold H. Bruff, *Untrodden Ground: How Presidents Interpret the Constitution* 213–14 (2015) (noting that prior to the U.S. entry into the war, Wilson "issued an executive order to arm . . . [U.S. merchant] ships, having been advised by the attorney general that he had constitutional power to do so without legislation"); Edward S. Corwin, *The President: Office and Powers 1787–1957*, at 237 (4th rev. ed. 1957) (arguing that in addition to other actions, Wilson's "creation of the Committee on Public Information, the War Industries Board, and a War Labor Board rested exclusively on this basis [of presidential prerogative]"); William Franklin Willoughby, *Government Organization in War Time and After: A Survey of the Federal Civil Agencies Created for the Prosecution of the War 70–74*, 223–25 (1919) (describing the creation, via executive order, of wartime agencies focused on industrial and labor issues).

127. See Kennedy, *Over Here*, supra note 7, at 123, 147–50.

128. See *infra* text accompanying notes 161, 214; see also Rogers, *Constitutional Difficulties*, supra note 119, at 33 (discussing delays); Rogers, *Presidential Dictatorship*, supra note 124, at 133 (same).

129. See Rogers, *Presidential Dictatorship*, supra note 124, at 132–33 (comparing legislative efficiency).

130. Hughes, *War Powers Under the Constitution*, supra note 4, at 242. Just as he repeats his war powers axiom in *Blaisdell*, he repeats these limits:

When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to "coin money" or to "make anything but gold and silver coin a tender in payment of debts."

*Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) (quoting U.S. Const. art. I, § 10).

occasionally between pragmatic purposivism, which he defends throughout much of the speech with appeals to history and political theory, and textual formalism.<sup>131</sup>

In the previous section of the speech Hughes had stressed the need for adaptation of nondelegation principles to allow for a “vast increase of administrative authority through legislative action springing from the necessities of war.”<sup>132</sup> So why not also allow for adaptation of textually precise constitutional structures (or, for that matter, rights)? Perhaps Hughes regarded administrative delegations, passed through regular legislative mechanisms, as sufficient to meet wartime necessities without any adjustment to constitutional structures. Perhaps Hughes regarded the rigidity of constitutional structures as a strength rather than a weakness to wartime democratic decisionmaking; procedural consistency could, for instance, be a stabilizing virtue during the most pressurized political moments. Or, perhaps Hughes believed that the Framers had wisely identified certain structures, like certain rights, that were so essential to representative democracy that they should be protected with unambiguous text from adjustment in crises. Given Hughes’s aim to show the “[g]enius of our institutions,”<sup>133</sup> however, this composite of adaptive flexibility of some constitutional features and unyielding rigidity of others points to a peculiarity of American war powers—a peculiarity for which particular provisions’ textual clarity, standing alone, is a shaky normative account.

#### B. A “Marching” Constitution

If the constitutional power to wage war is the power to do so effectively—to win the wars the country engages in—then this power necessarily evolves, because warfare itself evolves. Hughes is quite clear that his general theory of the Constitution includes the need to adjust to changing circumstances: “[T]here are constantly new applications of unchanged powers, and it is ascertained that in novel and complex situations, the old grants contain, in their general words and true significance, needed and adequate authority.”<sup>134</sup> Poetically, the fighting Constitution “marches.”<sup>135</sup> For war powers in particular, the scope and pliability of authority must accommodate changes in military technology, changes in the nature of warfare itself, and the advancing security needs of the nation.

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131. See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 Ga. L. Rev. 699, 728–30 (2006) (critiquing Hughes’s reliance on this distinction in *Blaisdell*).

132. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 241.

133. See Hughes, *Outline*, *supra* note 40, at 2.

134. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 248.

135. *Id.*

With the exception of textually specific constitutional structures, Hughes appears to embrace a rather frictionless adjustment of wartime constitutional machinery.<sup>136</sup> That efficiency, however, is in some tension with the early history and particular features of the Constitution.

While it may be true that the Framers endowed the United States as a whole with the necessary powers of self-preservation, it is also certainly the case that they originally settled on compromises that were—by design—quite inefficient with regard to waging war. Military command is centralized in the President, as commander in chief, to avoid confusion and the sort of burdensome command-by-congressional-committee that characterized the Revolutionary War:

It was not in the contemplation of the constitution that the command of forces and the conduct of campaigns should be in charge of a council or that as to this there should be division of authority or responsibility. The prosecution of war demands in the highest degree the promptness, directness and unity of action in military operations which alone can proceed from the Executive.<sup>137</sup>

Unity of command is efficient. At the same time, however, the constitutional powers of the purse are limited with regards to the military; army appropriations can be made for up to only two years.<sup>138</sup> The Constitution also divides military power between the federal army and navy and the state militias, reserving for state governments the authority to appoint militia officers and train militia forces and limiting the purposes to which militia forces could be put when called upon by Congress to serve the federal government.<sup>139</sup> No Framer would defend these restrictions and apportionments as smoothly efficient.<sup>140</sup>

Such design compromises were necessary because many Framers and political leaders during the Founding era associated potent military forces with *militarism*, and they worried that strong military power—and especially standing armies—would naturally be put to use.<sup>141</sup> Those com-

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136. See supra sections I.A.1–3 (discussing wartime flexibility of government powers, congressional delegation, and individual rights). Hughes’s very phrase “[our] *fighting* constitution” evokes these qualities. Hughes, *War Powers Under the Constitution*, supra note 4, at 248.

137. Hughes, *War Powers Under the Constitution*, supra note 4, at 233.

138. U.S. Const. art. I, § 8, cl. 12.

139. *Id.* § 8, cls. 15–16.

140. See Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations 167–69* (4th prtg. 1967) (discussing military inefficiencies built into the Constitution).

141. See *id.* (discussing the Framers’ widespread association of standing armies with militarism); Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783–1802*, at 73–88 (1975) (noting that because of Founding-era political concerns about militarism, “[t]he convention never seriously debated allowing Congress a permanent army”); Allan R. Millett et al., *For the Common*

promises also seemed reasonable in light of the early Republic's strategic needs and ambitions.

At the time the Constitution was drafted and ratified, the main security aims of the United States, besides building and maintaining internal order and union, were mostly confined to defending its territorial borders and its maritime commerce.<sup>142</sup> The war power thus largely comprised three basic elements. First, there was the need to field a modest military force, which generally required recruiting and paying volunteers, building a navy and enlisting private vessels, or, in the case of repelling invasions, mobilizing state militias. Second, there was the need to feed and supply those forces, mostly through purchases on the open market and requisitions pursuant to the law of nations. And, third, there was the need to command those forces and direct their operations.<sup>143</sup> The Constitution clearly addressed each of these three elements: the first two in Article I's grants to Congress of the powers to create and equip a national military force, and the third in Article II's designation of the President as commander in chief.<sup>144</sup> Whatever implied war powers also existed, express war powers covered most foreseeable national defense needs during the early Republic.

Dramatic changes in national defense needs over time called for expanded government authority and overturned Founding-era compromises about military powers. The Civil War, for example, required novel, centralized government controls and structures to harness elements of a fast-industrializing economy—particularly railroads and factories—in support of a Union Army far larger than the ones created to wage the United States' previous military engagements—namely, the 1846 Mexican–

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Defense 81–83 (3d ed. 2012) (“The Constitution tried to create a delicate balance in which the central government received enough power to ‘provide for the common defense’ and ‘insure domestic tranquility,’ without extinguishing state sovereignty and individual liberty.” (quoting U.S. Const. pmb.)); Bernard Donahoe & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787–1788*, 33 *Rev. Pol.* 202, 202, 207–10 (1971) (discussing Founding-era concerns regarding militarism). To a much greater extent, the United States–created pacifist constitutions of post–World War II Japan and Germany strictly limit the countries' capacities to wage war. See Russell A. Miller, *Germany's Basic Law and the Use of Force*, 17 *Ind. J. Global Legal Stud.* 197, 199–200 (2010) (discussing Germany's pacifist constitution); D.McN., *Keeping the Peace*, *Economist: Banyan* (May 14, 2014), <http://www.economist.com/blogs/banyan/2014/05/japans-pacifist-constitution> [<http://perma.cc/W4V9-DXQH>] (discussing Japan's pacifist constitution).

142. See Herring, *supra* note 3, at 56–59 (highlighting early U.S. foreign relations priorities, including neutrality and territorial defense).

143. See Edward S. Corwin, *Our Constitutional Revolution and How to Round It Out*, 19 *Pa. B. Ass'n Q.* 261, 264 (1948) [hereinafter Corwin, *Our Constitutional Revolution*].

144. U.S. Const. art. I, § 8, cls. 12–15; *id.* art. II, § 2.

American War or the War of 1812.<sup>145</sup> The United States' aims in the Civil War—to preserve the Union from secession and, later, to combat slavery<sup>146</sup>—also publicly cast strong, centralized defense powers as a vital check against liberty deprivation by states, rather than the other way around.<sup>147</sup>

By the time Hughes spoke of the wartime Constitution, the United States was experiencing one of the most dramatic transformations of military power in its history. These transformations are evident, as detailed in the next Part, in Hughes's application of general theory to the specific circumstances of World War I.

## II. OUR "FIGHTING CONSTITUTION" IN THE FIRST WORLD WAR

Having established a general framework of wartime powers, Hughes then explains how his "fighting constitution" principles effectively matched two new features of American warfare: U.S. participation in World War I was *industrial*, and it was *expeditionary*.

When the United States entered the war in 1917, the two European sides had been bleeding each other nearly to death for three years.<sup>148</sup> At that time, "the suffering and war-weariness of all the major belligerents greatly increased while the terrible campaigns of attrition seemed to bring decisive victory no nearer to either combination of powers."<sup>149</sup> Breaking that battlefield stalemate required mobilizing, training, equipping, feeding, and supplying a massive army operating abroad. Not only would the domestic economy need to support these efforts, possibly for years, but it would also need to do so having been deprived of a significant percentage of its workforce. Some of these challenges, as alluded to above, existed on a smaller scale during the Civil War.<sup>150</sup> This war effort would be industrial in magnitude and in nature, mass-producing all the elements of a modern fighting force and mobilizing the entire national economic system behind it. In his address to Congress requesting a war declaration, President Wilson emphasized that this step would require not just massive increases to the size of the military, but "the organization

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145. See Richard Franklin Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877*, at 94–237 (1990) (outlining war mobilization and state formation in the Union and Confederacy during the Civil War).

146. See James M. McPherson, *Battle Cry of Freedom* 494–96 (1988).

147. See Akhil Reed Amar, *America's Constitution* 380 (2005) (arguing that, because "states could be just as tyrannical" as Americans feared the federal government could be, a strong central government could alleviate such tyranny); Paul Foss, *A Short, Offhand, Killing Affair: Soldiers and Social Conflict During the Mexican–American War* 171 (2002) ("The blue [U.S. Army] uniform had been a badge of shame for Mexican War volunteers; it quickly became an honorable symbol of national service in the Civil War.").

148. See Keegan, *supra* note 7, at 401–03.

149. Brian Bond, *War and Society in Europe, 1870–1970*, at 121 (1983).

150. See Bense, *supra* note 145, at 94–96 (describing the mobilization problems faced by both the Union and Confederacy).

and mobilization of all the material resources of the country to supply the materials of war and serve the incidental needs of the nation.”<sup>151</sup>

When it entered the war in 1917, the United States had only a few hundred thousand troops at its disposal, many of them national guardsmen posted on the Mexican border.<sup>152</sup> While this placed it well behind the major European powers militarily, the United States was outproducing them economically—in most cases by significant margins.<sup>153</sup> Within eighteen months of declaring war, the U.S. military had grown about twentyfold.<sup>154</sup> The U.S. government put around 4.8 million men in uniform, which meant dislocating a substantial share of the total population—including many of the most able-bodied men—from the civilian economy.<sup>155</sup> Its military draft was therefore a “selective service,” an industrial system designed to keep certain men—such as miners and factory workers—in jobs that were critical to the war effort.<sup>156</sup> As historian David Kennedy explains, World War I conscription “was to serve primarily as a way to keep the right men in the right jobs at home.”<sup>157</sup>

The great oceanic moat separating the United States from Europe was both a blessing and a curse. While offering protection from many of the war’s ravages, it also posed an obstacle to deploying and equipping the massive new army to wage war thousands of miles away.<sup>158</sup> True, American

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151. Wilson, Declaration of War Against Germany, *supra* note 48. Congress’s resulting war declaration also pledged “all of the resources of the country” to the war effort. Act of Apr. 6, 1917, S.J. Res. 1, 65th Cong. (enacted).

152. Precise figures vary on this point. Compare Leonard P. Ayres, *The War with Germany: A Statistical Summary* 16 (2d ed. 1919) (“When war was declared there were only 200,000 in the Army. Two-thirds of these were Regulars and one-third National Guardsmen who had been called to Federal service for duty along the Mexican border.”), with Jennifer D. Keene, *Doughboys, the Great War, and the Remaking of America* 9 (2001) (providing an April 1917 total force of about 290,000 including both regular army and National Guard), Millett et al., *supra* note 141, at 312 (“In April 1917, the regular Army numbered 133,111, reinforced by another 185,000 National Guardsmen.”), and Robert H. Zieger, *America’s Great War: World War I and the American Experience* 86 (2001) (describing the June 1917 army as totaling 220,000 troops).

153. See Paul Kennedy, *The Rise and Fall of the Great Powers 198–203, 242–49* (1989).

154. Cf. Keegan, *supra* note 7, at 401–02 (noting that while the U.S. Army contained about 107,000 men at the beginning of 1917, it grew to 1.3 million by August and ultimately reached over 2.8 million draftees, and that by the end of the war, U.S. ground forces as a whole totaled over 4 million).

155. See Millett et al., *supra* note 141, at 315.

156. See John Whiteclay Chambers II, *To Raise an Army* 125–26 (1987) (describing the selective service system during World War I as designed to raise a large army while preserving civilian manpower and skilled labor); Kennedy, *Over Here*, *supra* note 7, at 147–48 (same).

157. Kennedy, *Over Here*, *supra* note 7, at 148.

158. See Millett et al., *supra* note 141, at 318 (discussing challenges of transporting army to Europe); see also *id.* at 391 (quoting Prime Minister Winston Churchill’s message to President Franklin Roosevelt at the beginning of World War II: “The oceans, which were your shield, threaten to become your cage”).

forces had been sent abroad many times before; in just the previous two decades, American soldiers had battled Spanish forces and their allies in Cuba and the Philippines, helped put down the Boxer Rebellion in China, and launched cross-border incursions into Mexico.<sup>159</sup> Those were, however, comparatively small affairs, and even in victory the Spanish–American War had revealed that existing U.S. military forces were poorly trained and organized.<sup>160</sup> To meet the strategic demands of twentieth century “total” warfare, constitutional law would take several turns defended by Hughes.

A. *Over There: The National Draft and Expeditionary War Powers*

The first significant legal controversy of World War I that Hughes addresses in his speech, and the one he spends the most time discussing, is conscription. Congress had legislated a national draft a month after the U.S. entry into the war.<sup>161</sup> Did the national government have the power to compel military service in the expeditionary forces Wilson was sending to European battlefields?

This was an emotional issue for Hughes. In the six weeks leading up to the speech, he had devoted a significant amount of his time to his work as chairman of the New York City District Draft Appeals Board, reviewing petitions for draft exemptions submitted by city draftees.<sup>162</sup> By late August, the board was deciding nearly 200 cases a day,<sup>163</sup> and later that daily rate rose to closer to a thousand.<sup>164</sup> Aware that he was sending young men to risk their lives overseas, Hughes insisted on personally signing each appellant’s papers.<sup>165</sup> The day before his “fighting constitution” speech, he stood alongside former President Theodore Roosevelt and others in front of the New York Public Library to watch recently

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159. See Herring, *supra* note 3, at 314–24, 332–33; Schlesinger, *supra* note 44, at 91–92 (describing Wilson’s 1914 unilateral dispatch of “troops to protect American citizens against the Huerta regime in Mexico”).

160. See Millett et al., *supra* note 141, at 257–59, 268–71.

161. Selective Service Act of 1917, Pub. L. No. 65-12, 40 Stat. 76.

162. Pusey, *supra* note 2, at 370. The draft was a hybrid of national and local organization.

The organization of the draft diffused resistance and hostility toward the national government and applied the full majesty of the local community . . . to make the draft work. At the national level the War Department administered the draft through the Office of the Provost Marshal General . . . [But that office] did not select or exempt individuals. Supervised by state officials and district boards, the actual task of inducting draftees rested with the members of some 4,600 local boards.

Millett et al., *supra* note 141, at 313.

163. Hughes Board Speeds Up; Decides 178 Cases in Day, N.Y. Trib., Aug. 21, 1917, at 6.

164. Pusey, *supra* note 2, at 371.

165. *Id.*

drafted soldiers march up Fifth Avenue.<sup>166</sup> Many of those on parade likely had only weeks earlier received rejection letters bearing Hughes's signature to their draft appeals.

1. *Constitutional Powers of Conscription*. — Whether the federal government can institute a national draft seems today like an easy constitutional question, given Congress's broad Article I powers to "raise and support armies."<sup>167</sup> But historically the constitutionality of a national draft was not at all clear.<sup>168</sup> The issue would be settled affirmatively by the Supreme Court a year after Hughes spoke, in the 1918 *Selective Draft Law Cases*.<sup>169</sup> The oral arguments in that case were marked by patriotic intensity along the bench, and the decision was unanimous.<sup>170</sup> In prior eras, however, that decision might very well have come out differently, or at least divided, but for changes in military power and its exercise abroad by the United States.

At the time Hughes spoke, some constitutional arguments against a national draft were based on individual rights. Most prominently, draft opponents contended that conscription was a form of slavery or "involuntary servitude" contrary to the Thirteenth Amendment, or that it would violate the religious beliefs of conscientious objectors contrary to the First Amendment.<sup>171</sup> But debate about the constitutionality of a national draft long predated the abolition of slavery, and forms of local conscription had been practiced in America since colonial times.<sup>172</sup> Hughes quickly dismisses these First and Thirteenth Amendment arguments.<sup>173</sup>

Historically, the most potent constitutional objection to national conscription was not about individual rights at all. It was, rather, a structural argument about federalism.<sup>174</sup>

Many national draft opponents viewed the issue in terms of federal powers versus those of the states: Involuntary conscription, the argument

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166. City to Review Draft Army in March To-day, N.Y. Trib., Sept. 4, 1917, at 1.

167. U.S. Const. art. I, § 8, cl. 12.

168. See *infra* notes 179–184 and accompanying text (describing debates on conscription in the War of 1812 and the Civil War).

169. 245 U.S. 366 (1918).

170. William H. Harbaugh, *Lawyer's Lawyer: The Life of John W. Davis* 124–25 (1973).

171. See Hughes, *War Powers Under the Constitution*, *supra* note 4, at 235–37 (arguing against these two contentions). The main individual rights challenge in the *Selective Draft Law Cases* was based on Thirteenth Amendment involuntary servitude. See Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493, 1551–52 (1969).

172. See Millett et al., *supra* note 141, at 3 ("Colonial laws regularly declared that all able-bodied men between certain ages automatically belonged to the militia.").

173. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 235–37.

174. See generally Friedman, *supra* note 171, at 1507–50 (detailing these historical arguments in the early Republic through the Civil War). But see Webster, *supra* note 65, at 56–68 (emphasizing individual rights arguments against national conscription during the War of 1812).



ran, was an integral aspect of traditional state militia powers protected by the Constitution's Militia Clauses—reserving to states the power to maintain and train well-regulated militias that could be called into federal service by Congress for limited purposes<sup>175</sup>—and, as such, a federal effort to draft directly the able-bodied population would nullify these state rights and protections. In other words, an inherent feature of “militias,” as distinct from regular armies, was mandatory conscription, and the latter were traditionally raised through voluntary terms of service. Whereas maintaining the former was the right and responsibility of states, the federal power to raise and support armies was deliberately limited to recruiting volunteers or calling forth the militias maintained by the states. Prior to the U.S. entry into World War I, American debates about military preparedness therefore showed deep political suspicion of compulsory military service at the national level.<sup>176</sup> If Congress could conscript directly, then little might be left of state militias and the traditional relationship between individual citizens and those state institutions.<sup>177</sup>

Hughes takes his time in countering this claim. A significant portion of Hughes's research notes for the speech is devoted to cases, statutes, and historical executive action surrounding conscription in the United States and the Colonies.<sup>178</sup> His conclusions reveal how far U.S. military needs and strategy had evolved during the preceding century and the vast rebalancing and adjustment of constitutional powers required to meet them.

Indeed, some of the historical episodes that Hughes invokes to support a federal conscription power actually show just how constitutionally controversial it had always been. Hughes notes that during the War of 1812, for instance, Secretary of War James Monroe proposed a national draft that “was vigorously opposed as unconstitutional.”<sup>179</sup> (Indeed, that proposal was ultimately defeated in Congress.<sup>180</sup>) Hughes also quotes at length President Lincoln's argument from the Civil War that the Article I power of Congress to “raise and support armies” contains no restrictions.<sup>181</sup> Lincoln's argument fit nicely with Hughes's view that con-

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175. U.S. Const. art. I, § 8, cls. 15–16; see also *supra* text accompanying notes 138–139 (discussing constitutional division of military power between the federal army and the state militias).

176. See Neiberg, *supra* note 14, at 131 (“[P]roposals [in 1915] by the army and its advocates for some form of compulsory military service struck many as unnecessary . . . , [whereas] [t]he [state-level] National Guard model . . . had strong backing of state governors and those fearful of the extension of federal power at the expense of the states.”).

177. See Friedman, *supra* note 171, at 1541–50 (detailing these arguments, based on original constitutional compromises, during the War of 1812 and the Civil War).

178. Charles Evans Hughes, Draft Conscription Notes 1–31 (1917) (unpublished document) (on file with the *Columbia Law Review*), in CEH Papers, *supra* note 40.

179. Hughes, War Powers Under the Constitution, *supra* note 4, at 234.

180. See Friedman, *supra* note 171, at 1541–44.

181. Hughes, War Powers Under the Constitution, *supra* note 4, at 234–35.

stitutional powers for waging war must adapt fluidly to meet contemporary security challenges and requirements.

Federal conscription during the Civil War was, however, more constitutionally controversial than Hughes let on.<sup>182</sup> During that conflict, Chief Justice Taney went so far as to draft a detailed legal memorandum arguing that the federal government's conscription policy was fundamentally incompatible with state powers protected by the Constitution, though Taney did not publish it during the war and no legal challenge ever reached the Supreme Court for Taney to finalize it as a judicial opinion.<sup>183</sup> True, as Hughes cites, the Pennsylvania Supreme Court upheld by a 3-2 vote the Union's national draft, but only a few months earlier that same court (with a slightly different composition of judges, and reflecting bitter partisan infighting) had held 3-2 the other way and temporarily enjoined its state-level enforcement.<sup>184</sup>

In short, the Civil War had not settled the matter of the constitutionality of conscription. It is no surprise, therefore, that Hughes devotes so much research and text to this issue.

2. *Constitutional Limits on a Conscripted Army.* — To some opponents, the World War I draft was doubly offensive to the Constitution: It obliterated states' militia powers while it also eviscerated constitutional restrictions on the purposes to which conscripted forces could be put.

The Militia Clause limits Congress's power to call forth state militias to three specified purposes: "execut[ing] the laws of the union, suppress[ing] insurrections and repel[ling] invasions."<sup>185</sup> These limitations have their roots in ancient British tradition under which citizens could be called into military service only locally, not to be sent abroad.<sup>186</sup> In 1912, Attorney General George Wickersham provided a memorandum to the Secretary of War confirming that this clause barred sending the militia abroad<sup>187</sup>—a memorandum that Hughes notes approvingly in his speech.<sup>188</sup> If, as some believed, involuntarily conscripted servicemen

182. Hughes observed that drafts were used to raise armies by the American Colonies during the Revolutionary War and that both sides nationalized the draft during the Civil War—a policy whose validity "was sustained by the courts in both North and South." *Id.* at 234.

183. See Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* 53–54 (2010) (discussing Chief Justice Taney's memorandum, which raised a federalism argument against conscription that "the federal government . . . [is] not authorized to *undermine* the state militias by, in effect, poaching their members and putting them directly into federal service instead").

184. See Randall, *supra* note 61, at 11–12 (discussing the famous case of *Kneedler v. Lane*, 45 Pa. 238 (1863)).

185. U.S. Const. art. I, § 8, cl. 15.

186. Auth. of President to Send Militia into a Foreign Country, 29 Op. Att'y Gen. 322, 323 (1912).

187. *Id.* at 328–39.

188. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 237.

were, by definition, constitutionally “militia,” then it would arguably follow that they could not be sent to fight in Europe.

Perhaps the most vitriolic critic on this point was Hannis Taylor,<sup>189</sup> who litigated several cases up to the Supreme Court challenging the World War I draft.<sup>190</sup> A former diplomat, he was anything but diplomatic in his public criticism.<sup>191</sup> In a legal memorandum—submitted into the congressional record in October 1917 by a House member who opposed the draft—Taylor ripped into the Wilson Administration and Hughes.<sup>192</sup> He called legal arguments defending the federal drafting of citizens for service abroad “the most indefensible and deadly assault ever made on the Constitution.”<sup>193</sup> Turning his fire directly on Hughes’s recent defense of conscription in his “fighting constitution” speech, Taylor wrote:

Was there ever such a dreadful spectacle? There stood an ex-justice of the Supreme Court as the prosecutor of half a million of American youths, under military duress and on trial for their lives, with no one to defend them. The idea was that in that star-chamber proceeding the mere ipse dixit of a great legal functionary would deprive our sons of the protection guaranteed by a thousand years of English and American constitutional law.<sup>194</sup>

But Hughes would say that this argument gets the issue precisely backwards. The constitutional injunction that state militia may not be

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189. In an editorial praising Hughes’s 1917 speech, the *New York Times* took specific aim at Taylor, arguing that Hughes’s arguments proved that Taylor’s anticonscription position was “contradicted by common sense.” Editorial, *War Powers Under the Constitution*, *N.Y. Times*, Sept. 7, 1917, at 8.

190. Besides serving as counsel in *Cox v. Wood*, 247 U.S. 3 (1918), Taylor filed a brief as amicus curiae in the Selective Draft Law Cases, 245 U.S. 366, 368 (1918).

191. Taylor had previously served as U.S. minister to Spain. See Kennedy, *Over Here*, supra note 7, at 168 n.66. When Wilson learned of Taylor’s constitutional criticisms, he asked Attorney General Thomas Gregory if there was “anything we could do to this wretched creature.” *Id.*

192. Taylor’s statement is titled “A Petition to the Senate and House of Representatives” submitted “in behalf of himself and as next friend of the half million and more of American youths now under military duress.” 55 Cong. Rec. app. 640 (1917) (extension of remarks of Rep. Gordon). Indeed, Representative Gordon introduces Taylor’s statement with (negative) reference to Hughes’s famous “fighting constitution” speech, issued a month prior. *Id.*

193. *Id.* at app. 643. He also called them “stupid” and “pitiful” and perpetrated by “evil-minded” people. *Id.* at app. 641–42.

194. *Id.* at app. 643. In litigating unsuccessfully a Supreme Court case challenging the constitutionality of sending drafted servicemen abroad, Taylor wrote to the Court: “It is hard to understand why the term ‘brief’ should be applied to a light, flippant and offensive paper” filed by the Solicitor General. Reply to “Brief for the Appellee” at 1, *Cox v. Wood*, 247 U.S. 3 (1918) (No. 833). Indeed, Taylor’s zealotry so surpassed the boundaries of professional decorum that the Solicitor General requested that Taylor’s briefs be stricken from the record. The Court denied that request, but Taylor lost the case 9-0. *Cox*, 247 U.S. at 6–7.

sent abroad<sup>195</sup> is an argument for, not against, the constitutionality of a *federal* draft.

For Hughes, “[t]he power to use an army is co-extensive with the power to make war.”<sup>196</sup> If the government has the power to fight that war abroad, which it clearly does, then it must have the power to create an army capable of doing so effectively. And if a modern expeditionary army of sufficient size and composition can be assembled only by way of selective conscription, but the state militia system is constitutionally barred from providing it, then this power must instead be lodged in the federal government. “[T]he army may be used wherever the war is carried on, here or elsewhere,” Hughes remarked.<sup>197</sup> In conclusion, “[t]here is no limitation upon the authority of Congress to create an army and it is for the President as Commander-in-Chief to direct the campaigns of that army wherever he may think they should be carried on.”<sup>198</sup>

Note that the Hughes–Taylor debate constitutes, at root, a new constitutional argument and counterargument raised by an evolution in American grand strategy, one that entailed sending large armies abroad. The argument would not arise if national military power were confined largely to defending U.S. borders.<sup>199</sup> Indeed, a constitutional debate about sending large-scale forces abroad would have been almost academic for much of American history before the late nineteenth century;<sup>200</sup> it was, simply, far from foreign policy thinking during that period.<sup>201</sup>

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195. See U.S. Const. art. I, § 8, cls. 15–16.

196. Hughes, *War Powers Under the Constitution*, supra note 4, at 238.

197. *Id.*

198. *Id.*

199. See supra notes 142–144 and accompanying text (describing the early U.S. national security priority of territorial defense).

200. As Professor Walter LaFeber explains, until the Civil War, U.S. foreign policy interests “were not to be located on the other side of the globe . . . but across the next river or mountain range where lands and ports claimed by Indians, Mexicans, Canadians, or Europeans were coveted.” LaFeber, supra note 124, at 699. Writing during the Second World War, political commentator Walter Lippmann noted:

Until very recently, and for so long a time that no one living could remember anything else, . . . [Americans explained their security] by a popular myth: the Atlantic Ocean was too wide for an enemy to cross it . . . The United States did not need measures to provide for its own security; it needed merely to abstain from becoming involved across the seas.

Walter Lippmann, *U.S. War Aims* 197 (1944); see also Walter Lippmann, *U.S. Foreign Policy: Shield of the Republic* 49 (1943) (describing long American history of “unearned security” provided by oceans).

201. Hughes notes that the United States had sent military troops to foreign soil in, for example, the War of 1812 (to Canada), the Mexican–American War, the Spanish–American War, and, more recently, to address crises in China and Mexico. Hughes, *War Powers Under the Constitution*, supra note 4, at 238.

From World War I onward, however, the constitutional arguments had to take cognizance of new strategic thinking. Although during the interwar decades American politics strongly favored a narrow view of global American security interests and a restrained view of American military power to address them, since World War II American strategy has stressed keeping and using American military power abroad.<sup>202</sup> This Article returns to that strategic transformation—seeing global stability, and U.S. military underwriting of it, as critical to American national defense—in Part III, because it revamps what it means constitutionally to “wage war successfully.”

As it happened, Hughes’s argument won. The Supreme Court upheld unanimously the World War I draft in a set of challenges grouped as the *Selective Draft Law Cases*.<sup>203</sup> “The army sphere therefore embraces such complete authority,” held the Court, and “the duty of exerting the power thus conferred in all its plenitude . . . was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play.”<sup>204</sup> The fact that the 1918 decision gives relatively short shrift to some of the historical arguments about protecting states’ rights perhaps suggests that the Court was moved by perceived immediate necessities of modern warfare—concerns that had displaced early-Republic faith in state militias as safeguards of constitutional order.<sup>205</sup>

#### B. *The Home Front: Economic Regulation and Industrial War Powers*

After dispensing with the conscription issue, much of the remainder of Hughes’s speech is dedicated to defending the radically far-reaching domestic economic regulations needed to successfully wage the war. As with conscription, the Civil War had involved strategic and legal antecedents on wartime economic regulation, but World War I economic regulation differed in degree and in kind. In his 1948 book *Constitutional Dictatorship*, historian and political scientist Clinton Rossiter later described the domestic power Wilson wielded as “infinitely more . . . than had ever been given to an American President. In absolute terms it far exceeded Lincoln’s, for it extended to a control of the nation’s economic life that would have caused a revolution in 1863.”<sup>206</sup>

At the time of Hughes’s speech in September 1917, Congress had just begun its program of enacting major wartime economic and admini-

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202. See *infra* section III.C.2 (describing the post-World War II change in grand strategy as a direct challenge to earlier understandings of constitutional war powers).

203. 245 U.S. 366, 382–83 (1918).

204. *Id.*

205. At one point, the Court referenced congressional opposition to a national draft during the War of 1812 but said simply, “[W]e need not stop to consider it,” because it felt the issues had already been disposed of earlier in the opinion. *Id.* at 385.

206. Rossiter, *Constitutional Dictatorship*, *supra* note 120, at 241–42.

strative acts. Without yet knowing the extent of economic control that Wilson would soon wield, Hughes confidently offers in general terms a strong constitutional justification. This involved addressing three main questions: First, did Congress have the power to impose such expansive economic controls; second, were such controls consistent with constitutional rights; and, third, could Congress delegate to the President broad policymaking discretion with regard to that power?

1. *Wartime Regulation.* — In the decade or so before Hughes's wartime address, Congress and the courts had been wrestling with how to govern an increasingly complex and interconnected modern economy.<sup>207</sup> Addressing the New York State Bar Association in his capacity as a Supreme Court Justice in 1916, Hughes spoke of entering a new era in American law: "Most notable, I think, is first, the exercise of the power of Congress in the regulation of interstate commerce and, second, the establishment in Nation and State of administrative agencies with both legislative and quasi-judicial powers of vast importance."<sup>208</sup>

However these trend lines may have looked in peacetime, the United States' entry to the war massively and suddenly accelerated regulation and administrative control over the national economy.<sup>209</sup> The new era of "total war," entailing mobilization of entire societies to meet the needs of fielding and supplying unprecedentedly large armies over long periods, required expansive government control of industry, labor, transportation, and information.<sup>210</sup> For the Western allies, this included new governmental structures that sharply broke with classical liberal philosophy celebrating the role of the individual.<sup>211</sup> The American public's

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207. For a useful account of the debates about the growth of the regulatory state in the early twentieth century, see Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *Stan. L. Rev.* 1189, 1216–36 (1986).

208. Charles E. Hughes, *Assoc. Justice of the U.S. Supreme Court, Some Aspects of the Development of American Law* 4 (Jan. 14, 1916) (on file with *Columbia Law Review*). Hughes went on to present the common justifications for the administrative state—"special knowledge, flexibility, disinterestedness and sound judgment"—but then cautioned that "mere bureaucracy—narrow, partisan, or inexpert—is grossly injurious." *Id.* at 6–7.

209. For a useful overview of mobilization, see Millett et al., *supra* note 141, at 314–15.

210. See Edward S. Corwin, *Total War and the Constitution* 38 (1947) [hereinafter Corwin, *Total War*] (describing the challenge of "adapting legislative power to the needs of total war").

211. See Ernst, *supra* note 91, at 44 (describing the rise of administrative agencies to facilitate wartime mobilization); see also Beckett, *supra* note 37, at 245 (describing Australia's War Precautions Act and Unlawful Associations Act, which "enabl[ed] the introduction of censorship, the curtailment of civil liberties, . . . the control of aliens . . . [and] enabled the [government] to move against groups regarded as subversive . . ."); *supra* notes 120–124 and accompanying text (discussing changes to British and French governmental structures).

lives would be dictated in unparalleled ways by a complex set of agencies, boards, councils, and commissions.<sup>212</sup>

Prior to Hughes's speech, Congress had already enacted several far-reaching laws and committed to the President vast authority to work out the details as he saw necessary. Most prominently, Congress had in August 1917 passed the Food and Fuel Control Act, or the Lever Act, which conferred on the President broad powers "to make such regulations and to issue such orders as are essential"<sup>213</sup> to assure adequate and equitable supply and distribution of those critical resources—that is, essentially to regulate vast parts of the economy in furtherance of vast objectives.<sup>214</sup>

Hughes's understanding of wartime legislative powers provided ample basis for significant additional regulation to come.<sup>215</sup> Prior to the war, Congress had included, in an army appropriations act, provisions that authorized the President "to take possession and assume control of any system or systems of transportation" in times of war, and Wilson exercised this power in December 1917.<sup>216</sup> In July 1918, Congress passed a

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212. Rossiter, *Constitutional Dictatorship*, supra note 120, at 247. Prior to the war, the "preparedness" movement had led the creation of various boards designed "to prepare for integration of government and business in the event of American entry to the war." Beckett, supra note 37, at 247. Once the United States joined the war, the Wilson Administration created myriad executive-branch organizations. Among the most famous were the General Munitions Board, the War Trade Board, and the War Industries Board, which sought to guide the process of total economic mobilization in a way that balanced military need with civilian economic dislocations. See *id.* at 247–48; see also Millett et al., supra note 141, at 316–17.

213. Pub. L. No. 65-41, § 1, 40 Stat. 276, 276 (1917).

214. Corwin, *Total War*, supra note 210, at 39 (describing Congress's delegation of power to the executive in this and other wartime statutes).

Prior to Hughes's September 1917 speech, Congress had already passed numerous wartime regulatory statutes. Most famous, of course, were the Selective Service Act, ch. 15, 40 Stat. 76 (1917) and the Espionage Act, ch. 30, 40 Stat. 217 (1917). In addition, Congress had passed the First Liberty Bond Act, ch. 4, 40 Stat. 35 (1917) (raising revenue for the war); the Emergency Shipping Fund Act, ch. 29, 40 Stat. 182 (1917) (authorizing the creation of an agency to regulate the shipping industry); the Enemy Vessel Confiscation Joint Resolution, ch. 13, 40 Stat. 75 (1917) (permitting the seizure of ships registered under an enemy flag or owned by an enemy corporation); the Jones-Shafroth Act, ch. 145, 39 Stat. 951 (1916) (granting U.S. citizenship to Puerto Ricans, in part for conscription reasons); and multiple massive military and defense appropriations measures. By the end of 1917, Congress would pass several more measures, including the Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (prohibiting commerce with enemy governments, corporations, and others); the Aircraft Board Act, ch. 61, 40 Stat. 296 (1917) (creating an agency to regulate the aircraft industry); the Explosive Act, ch. 83, 40 Stat. 385 (1917) (regulating the manufacture and distribution of dangerous chemicals and ingredients); and several revenue-generating bills.

215. Hughes, *War Powers Under the Constitution*, supra note 4, at 246–47 ("Reasonable regulations to safeguard the resources upon which we depend for military success must be regarded as being within the powers confided to Congress to enable it to prosecute a successful war.").

216. Act of August 29, 1916, Pub. L. No. 64-242, 39 Stat. 619, 645; see also Presidential Proclamation, 40 Stat. 1733, 1734 (1917) (invoking that Act to "take possession and assume

joint resolution authorizing the President to seize control of communication lines, which the President exercised later that year.<sup>217</sup> In addition, Congress passed the Overman Act in August 1918, which granted the President wide powers to reorganize the functions of executive agencies as needed—according to his own assessment—to prosecute the war.<sup>218</sup> This reorganization authority bolstered Wilson's efforts to regulate war industries and labor pursuant to his own constitutional authority, which he regarded as abundant.

This legislation was not applied without reservation. For example, the great federal appeals court judge Charles Hough of New York declared around the same time of these actions that “[w]hen one turns from laws for or directly affecting the military” to Congress's recent wartime economic control measures, “there appears a kind of governmental effort absolutely new in American history, and concerning which no court has yet been called on to speak. On the subjects treated we have no social or political traditions that have not been violated, and few inherited legal suggestions.”<sup>219</sup>

But Hughes instead saw these activities as a continuity of long-standing constitutional principles. As to whether Congress possessed constitutional authority to enact such far-reaching economic regulation, this was, for Hughes, Congress exercising the very “power to wage war successfully” he describes in his speech.<sup>220</sup> The Commerce Clause could not have served effectively as a source of authority, because, at the time, regulation of most domestic economic activity was regarded as the exclusive province of the states.<sup>221</sup> However, as Hughes explains in his speech, that limited understanding of federal dominion does not hold in war-

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control . . . of each and every system of transportation [including railroads] . . . to . . . utilize[] . . . [such systems] for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon”).

217. See *infra* notes 276–279 and accompanying text. The July 1918 law had roots in the Civil War, during which Congress had similarly authorized the President to take over telegraph and railroad lines whenever “in his judgment the public safety may require it.” See *Railroad and Telegraph Seizure Act*, ch. 15, 12 Stat. 334 (1862).

218. *Overman Act*, ch. 78, 40 Stat. 556 (1918).

219. Charles M. Hough, *Law in War Time—1917*, 31 *Harv. L. Rev.* 692, 699 (1918).

220. Hughes was not the only one to conceive of these statutes in this way. For example, during congressional deliberations of the Food and Fuel Control Act, see *supra* note 127 and accompanying text, supporters in Congress and the executive branch made similar claims about the breadth of war powers. See, e.g., H.R. Rep. No. 65-75, at 1 (1917) (describing the bill as a “war emergency measure”); 55 *Cong. Rec.* 3822, 3822–24 (1917) (memorandum of Solicitor of the Department of Agriculture Francis G. Caffey) (describing the bill as a “war measure”); 55 *Cong. Rec.* 3809, 3809–10 (1917) (statement of Rep. Anderson) (demonstrating a “direct and conclusive relation between the prosecution of the war . . . and food regulation and control”).

221. See, e.g., May, *supra* note 62, at 15–16 (describing the limited contemporary understanding of congressional authority to regulate interstate commerce).



time; rather Congress “is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success.”<sup>222</sup>

Hughes’s confidence in making these bold pronouncements must have been buttressed by his observations of the European wartime experience. He had paid especially close attention to events across the Atlantic,<sup>223</sup> especially when resolute military preparedness became a major issue for him in the 1916 presidential campaign.<sup>224</sup> The European antagonists had gone to war in 1914 self-assured of a short affair. The three years of European conflict before American entry had exposed their tragic mistakes in failing to prepare and organize their economies sufficiently to meet the demands of protracted war at modern scale and intensity.<sup>225</sup> That experience empirically validated claims of sweeping wartime economic powers as necessary.

2. *Wartime Rights.* — Whether Congress had the power to regulate economic affairs so extensively was, in addition to a question of powers, a question of rights. So it was on this issue that Hughes brought to bear his elastic understanding of the Bill of Rights in wartime.

Substantive due process rights of the Fifth and Fourteenth Amendments were generally understood during that period to bar, respectively, federal and state regulation of “private” activities. Businesses and activities that were not “affected with the public interest” were largely protected from government interference or control.<sup>226</sup> Because there was relatively little federal regulation before World War I (due to the narrow construction of the Commerce Clause), most of the pre-War constitutional jurisprudence arose out of states’ exercise of their police powers. During this period, the Supreme Court wrestled with where to draw the line between private activities and those “affected with the public interest”—and therefore the outer boundary of government regulation.<sup>227</sup>

Here Hughes draws on the idea that rights must bend to meet the demands of modern warfare: “We are witnessing a new phase of the exercise of war powers. But the applicable principle to determine the

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222. Hughes, *War Powers Under the Constitution*, supra note 4, at 239–40.

223. See Pusey, supra note 2, at 368–70 (describing Hughes’s reaction to Germany’s war efforts as “an onslaught on liberty and on civilization itself”).

224. See *id.* at 353–59 (describing Hughes’s pro-preparedness platform).

225. See Rogers, *Constitutional Difficulties*, supra note 119, at 32, 35–37 (describing how the “European experience has forced on us the conviction that various autocratic laws are necessary and proper if a democracy is to prosecute a war successfully”). Rogers wrote that the European experience proved the necessity of unprecedented wartime economic regulation, but he expressed doubt as to how far the law would stretch. See *id.* at 36–38.

226. See *Munn v. Illinois*, 94 U.S. 113, 130–32 (1876) (upholding state price-fixing for grain elevators because they were found to be businesses “affected with a public interest”).

227. See generally Cushman, supra note 100, at 47–65 (discussing how the distinction between “public and private spheres” affected economic regulation jurisprudence of that era).

validity of such action is not new.”<sup>228</sup> Addressing whether modern warfare could dramatically expand understandings of what it meant for otherwise-private activities to be “affected with the public interest,” Hughes cites *German Alliance Insurance Co. v. Lewis*.<sup>229</sup> That 1914 case upheld a state statute setting fire insurance rates. In holding that the regulated business had “by circumstances and its nature, . . . rise[n] from private to be of public concern and [was] subject, in consequence, to governmental regulation,”<sup>230</sup> the Court noted that as the economy evolved, the line between private and public interests would shift—and with it, the contours of permissible regulation.

Hughes extends this analysis to argue that “[t]he extraordinary circumstances of war may bring” certain industries, businesses, and other private activities within the scope of regulatory power, and Congress had powers to reasonably control and manage resources “to enable it to prosecute a successful war.”<sup>231</sup> With the recently enacted and sweeping Food and Fuel Control Act clearly in mind, for example, Hughes states: “The production and distribution of foodstuffs, articles of prime necessity, those which have direct relation to military efficiency, those which are absolutely required for the support of the people during the stress of conflict, are plainly of this sort.”<sup>232</sup>

Hughes does not say a word about the First Amendment or free expression in the address. The lack of any discussion by Hughes is striking given that the 1917 Espionage Act had been enacted several months earlier after considerable debate and constitutional controversy regarding some provisions proposed by Wilson.<sup>233</sup> This omission seems especially

228. Hughes, *War Powers Under the Constitution*, supra note 4, at 246–47.

229. *Id.* at 247 (citing 233 U.S. 389 (1914)).

230. *German Alliance*, 233 U.S. at 411.

231. Hughes, *War Powers Under the Constitution*, supra note 4, at 247.

232. *Id.* For a contemporary view less sanguine about the constitutionality of such regulation, see Rogers, *Constitutional Difficulties*, supra note 119, at 36–37 (“Not so clear, however, is the extent to which Congress may go in regulating the food supply . . . [I]t would be impossible to make any definite prediction regarding the constitutional question . . . [T]here would be very serious doubts as to the federal right.”).

233. See Kennedy, *Over Here*, supra note 7, at 24–26 (discussing debates about the Espionage Act); Rogers, *Constitutional Difficulties*, supra note 119, at 38–40 (discussing the controversy around the Espionage Act). Later statements by Hughes suggest that he was not much bothered by wartime restrictions on dissent and that he applied his flexible approach to rights in wartime to the First Amendment. In a 1919 address, for example, he stated: “In speech . . . we have had unwonted restraints to which we have submitted in order to win the victory,—not to enthrone military rule, but to destroy the rule of force and to make freedom permanent.” Charles E. Hughes, President, N.Y. State Bar Ass’n, *The Republic After the War* (Jan. 17, 1919) [hereinafter *Hughes, Republic After the War*], in *New York State Bar Association: Proceedings of the Forty-Second Annual Meeting* 224, 233 (The Argus Co. 1919). He continued: “The war has stifled criticism, subordinated individual initiative to public control, and centered power in small and irresponsible groups. We have welcomed all these methods that the cause might triumph.” *Id.* A 1918 editorial quotes Hughes as saying in a speech:

glaring in retrospect because World War I is often associated today with restrictions on free speech and press.<sup>234</sup> But at that time there was still “scant judicial precedent on the meaning of the First Amendment”<sup>235</sup> and the public was more worried about disloyalty than freedom of dissent.<sup>236</sup> It was not until a few years later that World War I efforts to suppress antiwar speech and publications sparked high-profile Supreme Court litigation and free-expression progressivism.<sup>237</sup>

3. *Wartime Delegation.* — Nobody thought that Congress itself had the necessary expertise and agility to set and continually update the intricate rules and details of a vast new regulatory administration. These tasks would have to be delegated to experts in executive-branch agencies. However, under prevailing peacetime constitutional thought (cases were rare in the nascent administrative state, so “jurisprudence” would be an overstatement<sup>238</sup>), many of the major wartime statutes would normally have been regarded as impermissible transfers of policymaking responsibility from the Congress to the President.<sup>239</sup>

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I believe in freedom of criticism, but every one who criticizes should apply to his criticism the acid test of whether it helps to the vigorous prosecution of the war or retards it. If it helps, then the more of that criticism we have the better. If it embarrasses, then we want none of it and the American people won't stand it.

Editorial, *The Test of Criticism*, N.Y. World, Feb. 7, 1918, at 6.

After the war, Hughes would gain a reputation as a strong guardian of free expression for defending a group of socialists from expulsion from the New York legislature. See Pusey, *supra* note 2, at 391–93.

234. See Bruff, *supra* note 126, at 218–22 (noting that the Wilson Administration—with help from “prosecutors, judges, and juries”—“aggressively stifled dissent” to “suppress disloyalty,” which resulted in, *inter alia*, “over two thousand” prosecutions under the Espionage Act and Sedition Act); Rabban, *supra* note 41, at 255–69 (detailing lower court Espionage Act litigation); William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime 170–83* (1998); *supra* note 41 and accompanying text (introducing the significant restrictions on civil liberties during World War I).

235. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* 159 (2004).

236. See *id.* at 182; see also Rabban, *supra* note 41, at 2 (contrasting prewar “pervasive judicial hostility to virtually all free speech claims” with “a comprehensive defense by libertarian radicals of broad protection for almost every expression”).

237. See Stone, *supra* note 235, at 138.

238. Prior to World War I, there was scant judicial precedent on the delegation question. Two notable exceptions were *United States v. Grimaud*, 220 U.S. 506, 516–17 (1911) (upholding a statute delegating to the Secretary of Agriculture the authority to establish regulations, including criminal penalties, regarding the use of public forest reservations), and *Field v. Clark*, 143 U.S. 649, 696–97 (1892) (upholding a statute delegating to the President the authority to alter tariffs upon the congressionally imposed condition of finding of unfair treatment to American businesses).

239. See *supra* notes 88–89 and accompanying text (outlining the peacetime nondelegation doctrine, which forbade the blending of executive, judicial, and legislative powers). However, Westel Willoughby—whose treatise Hughes relied upon in crafting his 1917 speech—interestingly seemed to endorse at least some wartime delegation on functional

To that anticipated charge Hughes argues that “[t]he principles governing the delegation of legislative power are clear, and while they are of the utmost importance when properly applied, they are not such as to make the appropriate exercise of legislative power impracticable.”<sup>240</sup> Furthermore, whereas in peacetime:

Congress cannot be permitted to abandon to others its proper legislative functions; . . . in time of war when legislation must be adapted to many situations of the utmost complexity, which must be dealt with effectively and promptly, there is special need for flexibility and for every resource of practicality . . . .<sup>241</sup>

While wartime economic powers expanded and individual rights narrowed, nondelegation restrictions eased. As a result, Hughes concludes, “We thus not only find these great war powers conferred upon the Congress and the President, respectively, but also a vast increase of administrative authority through legislative action springing from the necessities of war.”<sup>242</sup>

At the time Hughes spoke, the sweeping bureaucratic apparatus was still being designed and constructed, and it would quickly be accepted politically—and legally—in just such terms of necessity.<sup>243</sup> In Rossiter’s depiction, the American citizen “was most conscious of the war . . . by the migration of private citizens to Washington and the erection there of a complexity of boards, commissions, and agencies to control his economic life.”<sup>244</sup>

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In November 1918, about a year and a half after the United States entered the war, the Allies and an utterly defeated Germany reached an armistice, or ceasefire truce.<sup>245</sup> In the short span between Congress’s April 1917 war declaration and the armistice—during which Germany, freed from fighting in the East after Russia’s withdrawal from the war, threw its

grounds. Willoughby, *Constitutional Law*, supra note 32, at 1208 (“With respect to many matters of detail Congress has delegated to the President . . . the establishment of administrative orders for the government of the land and naval forces which it might constitutionally itself provide, but which . . . it is either impossible or unwise for it to attempt to do so.”).

240. Hughes, *War Powers Under the Constitution*, supra note 4, at 241.

241. *Id.*

242. *Id.*

243. See generally Kennedy, *Over Here*, supra note 7, at 93–143 (discussing the political economy of the home front as the wartime bureaucracy was established).

244. Rossiter, *Constitutional Dictatorship*, supra note 120, at 247.

245. Armistice with Germany, Nov. 11, 1918, 2 U.S.T. 9, <http://www.loc.gov/law/help/us-treaties/bevans/m-ust000002-0009.pdf> [<http://perma.cc/R78V-WBG4>]; see also Keegan, supra note 7, at 444–50 (detailing Germany’s military defeat).

full military weight to the Western Front<sup>246</sup>—the United States converted its immense economic resources and energy into a formidable military force.

In the end, the Supreme Court validated Hughes's views on wartime economic regulation and administration. Despite plenty of challenges and opportunities for judicial repudiation, no significant wartime economic regulation was struck down as beyond Congress's powers, as an unconstitutional delegation, or as violating constitutional economic or contractual rights.<sup>247</sup>

When considered together, this marked the most significant development in American war powers to date. True, immediately after the Civil War the Supreme Court upheld significant wartime economic measures, notably the 1862 Legal Tender Act,<sup>248</sup> in which Congress, for the first time in the nation's history, authorized the production of paper currency—the famous “greenbacks”—unbacked by hard coin.<sup>249</sup> Emphasizing the centrality of the emergency of the Civil War in its analysis and invoking the seminal *McCulloch* decision, the Court held the Act to be a valid exercise of Congress's Article I authority under the Necessary and Proper Clause.<sup>250</sup>

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246. See, e.g., Keegan, *supra* note 7, at 358–69 (describing the Russian Revolution as permitting Germany to “transfer[] the best of its eastern army to the Western Front, in preparation for what it planned to be the war-winning offensives against the French and British”).

247. See, e.g., *United States v. Chem. Found., Inc.*, 272 U.S. 1, 11–14 (1926) (upholding actions under the Trading with the Enemy Act, including delegation to the President to determine the terms of sale of enemy properties in light of conditions arising in the war); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 86–93 (1921) (striking down criminal convictions for excessive price fixing under regulations promulgated pursuant to the Food Control Act, on the grounds of vagueness, but not calling into question Congress's power to authorize regulation of food pricing); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156–61 (1919) (upholding wartime prohibition of liquor traffic as within Congress's war powers); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183 (1919) (“That under its war power Congress possessed the right to confer upon the President the authority [to seize communications networks as necessary to protect national defense] we think needs nothing here but statement . . . .”); see also Clarence A. Berdahl, *War Powers of the Executive in the United States* 204 (1921) (citing Hughes, as validated by World War I precedent, for the proposition that the necessities of total war extended constitutional powers “to cover practically every enterprise and activity within the country”).

248. Legal Tender Act, ch. 33, 12 Stat. 345, 345 (1862) (declaring the paper notes “shall be . . . lawful money and a legal tender in payment of all debts, public and private, within the United States”).

249. Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871).

250. *Id.* at 537–40. The Court recognized that Congress, faced with a dire emergency after the disastrous Union defeat at Bull Run and in the midst of an economic crisis, was faced with a “necessity . . . immediate and pressing.” *Id.* at 540. Lest the war effort collapse, Congress had to provide a means of funding; its choice to issue paper currency was “appropriate and adapted” to that end. *Id.* at 541. Additionally, the Court rejected argu-

But whereas many of Lincoln's most drastic Civil War measures—suspension of habeas corpus, a federal draft, slave emancipation—were proclaimed unilaterally or never received Supreme Court validation, the most drastic World War I measures were blessed by all three branches of government.<sup>251</sup> Hughes would reflect back, a decade after the war, that “the Great War . . . furnish[ed] the occasion for decisions of the Supreme Court sustaining [the war power] in its broadest scope.”<sup>252</sup> The alternative views that constitutional limits were either suspended altogether or remained unbendingly fixed in wartime<sup>253</sup> were soundly defeated by Hughes's adaptive approach.<sup>254</sup> Surveying jurisprudential developments through the Second World War, Rossiter would later conclude that the Supreme Court has “for the most part . . . agreed with Chief Justice Hughes's famous observations that ‘the war power of the Federal Government . . . is a power to wage war successfully’ and that ‘so, also, we have a *fighting* constitution.”<sup>255</sup>

This Part has shown how Hughes's flexible and adaptive interpretation of war power solved one major problem of his day that he keenly understood: how to mobilize the entire national industrial economy for expeditionary war. As the following Part explains, however, this solution opened up another set of problems that Hughes's war power theory was unable to close.

### III. HUGHES AND OUR POSTWAR FIGHTING CONSTITUTION

Hughes's main purpose in the “fighting constitution” speech being to justify the Wilson Administration's wartime policies, he stridently defended an unreservedly muscular conception of constitutional war powers. But he was also cognizant—and later, after the immediate peril

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ments that the Act violated the right to individual freedom of contract and the Fifth Amendment's Takings Clause. *Id.* at 548–52.

251. Cf. Berdahl, *supra* note 247, at 268 (noting that Wilson was careful to secure legislative authorization for his actions, unlike Lincoln who “in cases of doubted authority and even of undoubted lack of authority . . . usually acted first and secured the sanction of law afterwards, if at all”).

252. Charles Evans Hughes, *The Supreme Court of the United States* 104 (1928) [hereinafter Hughes, *The Supreme Court*].

253. See *supra* notes 55–69 and accompanying text.

254. As Corwin wrote:

The early quarrel between the theory that the clauses of the Constitution protective of private rights were suspended by war and the theory that these clauses remained in full sway in war's despite was resolved in World War I in favor of a compromise theory, what I have termed “constitutional relativity” . . . .

Corwin, *Total War*, *supra* note 210, at 131 (quoting Hughes, *War Powers Under the Constitution*, *supra* note 4, at 238, 248).

255. Rossiter, *The Supreme Court and the Commander in Chief*, *supra* note 45, at 7.

had subsided, outspoken—of the acute dangers of wartime government power.

For Hughes, the elasticity of the power to wage war successfully was justified on the assumptions that clear lines exist between wartime and peacetime and that following successful war there would be a reversion to constitutional normality.<sup>256</sup> War-waging constitutional pliancy would be only temporary.<sup>257</sup> Hughes remarked in an address at Columbia University less than two weeks after the November 1918 armistice:

The astounding spectacle of centralized control which we have witnessed has confused many and turned the heads of some. But this, for the most part, has been the manifestation of the Republic in arms, fighting as a unit, with powers essential to self-preservation, which the Constitution not only did not deny but itself conferred.<sup>258</sup>

He went on to warn, however, that war could be used pretextually to advance political and legal agendas and he expected courts to play a checking role.<sup>259</sup>

For Hughes, the end of the war meant a retraction to prewar governmental powers. “[N]ow victory has been won,” Hughes proclaimed as President of the New York State Bar Association in January 1919, and therefore “[t]he Republic turns to the methods of peace.”<sup>260</sup> That included dismantling much of the wartime administrative apparatus.<sup>261</sup> Although there might be a need for some gradual adjustment, “[p]eace

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256. See Ernst, *supra* note 91, at 44; Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 *Harv. L. Rev.* 718, 740–41 (2016) (book review). Hughes’s view drew on a constitutionalist tradition that posited a strict dichotomy of emergency and nonemergency conditions. See Gross & Ní Aoláin, *supra* note 55, at 172–74; Lobel, *supra* note 55, at 1388–91. As Professor Rosa Brooks also notes, “For most of recorded history, humans have sought to draw sharp lines between war and peace.” Rosa Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon* 8 (2016).

257. Hughes emphasized temporariness in his later *Blaisdell* opinion regarding economic emergency powers as well. See Levinson, *supra* note 131, at 731–32.

258. Charles E. Hughes, *Some Reflections on Conditions Following the War* (Nov. 30, 1918) (on file with the *Columbia Law Review*). A version of this address was published several months later as Charles Evans Hughes, *Our After-War Dangers: In Saving the World Have We Lost Our Republic?*, 61 *Forum* 237 (1919) [hereinafter Hughes, *Our After-War Dangers*].

259. See Hughes, *Our After-War Dangers*, *supra* note 258, at 237–38 (warning of such political opportunism in extending war powers); see also Hughes, *Republic After the War*, *supra* note 233, at 233–35 (warning of the dangers of unaccountable delegations of legislative power after the war).

260. Hughes, *Republic After the War*, *supra* note 233, at 233.

261. See Kessler, *supra* note 256, at 740–41 (“At war’s end, Hughes called for a rapid scaling back and judicialization of ‘the astounding spectacle of centralized control’ that the wartime administrative apparatus had become.” (quoting Ernst, *supra* note 91, at 44)).

policies must be prosecuted with the authority and distribution of powers and according to the methods which pertain to peace.”<sup>262</sup>

But what if, as Hughes believed was happening, that reversion to normality was delayed, perhaps for political reasons? And what if there was no return to normality because the military crisis dragged on indefinitely? Some other astute observers forecasted from the very beginning of the American participation in the Great War that it would forever transform constitutional governance. Political scientist and constitutional scholar Edward Corwin, writing just weeks after the U.S. war declaration, predicted a “permanent reshaping” of governmental systems and only partial relaxation of the powers upon which they rest “with the return of peace.”<sup>263</sup> He saw the war as accelerating preexisting forces for constitutional change, especially those favoring federal regulatory power.<sup>264</sup>

Hughes’s statements after the November 1918 armistice evince anxiety about constitutional adjustment, not the confidence of his 1917 wartime speech. “What will it profit the Republic if it gains the whole world and loses its own soul?” he asked in his 1919 New York Bar Association address.<sup>265</sup> In a lecture the following year, his language was even stronger:

We went to war for liberty and democracy, with the result that we fed the autocratic appetite. And, through a fiction, permissible only because the courts cannot know what everyone else knows, we have seen the war powers, which are essential to the preservation of the nation in time of war, exercised broadly after the military exigency had passed and in conditions for which they were never intended . . . .<sup>266</sup>

He ominously punctuated that statement by declaring: “[W]e may well wonder in view of the precedents now established whether constitutional

262. Hughes, *Our After-War Dangers*, supra note 258, at 238. A version of this issue arose after the Civil War as well. In *Stewart v. Kahn*, the Supreme Court upheld a Civil War measure extending the statute of limitations on suits brought against Confederacy residents. 78 U.S. (11 Wall.) 493, 507 (1871). The Court stated that the war power “is not limited to victories in the field and dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.” *Id.*

263. Edward S. Corwin, *War, the Constitution Moulder*, 11 *New Republic* 153, 153 (1917), <http://www.unz.org/Pub/NewRepublic-1917jun09-00153?View=PDF> (on file with the *Columbia Law Review*).

264. *Id.* at 155.

265. Hughes, *Republic After the War*, supra note 233, at 233; see also Hughes, *Our After-War Dangers*, supra note 258, at 237.

266. Charles E. Hughes, *Some Observations on Legal Education and Democratic Progress* 4 (June 21, 1920) [hereinafter *Hughes, Some Observations*] (on file with the *Columbia Law Review*); see also Hon. Charles Hughes Warns of Intolerable Personal Government, *Harv. Crimson* (June 22, 1920), <http://www.thecrimson.com/article/1920/6/22/hon-charles-hughes-warns-of-intolerable/> [<http://perma.cc/PA64-N4WG>] (describing the speech as “a warning against the tendencies among American lawmakers and the government, toward autocracy”).



government as heretofore maintained in this republic could survive another great war even victoriously waged.”<sup>267</sup>

When the political branches were slow to yield their temporary war-time powers, Hughes unsuccessfully petitioned courts to flip the switch. The world—and the United States’ position in it—was changing, and Hughes’s doctrinal solution proved inadequate. Post–World War I events showed that in articulating a constitutional framework for waging successful war, Hughes failed to develop a clear and stable definition of success, especially one that could endure new developments in American security strategy.

#### A. *The Cable Seizure Case*

The case of *Commercial Cable Co. v. Burlison* is little-known because it was rendered moot before the Supreme Court could consider its merits.<sup>268</sup> It features, however, two of the sharpest legal minds at the time—Hughes and federal district court Judge Learned Hand—squaring off across Hand’s bench about what waging war successfully really meant.

The case arose from a federal government seizure, pursuant to powers delegated by Congress, of the undersea communications cables operated by private American companies.<sup>269</sup> This would not have been very legally controversial, especially under Hughes’s theories of expansive war powers, but for an important wrinkle: The seizure did not occur until shortly *after* the United States and its European partners declared an armistice with Germany and the other Central Powers.<sup>270</sup> The fighting in Europe had essentially halted. This was more than a ceasefire, as the negotiated terms with the Allies required Germany to withdraw its troops and hand over the bulk of its navy.<sup>271</sup> The resulting case showed how difficult it was to turn off modern war powers once they were turned on.

1. *The Undersea Cable Seizure.* — In the new era of total war, telecommunications infrastructure was a critical resource because war efforts depended so much on the free flow of information. News was tied to government propaganda efforts, business correspondence was key to industrial production, and military communications were vulnerable to

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267. Hughes, *Some Observations*, supra note 266, at 4; see also Ernst, supra note 91, at 44 (discussing Hughes’s postwar concern about wartime administrative bureaucracy); James A. Henretta, Charles Evans Hughes and the Strange Death of Liberal America, 24 *Law & Hist. Rev.* 115, 157 (2006) (same). The contrast between Hughes’s 1917 addresses and his post-armistice speeches illustrates Professor James Henretta’s observation that Hughes “sensed both the allure and the threat of a national bureaucratic order.” *Id.* at 170–71.

268. 255 F. 99 (S.D.N.Y.), rev’d as moot, 250 U.S. 360 (1919).

269. *Id.* at 99–100.

270. *Id.* at 100 (noting the seizure took place on November 16, 1918, five days after the armistice was signed).

271. See Gordon Brook-Shepherd, November 1918: The Last Act of the Great War 376–77 (1981); Keegan, supra note 7, at 447–50.

espionage and counterespionage.<sup>272</sup> Because the war was global, undersea telegraph cables were especially important. Britain, cognizant of the need to maintain control of its worldwide empire, had recognized marine cables' strategic importance in the decades leading up to war,<sup>273</sup> and from the very start of the conflict Britain and Germany had engaged in naval efforts to sever each other's undersea communication links.<sup>274</sup> The United States was a latecomer to this reality, relying heavily on foreign (especially British-controlled) communication networks.<sup>275</sup>

To help protect American communications infrastructure and ensure that it was used efficiently, Congress passed a joint resolution in July 1918 authorizing

the President during the continuance of the present war . . . , whenever he shall deem it necessary for the national security or defense, to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, . . . and to operate the same in such manner as may be needful or desirable for the duration of the war . . . .<sup>276</sup>

The Wilson Administration acted almost immediately in taking control of the telegraph and telephone lines inside U.S. borders effective August 1.<sup>277</sup> This resembled actions taken earlier in the war with respect to the railroad network, control of which the government had assumed based on a prior delegation of wartime power over transportation systems.<sup>278</sup> As mentioned above, the Supreme Court would later uphold all these seizures as valid exercises of war powers.<sup>279</sup>

272. See Daniel R. Headrick, *The Invisible Weapon: Telecommunications and International Politics 1851–1945*, at 138–52 (1991) (“[In World War I,] every piece of information . . . represented a danger and an opportunity . . . . [T]elecommunications channels, with their ability to carry vital information fast enough to affect the outcome of a battle in progress, turned into weapons.”).

273. See P.M. Kennedy, *Imperial Cable Communications and Strategy, 1870–1914*, 86 *Eng. Hist. Rev.* 728, 729 (1971) (“A widely-developed system was seen to provide the Empire with an efficient and secure means of communication, and to be a vital part of the network of imperial defence.”).

274. Headrick, *supra* note 272, at 138–42.

275. See Jonathan Reed Winkler, *Nexus: Strategic Communications and American Security in World War I*, at 12–13 (2009) (describing the “large gap” between the United States and the warring powers in “appreciating the strategic importance of international communications”).

276. H.R.J. Res. 309, 65th Cong., 40 Stat. 904 (1918) (enacted).

277. See Presidential Proclamation, 40 Stat. 1807 (1918); see also May, *supra* note 62, at 37.

278. See *supra* note 216 and accompanying text (discussing Wilson’s assumption of control of domestic transportation systems).

279. See *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183–88 (1919) (upholding seizure of telephone lines); *N. Pac. Ry. Co. v. North Dakota ex rel. Langer*, 250 U.S. 135, 149–52 (1919) (upholding seizure of railroads).

Within several months of Congress's resolution authorizing seizure of communications system, the Allies and Germany signed the armistice that ended the remaining fighting on the Western Front. In his address to Congress on that day, November 11, President Wilson declared: "The war thus comes to an end, for, having accepted these terms of armistice, it will be impossible for the German command to renew it."<sup>280</sup>

On November 16, almost a week after the armistice was signed, Postmaster General Albert Burleson, acting under presidential proclamation, took control of the undersea cables owned and operated by the Commercial Cable Company and Commercial Pacific Cable Company.<sup>281</sup> Burleson had been planning to seize control of the cables for months and the President had actually signed the proclamation on November 2, but it took two more weeks for the orders to be finalized and carried out, by which time the armistice had come earlier than the Wilson Administration expected.<sup>282</sup>

2. *Hughes, Hand, and the Cable Companies' Suit.* — The government's refusal to immediately relinquish control after the armistice "mystified" Hughes,<sup>283</sup> and he took on the case challenging the government's actions as unconstitutional and beyond the scope of Congress's authorization. Around this time Hughes had been litigating cases at a fierce pace;<sup>284</sup> some of this work had included serving as counsel in several cases challenging Food Control Act criminal prosecutions against excessive pricing.<sup>285</sup> The cable seizures seemed like an example of the sort of opportunistic administrative policymaking and summary procedures that Hughes feared as unnecessary under the circumstances and, rather than based on special expertise, susceptible to antidemocratic political influences.<sup>286</sup>

Hughes may have already had this case in mind when he remarked soon after the cable seizure: "So far as we have harnessed our strength

280. Americanism: Woodrow Wilson's Speeches on the War—Why He Made Them—and—What They Have Done 138 (Oliver Marble Gable ed., 1918) [hereinafter Wilson's Speeches on the War].

281. *Commercial Cable Co. v. Burleson*, 255 F. 99, 100 (S.D.N.Y. 1919).

282. See Richard R. John, *Network Nation: Inventing American Telecommunications* 398 (2010) ("[T]he war ended more quickly than the administration had anticipated, leaving it in the embarrassing position of justifying a takeover as a military necessity after the military necessity had passed."); May, *supra* note 62, at 38–40 (discussing the delay in issuing the proclamation authorizing the seizure).

283. John, *supra* note 282, at 403; see also Hughes, *Autobiographical Notes*, *supra* note 80, at 191 (calling the seizures "wholly unwarranted and arbitrary").

284. In this twenty-eight-month period, he had twenty-five arguments in the Supreme Court and many others in lower courts and state courts. Hughes, *Autobiographical Notes*, *supra* note 80, at 191 & n.17. "Once he accepted a case, Hughes threw himself into it with the vigor of a dynamo." 1 Pusey, *supra* note 2, at 384.

285. Hughes, *Autobiographical Notes*, *supra* note 80, at 192.

286. See Ernst, *supra* note 91, at 36–43 ("During the twenties, [Hughes] continued to believe that judges could distinguish applications of administrative expertise from partisan confiscations of the investments of public utilities and bureaucratic overreaching.").

for war, we were acting under the Constitution and not in violation of it.”<sup>287</sup> That was our “fighting constitution” exercising the power to wage war successfully. “But,” he continued,

wherever, in the desire to take advantage of the situation for the purpose of fastening some new policy upon the country, there has been resort to arbitrary power through acts unjustified by real or substantial relation to a state of actual war, such acts will receive the condemnation they deserve when they are brought to the determination of the proper tribunals.<sup>288</sup>

Courts, in other words, might have to step in to enforce the return to peacetime powers.

The cable seizure suit was Hughes’s “first big case” since the armistice.<sup>289</sup> Everyone understood that on the home front a challenging period of economic readjustment still lay ahead,<sup>290</sup> and internationally much remained unresolved. Wilson was at this time preparing to decamp for months to Europe—an unprecedented trip for a sitting president—for the Paris Peace Conference, where the major powers would try to craft a lasting settlement.<sup>291</sup> The cable seizure was part of the Wilson Administration’s efforts to control the flow of news coverage from Paris, which it saw as a natural extension of wartime censorship and propaganda,<sup>292</sup> as well as to ensure government information links between Washington and Europe.<sup>293</sup> Wilson announced in his December 2, 1918, annual address to Congress that in order “to keep an open wire constantly available between Paris and the Department of State and another between France and the Department of War,” he had, on the expert advice of cable officials, “tem-

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287. Hughes, *Our After-War Dangers*, *supra* note 258.

288. *Id.* Hughes went on to describe the tendency of administrators to want to extend their authority over, among other things, “instrumentalities of communication” beyond the period of wartime necessity. See *id.*

289. Pusey, *supra* note 2, at 385.

290. See Kennedy, *Over Here*, *supra* note 7, at 248–58 (describing the Wilson Administration’s economic challenges in the postwar years).

291. See Margaret MacMillan, *Paris 1919*, at 4 (2003) (noting Wilson’s decision “whether or not he should have gone to Paris . . . exercised . . . many of his contemporaries”); see also *On Wilson at Peace Table the ‘Noes’ Have It*, *N.Y. Times*, Nov. 15, 1918, at 1 (enumerating arguments against Wilson’s decision to go to Paris) (on file with the *Columbia Law Review*).

292. See May, *supra* note 62, at 41–42 (“The [cable seizure], [Wilson] said, was taken in preparation for the peace conference, so ‘news of the next few months may pass with utmost freedom and with the least possible delay from each side of the sea to the other.’” (quoting Woodrow Wilson, *Sixth Annual Message to Congress* (Dec. 2, 1918), <http://millercenter.org/president/wilson/speeches/speech-3801> [<http://perma.cc/GF8B-LTTH>])).

293. See Bruce W. Bidwell, *History of the Military Intelligence Division, Department of the Army General Staff: 1775–1941*, at 247–48 (1986) (documenting those efforts within the War Department). Some of Wilson’s advisers viewed control of international cables as a critical strategic resource. See Headrick, *supra* note 272, at 174–75 (“What worried [officials] was the national security aspect of communications.”).

porarily taken over the control of both cables in order that they may be used as a single system.”<sup>294</sup>

Hughes, however, viewed the armistice as legally decisive. That event, he argued, marked the end of the seizure powers delegated by Congress and of the constitutional powers to delegate them so broadly.<sup>295</sup>

Hughes’s case came before Judge Learned Hand in the Southern District of New York. Hand had wrestled earlier in the conflict with war powers and had pushed back against the government. In July 1917, the New York postmaster (acting on orders from the same Postmaster General Burleson) had refused to distribute *The Masses* magazine on the grounds that its political cartoons and essays purportedly encouraged public resistance to wartime laws, in violation of the Espionage Act of 1917.<sup>296</sup> When the publisher sued to enjoin the Postmaster’s Office from refusing to distribute the magazine, Hand interpreted the Espionage Act narrowly, in a way that did not cover the published expression at issue, by refusing to assume that Congress had intended to make fullest use of its war powers.<sup>297</sup> His injunction was quickly and unanimously reversed on appeal.<sup>298</sup> Now, two years later, Hughes hoped that Hand might again boldly reject administrators’ spacious interpretation of wartime statutory authority.<sup>299</sup>

The crux of Hughes’s argument—the courtroom hearing of which was vibrantly described by the *New York Times*<sup>300</sup>—was that the legislative condition precedent (national security danger) no longer existed, in light of the armistice, and neither therefore did the legal authority to maintain control of his clients’ property. After the armistice, for Hughes, “[t]here was no basis for any reasonable judgment that there was any

294. Woodrow Wilson, Sixth Annual Message to Congress (Dec. 2, 1918), in Presidential Speech Archive, Univ. of Va. Miller Ctr., <http://archive.millercenter.org/president/wilson/speeches/speech-3801> [<http://perma.cc/8NQG-BNY9>].

295. Transcript of Record at 6–9, *Commercial Cable Co. v. Burleson*, 250 U.S. 360 (1919) (No. 815).

296. *Masses Publ’g Co. v. Patten*, 244 F. 535, 536–37 (S.D.N.Y. 1917).

297. *Id.* at 540 (concluding that the Congress, in passing the statute prohibiting “any willful obstruction of the [federal] recruiting or enlistment”—the statute under which the postmaster acted—did not intend to criminalize mere “[p]olitical agitation” absent an active “urging upon others . . . to resist the law”); see also Rabban, *supra* note 41, at 261–65; Stone, *supra* note 235, at 164–70.

298. *Masses Publ’g Co. v. Patten*, 246 F. 24, 39 (2d Cir. 1917).

299. See Gerald Gunther, *Learned Hand: The Man and the Judge* 220–22 (1994). Separately, Hand’s second-guessing of a wartime administrator’s judgment was atypical of courts at the time, and it likely cost him, for the time being, a promotion to the Second Circuit. *Id.*

300. Hughes Assails Seizure of Cables, *N.Y. Times*, Dec. 28, 1918, at 5. Whereas it had been hard at times to hear the government lawyers, the *Times* reported, the ex-Justice’s “voice carried to every part of the court room” as he argued for three hours in a style “earnest, vigorous, and enforced with frequent gestures” and with barely a glance at his notes. *Id.*; see also Pusey, *supra* note 2, at 385 (offering a similar account).

danger to the national security.”<sup>301</sup> Even if there remained a technical state of war pending a formal peace treaty, simply put, danger “no longer existed.”<sup>302</sup>

To that Judge Hand replied from the bench:

But the security or defense of the nation . . . depends does it not, upon the objects for which the war was fought, and until those objects have been ascertained authoritatively by a peace, it cannot be said that the security and defense is established. I take it a war is not for the sake of fighting, but for the sake of the purposes for which the parties have been engaged.<sup>303</sup>

Hand turned Hughes’s own reasoning back on him: If the power to wage war is the power to wage war successfully, then success must be gauged not necessarily just by the absence of immediate danger but by reference to the ultimate political aims sought.

In World War I, those aims were a boldly ambitious set of international security and diplomatic conditions—after all, Wilson had justified his war declaration request as necessary that the world “be made safe for democracy”<sup>304</sup>—not a battlefield line or status. Hand harbored some Wilsonian visions himself at that time, believing that a lasting peace would require assertive American involvement in rewriting the rules of international relations and suppressing nationalistic rivalries.<sup>305</sup> “The termination of fighting by no means is an indication that the security and defense of the nations, for which they went to war, has been achieved. Is that not so?” Hand probed.<sup>306</sup>

Hughes responded that delegated war powers could not be—or at least in this case should not be—tied to such diffuse and far-reaching ambitions.<sup>307</sup> “I think that what may be achieved, . . . in the sense of the final results of the war, will probably not be determined during our

301. Hughes Assails Seizure of Cables, *supra* note 300 (quoting ex-Justice Hughes’s argument in the cable seizure suit).

302. *Id.*

303. *Id.*

304. Wilson, Declaration of War Against Germany, *supra* note 48.

305. Gunther, *supra* note 299, at 314. Professor Gerald Gunther writes:

Hand was incontrovertibly an internationalist . . . convinced the United States should join the League of Nations even if it meant accepting the Senate’s reservations about it. To Hand, a reluctance to compromise and an insistence on perfectionist versions of world order were bound to fail, and would incur the unacceptable cost of curtailing sharply American engagements with the rest of the world.

*Id.*

306. Hughes Assails Seizure of Cables, *supra* note 300.

307. *Id.* In addition, Hughes made clear the constitutional limitation in Brief for Appellants at 38–48, *in* Transcript of Record, *Commercial Cable Co. v. Burlison*, 250 U.S. 360 (1919) (No. 815) (arguing that Congress improperly delegated to the President “arbitrary power,” “a power the exercise of which is unreviewable and uncontrollable”).

lifetime,” Hughes asserted.<sup>308</sup> “Congress in this resolution, upon a fair interpretation of it, had no reference to the national security in the sense of the ultimate establishment of some conditions, through treaties, which might promote the general welfare and happiness, and secure the lasting peace which we all desire to see attained.”<sup>309</sup> Such grand ambitions could not be the legal touchstone for the war powers granted by Congress.

For Hughes (at least as a litigator<sup>310</sup>), war powers should be tied to objectively determinable and measurable military aims. They should not toggle on and off based on “an arbitrary executive fiat, but a finding upon facts—a reasonable judgment based on a situation in which the national security could be deemed to be in actual danger.”<sup>311</sup> It was one thing to interpret wartime legal boundaries flexibly to allow expansive powers even indirectly tied to sustaining military efforts, such as domestic regulation of agricultural or fuel production and distribution, but it was quite another to adopt limitless objects of war as the measure of success. The latter would abolish limits to government powers.

Hughes’s proposed solution would fix war aims—and therefore government powers, since they are bounded by the necessities to achieving those aims—to the actual application of military force:

It was not a danger in the sense of a nebulous regard for possible policies, which could not be vindicated and carried through by force, that Congress had in mind. It was an actual state of applied force that we were looking to in arming the President with these extraordinary powers to take over, seize, hold, and operate great systems of communication.<sup>312</sup>

Hughes then quoted to Hand the President’s armistice proclamation to Congress<sup>313</sup> (even taking care to note that he was present for the dramatic occasion), which stated that Germany and its allies were militarily neutralized and powerless to resume the war: “[The President] knew that the potency of that war had gone, so far as it was directed against the peace and security of our people, and, therefore, the point was that the conditions no longer existed when there was any threat at the national security.”<sup>314</sup>

This was a tough argument for Hughes, at least as a matter of statutory interpretation. The July 1916 congressional resolution on which the

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308. Hughes Assails Seizure of Cables, *supra* note 300.

309. *Id.*

310. Hughes’s post-armistice public addresses, described above at *supra* notes 258–260 and accompanying text, provide a strong basis to believe that this was his view independent of his client representation.

311. Hughes Assails Seizure of Cables, *supra* note 300.

312. *Id.*

313. President’s Address to Congress Announcing Armistice Terms (Nov. 11, 1918), *in* Wilson’s Speeches on the War, *supra* note 280, at 138, 138–40.

314. Hughes Assails Seizure of Cables, *supra* note 300.

cable seizure rested expressly authorized such action until ratification of a peace treaty.<sup>315</sup> Now that the substantive scope of war powers had expanded to account for the new complexities of modern warfare, he struggled to put forward a workable doctrinal formula for terminating those powers that accounted for the new complexities of grand war aims.

On that point Judge Hand interrupted:

The purposes for which the war was successfully terminated . . . surely are to be found only in the terms of peace which are eventually established, and the security of the nation must be measured, and its defense must be measured, by the success with which the United States, in the end, the President and Congress, secure these purposes.<sup>316</sup>

Put another way, the cessation of fighting is merely a step toward but not the successful realization of war aims, which at the time Judge Hand supposed would probably be spelled out in an international peace agreement. He thus confronted Hughes with a version of Hughes's own axiom: "Now, then," if the political branches regard such a far-reaching international agreement as the measure of the war's success, "surely all means necessary to the achievement of that final end are necessary to the security and defense of the nation."<sup>317</sup>

In the end, Judge Hand dismissed the suit. He interpreted Congress's July 1918 communication-systems resolution as vesting the President with unreviewable discretion to seize the cables based on his assessment of security necessities.<sup>318</sup> "If the President, who by virtue of his office was charged with the successful conduct of the war, decided that any such means were necessary," he wrote, "his decision was final."<sup>319</sup>

Hughes appealed the case on behalf of the cable companies to the Supreme Court, but the Court dismissed it as moot in June 1919.<sup>320</sup> On May 2, 1919, the government had loosened its management over cable communication networks and turned back over all control of the cables to the companies.<sup>321</sup> Whereas Postmaster General Burleson had hoped to use exceptional wartime authorities to prove the value and efficiency of nationalizing communication instrumentalities, his efforts had backfired

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315. The July 16, 1917 joint resolution stated that presidentially authorized control of communications systems "shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace." H.R.J. Res. 309, 65th Cong., 40 Stat. 904 (1918) (enacted).

316. Hughes Assails Seizure of Cables, *supra* note 300 (internal quotation marks omitted) (quoting Judge Hand).

317. *Id.*

318. *Commercial Cable Co. v. Burleson*, 255 F. 99, 103-04 (S.D.N.Y. 1919).

319. *Id.* at 104.

320. *Commercial Cable Co. v. Burleson*, 250 U.S. 360, 360 (1919).

321. See May, *supra* note 62, at 52.



politically and the practical results of government control instead had revealed increased inefficiencies.<sup>322</sup>

### B. *The Uncertainty of “Successful” War*

If the power to wage war is the power to wage war successfully, and war’s success can be assessed only by reference to its political aims, then the constitutional boundaries of the power are a function of strategy, or a process of matching ends and the means to achieve them. In his “fighting constitution” speech and in his cable seizure litigation, Hughes evinced confidence that the reasonable necessity of proposed means for waging war can be assessed objectively using traditional legal analytic tools. But what about the definability of war ends? This too Hughes seemed certain of. Yet war ends are uncertain and shifting concepts.<sup>323</sup> Before they are pinned down, how can one assess the reasonableness of the means to achieve them?

In his written opinion holding for the government in the cable seizure case, Judge Hand offered in dicta his own general understanding of war aims:

War is not the release of primitive combative instincts; it is an enterprise conducted for purposes consciously understood, whose realization gives to it its only rational significance. The national security and defense is to be judged not by the immediate present, but by the stability of the ensuing state of peace. The terms of the final conventions, the success of the nation in achieving the aims with which it set out, and which it may have adopted during the progress of war, are the measure of that security and defense. Those aims, whatever they are, are deemed essential to some vital national interest, not necessarily confined to freedom from immediate invasion.<sup>324</sup>

There are several crucial aspects of this statement. First, Hand emphasized the points from his courtroom colloquy with Hughes: that war aims are inherently political, that they may shift over time (including during the course of a war), and that their fulfillment is sometimes difficult to assess.<sup>325</sup> Furthermore, Hand captured the idea that American national defense could no longer, if it ever could, be assessed narrowly in terms of protection from invasion. World War I took this point to an

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322. See John, *supra* note 282, at 395–404; May, *supra* note 62, at 40–52.

323. See generally Gabriella Blum, *The Fog of Victory*, 24 *Eur. J. Int’l L.* 391 (2013) (arguing intertwining military and civilian components of modern war renders obsolete normative limits on warfare based on combat).

324. *Burleson*, 255 F. at 105–06 (footnote omitted).

325. Philip Bobbitt has described military victory in a similar fashion. See Philip Bobbitt, *Terror and Consent* 187 (2009) [hereinafter Bobbitt, *Terror and Consent*] (“Victory is not simply the defeat of the enemy; it is the achievement of the war aim.”).

extreme, insofar as Wilson had defined U.S. war aims as the construction of an entire new world order.<sup>326</sup> Wilson viewed as essential to American security the replacing of traditional European balance-of-power international politics with a new system built upon new rules of diplomacy, ideals such as national self-determination, and orderly and collective responses to aggression and breakdowns in peace.<sup>327</sup>

Even if American aims in World War I had been defined more modestly, however, the cable seizure case helps show that the new foreign policy roles the United States adopted as a major global player complicated Hughes's idea of toggling between war powers and peace powers. Geopolitical conditions had changed: Increasingly, American defense imperatives were tied to events beyond its own borders and shores, making it all the more difficult to determine a baseline condition of security. The result of this *external* shift was that *internal* war powers could not easily retract into their peacetime configuration.

Judge Hand's response to Hughes's plea that the curtain be drawn quickly and conclusively on war powers presaged—but in a much more sophisticated form—several Supreme Court holdings that soon followed. In a pair of cases decided in June 1919, the Court upheld the validity of federal control of telephone and railway rates based on statutes granting wartime authority, even after the armistice.<sup>328</sup> In *Hamilton v. Kentucky Distilleries & Warehouse Co.*, the Court in December 1919 upheld as within Congress's war powers the War-Time Prohibition Act, which prohibited liquor traffic in order to maintain war efficiency and aid in military demobilization, even though Congress did not pass that Act until ten days after the signing of the armistice.<sup>329</sup> Justice Brandeis, writing for the Court, rejected the liquor company's challenge that Congress's war powers were now inoperative.<sup>330</sup> Three weeks later, in *Ruppert v. Caffey*, the Supreme Court extended that ruling, sustaining a post-armistice ban of nonintoxicating beer as a valid exercise of Congress's war powers.<sup>331</sup>

These rulings did not stop Hughes from pressing his arguments about war termination and the diminished powers that went with it. In a set of

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326. See Herring, *supra* note 3, at 411–12.

327. See *supra* note 299 and accompanying text (discussing Wilson's motivations for bringing the United States into World War I).

328. See *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183 (1919) (affirming government control of telephone rates); *N. Pac. Ry. Co. v. North Dakota ex rel. Langer*, 250 U.S. 135, 148 (1919) (affirming government control of railway rates).

329. 251 U.S. 146, 158–63 (1919).

330. *Id.* The challengers argued (as Hughes had) both that the armistice signaled the end of the war and that the circumstances of national danger had, in fact, ceased. The Court rejected these arguments. *Id.*

331. 251 U.S. 264, 301–02 (1920) (upholding broadened prohibition measures as within the government's war powers, notwithstanding changes in the post-armistice security situation).

1920 appeals to the Supreme Court, Hughes challenged war-profiteering cases brought under the Food and Fuel Control Act on due process grounds as well as the expiration of the war.<sup>332</sup> These convictions were overturned the next year on due process grounds, so the Court never reached Hughes's argument that whatever vestige of war may have remained in the prohibition cases, by now "the tenuous threat" underlying government war power had "long since diminished to nothingness and wholly disappeared."<sup>333</sup>

### C. *The Power to Wage War Successfully After the Great War*

The anxieties Hughes harbored in the immediate postwar period about war powers overreach seem mostly to have dissipated by the mid-1920s. When he published his 1927 Columbia University Lectures the following year as a book,<sup>334</sup> Hughes drew large chunks of text almost verbatim from his 1917 speech for his section on war powers. He also used the maxims that "[w]e have a *fighting* constitution" and that "[t]he power to wage war is the power to wage war successfully," which were originally found in the body and conclusion of that speech, in the opening of his book section.<sup>335</sup> Whatever his later misgivings about their extended application, these had not simply been rhetorical flourishes uttered in a moment of wartime fervor; they remained central to his theory of war powers.

Although he did not explain so, Hughes's post-armistice anxieties were probably allayed by two factors, one political and one judicial. On the political side, President Warren Harding pledged the return to "normalcy" in his 1921 inaugural address.<sup>336</sup> Hughes would serve as Harding's Secretary of State, and after the President signed Congress's joint declaration ending the war with Germany in July 1921,<sup>337</sup> Hughes negotiated the formal peace treaty with Berlin.<sup>338</sup> Those events and the lapsing or legislative repeal of wartime regulation soon thereafter seemed to close the book on the exercise of World War I war powers and the apparent mo-

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332. See May, *supra* note 62, at 220–23. The lead case was *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921).

333. Appellee's Brief at 37, *Tedrow v. A.T. Lewis & Son Dry Goods Co.*, 255 U.S. 98 (1921) (No. 357). Like *Cohen Grocery Co.*, the Court in this case held the criminal provision to be unconstitutionally vague. See *Tedrow*, 255 U.S. at 99.

334. Hughes, *The Supreme Court*, *supra* note 252.

335. *Id.* at 102–03.

336. Warren G. Harding, President of the U.S., Inaugural Address (Mar. 4, 1921), <http://www.presidency.ucsb.edu/ws/?pid=25833> [<http://perma.cc/7YHM-SCFL>].

337. War with Germany Ended July 2, 1921, *N.Y. Times*, Nov. 15, 1921, at 18 (on file with the *Columbia Law Review*).

338. Treaty of Peace Between the United States & Germany, U.S.-Ger., Nov. 14, 1921, 42 Stat. 1939; see also Hughes, *Autobiographical Notes*, *supra* note 80, at 225–30.

mentum of bureaucratic statism—at least for the present.<sup>339</sup> Government powers had not snapped back as quickly as he had anticipated, but by the time he returned to public service, they were substantially receding.

On the judicial side, the Supreme Court around that same time invested lower courts with at least some role in policing the durational boundaries of war powers. Though delayed from his perspective, this was the sort of judicial checking for which Hughes had argued in litigation and his public addresses.<sup>340</sup>

Whereas the Court had upheld post-armistice prohibition laws as valid war power exercises, it did so only having considered—albeit very deferentially—the prevailing war conditions of their continued exercise.<sup>341</sup> In subsequent cases of the early 1920s, the Court asserted a more active role in reviewing congressional determinations of wartime necessity. In *Chastleton Corp. v. Sinclair*, for example, the Court addressed a Fifth Amendment challenge to the constitutionality of a 1919 congressional statute, still in effect in 1922, that imposed rent control in the District of Columbia as a war-related emergency.<sup>342</sup> In that case, the Court gave great weight to the legislature's determination, but it also staked out the judiciary's role in weighing evidence and facts to determine whether a war emergency justifying continued reliance on constitutional war powers still existed.<sup>343</sup> These precedents, especially when combined with the political shifts just mentioned, would likely have mitigated Hughes's concerns that war powers would be perpetuated indefinitely.

1. *The Great Depression, Emergency Powers, and War Powers.* — Nominated back to the Court by President Herbert Hoover, Hughes served as Chief Justice from 1930 to 1941.<sup>344</sup> Hughes's return to the bench coin-

339. See Henretta, *supra* note 267, at 147–48 (describing Hughes's worries of postwar bureaucratic statism as premature, in light of subsequent political developments).

340. See *supra* notes 259–262, 283–288 and accompanying text (describing Hughes's view that, with the war won, courts should ensure government powers retract to peacetime levels).

341. See *Ruppert v. Caffey*, 251 U.S. 264, 301 (1920); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 163 (1919); see also May, *supra* note 62, at 191–207 (discussing these decisions as establishing some role for courts in assessing the actual state of wartime emergency justifying congressional reliance on war powers). In his 1927 Columbia lectures, Hughes cited *Hamilton* in noting the Supreme Court's recognition “that the war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations.” Hughes, *The Supreme Court*, *supra* note 252, at 108.

342. 264 U.S. 543, 546 (1924).

343. *Id.* at 546–49; see also May, *supra* note 62, at 241 (concluding from *Chastleton* that “[t]he court thus rejected as constitutionally inadequate the very emergency Congress had relied upon for the 1922 statute, and which it was then in the process of invoking as the basis for a further extension”); Daniel J. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 *Colum. L. Rev.* 1973, 2006 (1990) (discussing *Hamilton* and *Chastleton* as establishing that the existence of a continuing emergency was susceptible to judicial review).

344. Pusey, *supra* note 2, at 648, 787.

cided with the onset of the Great Depression and, soon after, Roosevelt's New Deal regulatory initiatives that greatly expanded the government's administrative role in peacetime.

The new Chief Justice quickly confronted questions of whether and how to apply his theories of wartime government emergency power to a peacetime context. Indeed, in responding to the Depression, the architects of the New Deal deliberately drew on Wilson's approach during World War I.<sup>345</sup> As mentioned above,<sup>346</sup> one case in particular stood out: In *Home Building & Loan Ass'n v. Blaisdell*, a Depression-era case about state mortgage regulation, Hughes both repeated his "power to wage war successfully" axiom and attempted to articulate important limits on that axiom.<sup>347</sup> He did so in dicta and as part of a discussion of general emergency powers, not just war powers.

The *Blaisdell* case arose after Minnesota passed a law in 1933 suspending the obligation of debtors to pay their debts during the period of widespread economic distress.<sup>348</sup> The state law was challenged as a violation of, among other things, the Contract Clause, which forbids states from "pass[ing] any . . . law impairing the Obligation of Contracts."<sup>349</sup> By a 5-4 vote, the Court sustained the act as a reasonable exercise of state police powers in an emergency.<sup>350</sup>

Writing for the Court, Hughes explained: "While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions."<sup>351</sup> And reiterating the thesis from his 1917 speech, Hughes compared economic emergency powers with war powers:

[T]he war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation.<sup>352</sup>

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345. See William E. Leuchtenburg, *The New Deal and the Analogue of War*, in *The FDR Years* 35 (1995) (arguing that World War I served as a rhetorical and political metaphor, as well as legal and policy precedent, for New Deal actions and government responses to the Great Depression).

346. See *supra* notes 17–19, 105–108 and accompanying text (discussing *Blaisdell* as one example of Hughes's axiom appearing in jurisprudence).

347. 290 U.S. 398, 426 (1934).

348. *Id.* at 415–18.

349. U.S. Const. art. I, § 10, cl. 1; *Blaisdell*, 290 U.S. at 416.

350. *Blaisdell*, 290 U.S. at 444–45 ("[T]hat there were in Minnesota conditions urgently demanding relief, if power existed to give it, is beyond cavil.").

351. *Id.* at 426.

352. *Id.*

This was Hughes's war powers axiom, expressed during the isolationist period in which the American political system was stridently committed to keeping the United States out of foreign wars. Since *Blaisdell* is a case about state (not federal) powers, it is especially mysterious why Hughes takes this opportunity to restate forcefully his war powers axiom. But as noted above, legislative responses to the Great Depression were often analogized at that time to waging war.<sup>353</sup> Here their linkage is useful in justifying expansive and flexible powers to meet crises, showing Hughes's evolving constitutional pragmatism in the context of economic depression.<sup>354</sup>

Importantly, Hughes went on to also discuss the *limits* of war powers, perhaps suggesting that as he contemplated broader contexts for constitutional elasticity, he was particularly attuned to how that elasticity might be constrained. Here in the context of state economic emergency powers, for example, Hughes repeated his same constitutional limitations mentioned above with respect to war powers.<sup>355</sup> Certain provisions, including individual rights and constitutional processes, remain inflexible if the text admits no room for interpretation:

[E]ven the war power does not remove constitutional limitations safeguarding essential liberties. When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled . . . . But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details.<sup>356</sup>

Whereas he viewed the Contract Clause as sufficiently vague that its meaning could bend in emergency or war, Hughes believed the right to a jury trial or the process for electing a president are so carefully spelled out that they must remain fixed. Like his war powers speech, this line-drawing helps contain the sweep of emergency powers but offers no further normative reasoning as to why textually precise provisions deserve protection from emergency pliancy.

Likely with the post-World War I experience in mind, Hughes also repeatedly emphasized throughout the *Blaisdell* opinion the tempora-

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353. See Leuchtenburg, *supra* note 345.

354. See 2 Pusey, *supra* note 2, at 699–700 (calling Hughes's *Blaisdell* ruling "a narrow victory for forward-marching constitutionalism").

355. See *supra* notes 113–116 and accompanying text.

356. *Blaisdell*, 290 U.S. at 426.

riens of the economic emergency measures at issue.<sup>357</sup> Expansive war powers and emergency powers are tolerably necessary, assumed Hughes, because they would help restore baseline normalcy. So long as they are not abusively extended longer than needed by the government for improper ends—and courts could sit in judgment of the reasonableness of their invocation—emergency powers are essential for states to carry out their basic public welfare functions.<sup>358</sup> Consistent with the observation above that Hughes would have been reassured by some judicial role in assessing emergency circumstances,<sup>359</sup> he devoted careful attention to the state's persuasive claims of urgent economic-crisis conditions.<sup>360</sup>

The Great Depression would, in fact, end a few years later, but the normalcy of peace would be short-lived. Hughes retired from the Chief Justiceship in 1941, only months before the official American entry into the Second World War.<sup>361</sup>

2. *Waging War Successfully in World War II and Beyond.* — Writing at the height of World War II, Professor Corwin wondered whether “as circumspect a gentleman as Mr. Hughes” would still express the confidence he did in his famous 1917 speech that the Constitution could effectively adapt to modern wartime crises “on the basis of the events of this war to date.”<sup>362</sup> Having mostly retreated from public life, Hughes did not engage publicly on World War II issues and controversies as he had surrounding World War I.<sup>363</sup> We can only speculate about how ensuing events might have prompted Hughes to revise his theory of the “fighting constitution,” or how he would have regarded the results of its continued “marching” to address new strategic challenges.

Corwin describes several features of World War II that challenged Hughes's prior optimism that American wartime constitutionalism would bend but not break. One was executive unilateralism: President Roosevelt's tendency to “invade the field of Congress and to set aside Congressional legislation on his own finding that our war effort will be aided by his doing so.”<sup>364</sup> The prime example that Corwin had in mind here was

357. See *id.* at 425, 439 (“[A] temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision . . .”).

358. See *id.* (“[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare.”).

359. See *supra* notes 340–342 and accompanying text.

360. *Blaisdell*, 290 U.S. at 442–45.

361. 2 Pusey, *supra* note 2, at 787–88.

362. Edward S. Corwin, *The War and the Constitution: President and Congress*, 37 *Am. Pol. Sci. Rev.* 18, 24 (1943) [hereinafter Corwin, *The War and the Constitution*].

363. When Roosevelt asked Hughes in September 1941 to accept an invitation from the American Bar Association to give a speech and to use it to warn against the Nazi peril, Hughes declined, explaining that he was no longer giving public addresses. See 2 Pusey, *supra* note 2, at 792.

364. Corwin, *The War and the Constitution*, *supra* note 362, at 24–25.

Roosevelt's threat to Congress in September 1942 that, unless it acted on his recommendation, he would treat as repealed certain provisions of the Emergency Price Control Act that hindered his ability to control wartime inflation.<sup>365</sup> If Hughes read Corwin's work, this example would likely have grabbed his attention; Roosevelt Administration lawyers had often cited Hughes's war powers axiom and 1917 speech before and during the war in justifying price control legislation.<sup>366</sup>

Hughes seemed confident in 1917 that the lines of power and responsibility between Congress and the President were fairly clear and workable, especially if legislative processes and delegations could be counted on to respond to security imperatives in a timely way. But what if those lines were fuzzy or those processes not fully responsive? One challenge that Hughes appeared not to have foreseen or acknowledged was that as more and more governmental functions were understood as integral to fighting modern wars, the President might regard them as within his own responsibilities as commander in chief and wartime chief executive.

A second feature of World War II that Corwin emphasized as a challenge to Hughes was the further blurring of wartime and peacetime, and with it the blurring of exceptional powers and regular ones. "There is always a tendency, even in democracies," wrote Corwin in the midst of the war, "for the emergency device to become the normal."<sup>367</sup> Soon after that fighting subsided, he declared that the "Constitution of World War I" had since been "adapted to peacetime uses in an era whose primary demand upon government is no longer the protection of rights but the assurance of security."<sup>368</sup> Well before Pearl Harbor and the U.S. declarations of war against the Axis powers, Congress and the President were wielding a combination of emergency powers and quasi-war powers to aid the Allies and prepare for possible entry directly into the conflict.<sup>369</sup> And as was the case in World War I, Congress also continued to invoke war powers to engage in domestic economic regulation well after the fighting

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365. *Id.* at 18–19.

366. See, e.g., *supra* note 22 and accompanying text (providing one such citation).

367. Corwin, *The War and the Constitution*, *supra* note 362, at 25.

368. Corwin, *Total War*, *supra* note 210, at 172. In a 1952 memorandum submitted to the House Judiciary Committee, the Department of Justice quoted Hughes's 1917 speech and "power to wage war successfully" axiom to justify extending emergency legislation enacted during World War II pursuant to Congress's war powers. See Memorandum from Joseph C. Duggan, Assistant Attorney Gen., Exec. Adjudications Dep't, on Emergency Powers Continuation Act, to Frederick J. Lawton, Dir., Bureau of the Budget (Mar. 19, 1952), *in* *Emergency Powers Continuation Act: Hearing on H.R.J. Res. 386 Before the H. Comm. on the Judiciary Subcomm. No. 4, 82d Cong.* 369, 371 (1952).

369. Corwin refers to this as "The War Before the War." See Corwin, *Total War*, *supra* note 210, at 26–29.



ended in Europe and the Pacific.<sup>370</sup> Hughes had assumed relatively clear delineations of wartime powers from normalcy. World War I blurred the line at the back end of conflict, and World War II also blurred the line at the front end.<sup>371</sup>

The most fundamental challenge of World War II to Hughes's theory of exceptional powers to wage war successfully was not, however, that the President and Congress stretched it aggressively before, during, and after that conflict. It was a transformation in American grand strategy.<sup>372</sup>

World War II marked the end of a long pattern, going back to the Founding, of rapid mobilization for wars followed by almost complete demobilization after their termination and return to peace.<sup>373</sup> Having es-

370. See, e.g., *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141–45 (1948) (upholding the Housing and Rent Act of 1947 on the basis of war powers, even though it was enacted after the presidential proclamation terminating World War II hostilities). Writing for the Court, Justice Douglas noted the possibility of abuse “if the war power can be used in days of peace to treat all the wounds which war inflicts on our society.” *Id.* at 144. And although concurring in the judgment, Justice Jackson expressed deep misgivings about long-term war powers:

I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended. I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent—as permanent as the war debts.

*Id.* at 147 (Jackson, J., concurring).

371. See Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences* 35–40 (2012) (discussing blurriness of the beginning and end of World War II).

372. As Professor Russell Weigley explains:

[T]hroughout American history until [World War II] . . . [there was] no national strategy for the employment of force or the threat of force to attain political ends, except as the nation used force in wartime openly and directly in pursuit of military victories as complete as was desired or possible. The only kind of American strategy employing the armed forces tended to be the most direct kind of military strategy, applied in war.

Russell F. Weigley, *The American Way of War*, at xix (1973).

373. Mark Skinner Watson has described the steps in this cycle thus:

In their preliminaries, developments, and immediate sequels World War I and World War II followed a cycle whose phases are well marked: (1) prior to the war, insufficient military expenditures, based on the public's prewar conviction that war could not come to America; (2) discovery that war *could* come after all; (3) a belated rush for arms, men, ships, and planes to overcome the nation's demonstrated military weakness; (4) advance of the producing and training program, attended by misunderstandings, delays, and costly outlay, but gradual creation of a large and powerful army; (5) mounting successes in the field, and eventual victory; (6) immediately thereafter, rapid demobilization and dissolution of the Army as a powerful fighting force; (7) sharp reduction of appropriations sought by the military establishment, dictated by concern over its high cost and for a time by the revived hope that, again, war would not come to America.

Mark Skinner Watson, Chief of Staff: Prewar Plans and Preparations 23 (Ctr. Military History 1991) (1950). For information on pre-World War I demobilization, see, e.g., Millett

chewed a sizable standing peacetime military for most of its history, the United States needed to assemble quickly an adequate fighting force at the outset of the War of 1812, the Mexican–American War, the Spanish–American War, and World War I. When those wars were won, the forces were largely disbanded.<sup>374</sup>

There would be no such thorough and long-term demobilization after World War II, however.<sup>375</sup> After the Allied victory in 1945, the United States did not retreat (as it had after World War I) from an ambitiously prominent role as global military power in a vain hope that its surrounding oceans could underwrite much of its security.<sup>376</sup> The dawning of the Cold War entailed maintaining a constant state of military readiness. As many scholars have recognized, throughout the period of World War II and the Cold War the United States was in a perpetual state of emergency.<sup>377</sup>

Illustrative of this strategic and legal transformation, in 1947—a year before Hughes died and thirty years after his “fighting constitution” speech—the Department of Justice invoked Hughes’s axiom to justify proposed programs of universal military training. It argued that in the context of modern warfare, only by preparing adequately in peacetime could the United States expect to prevail when future conflict erupts:

The events of the past decade have amply demonstrated that it is too late to improvise armies when war starts or is declared—the latter generally after the attack has started and the enemy invasion is well under way. And the latest scientific

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et al., *supra* note 141, at 133–34 (describing sudden mobilization for the Mexican–American War); *id.* at 218–19 (detailing rapid post–Civil War demobilization); *id.* at 256–57 (describing rapid mobilization for the Spanish–American War).

374. See Abbott A. Brayton, *American Reserve Policies Since World War II*, 36 *Military Aff.* 139, 139 (1972) (describing reluctance of Congress to maintain “a large peacetime military establishment”); see also Millett et al., *supra* note 141, at 108–13 (noting that while in 1815 Congress established a sizable peacetime army of 12,000 and a long-term naval development program, “by the 1820s . . . the Army and Navy entered an era of neglect”).

375. See Griffin, *Long Wars*, *supra* note 43, at 59–60 (discussing the permanent state of military readiness after the Second World War); Stephen Daggett & Amy Belasco, *Cong. Research Serv.*, RL31349, *Defense Budget for FY2003: Data Summary 16* (2002), <http://www.iwar.org.uk/news-archive/crs/9665.pdf> [<http://perma.cc/R462-ZERU>] (showing continued high levels of military forces after the Second World War).

376. See John Lewis Gaddis, *Surprise, Security, and the American Experience* 53–54 (2003) (discussing the post–Second World War turn toward collective security and alliances); Herring, *supra* note 3, at 595 (describing the post–Second World War transformation in American security strategy). NSC-68, a sweeping national security policy document approved by President Harry Truman in 1950, called for massive military spending to combat the Soviet threat. See *id.* at 638.

377. See Dudziak, *supra* note 371, at 66–72 (discussing the constant sense of “impending nuclear annihilation”); Lobel, *supra* note 55, at 1400–04 (“[T]he era of our greatest international power and security has coincided with a mentality of great fear for our own national survival.”).

developments foreshadow a time when an even shorter period of grace will be available to nations whose peaceable intentions and limitless resources invite aggressive action from without. Chief Justice Hughes has pointed out that the war power of the federal government is the “power to wage war successfully.” The power to “provide for the common Defense” must be the power to provide in time of peace for the protection of the Nation. “In time of peace prepare for war” is not only good sense, it is also sound constitutional law.<sup>378</sup>

Hughes had always acknowledged that some war powers were necessarily activated before the start of a war, to reasonably enable preparation for it.<sup>379</sup> But he also sought limiting principles that would constrain their use.<sup>380</sup> The onset of the Cold War defied not only Hughes’s prior efforts to confine war powers temporally to military crisis situations but also his efforts to tie them to objectively measurable outcomes.

The new U.S. strategy to emerge in the years that followed aimed primarily at deterring a major superpower war, including a nuclear war, with the Soviet Union. Moreover, it aimed at deterring a war that would not likely start with attacks directly against American territory but against American allies halfway around the world. This strategy involved overturning assumptions that the United States could defend itself without permanently maintaining a grand military force.<sup>381</sup> The United States also formed defensive alliances, once seen aversively as drawing the United States into wars, but now—when combined with large military forces stationed abroad—seen as critical to preventing wars.<sup>382</sup>

Such a strategy of deterrence—maintaining the capacity and perceived will to make war to dissuade others from doing so—fits uncomfortably with a theory of war powers triggered by the onset of war.<sup>383</sup> At the end of World War I, Hughes worried that unaccountable bureaucrats

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378. See *Authority to Establish System of Universal Military Training*, 1 Op. O.L.C. Supp. 17, 22 (1947) (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934)).

379. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 327–28 (1936) (sustaining validity of dam construction in part to ensure adequate electrical supply to meet defense needs in the event of war).

380. See *supra* section III.A.2 (discussing Hughes’s role in litigating a case challenging the exercise of war powers after the signing of the armistice).

381. See *supra* notes 375–377 and accompanying text (discussing the historically anomalous lack of demobilization after World War II).

382. See John Lewis Gaddis, *The Cold War: A New History* 26–32 (2005) (describing the formation of NATO); John Lewis Gaddis, *Strategies of Containment* 54–88 (1982) (describing the implementation of the U.S. policy of containment during the Cold War); see also Philip Bobbitt, *The Shield of Achilles* 11–15 (2002) (describing the “revolutionary” nature of the concept of deterrence, as used by the United States in the Cold War).

383. See Griffin, *Long Wars*, *supra* note 43, at 96 (describing the “erasure of a clear distinction between wartime and peacetime” as fitting uncomfortably with “long-standing American values”).

and political incentives would unnecessarily prolong war powers.<sup>384</sup> Now it was American security strategy that pitted Hughes's pragmatic flexibility to protect security against his desire to cabin exceptional powers to temporally discrete, aberrational crises. Throughout the Cold War, the United States was simultaneously in a constant state of war as well as a constant state of nonwar.<sup>385</sup> It was often involved in regional conflicts and always in a state of determined military readiness, but the ultimate cataclysmic superpower conflict it planned for never occurred.

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As discussed above, Hughes argued to Judge Hand that war powers should be tied to objectively determinable and measurable military aims.<sup>386</sup> A fact-finder should be able to assess whether claimed powers are reasonably necessary to achieve war ends.<sup>387</sup> That task is difficult enough when the measure of success is military victory; it is much harder still when the measure of success is the *absence* of military conflict.<sup>388</sup>

By tying the scope of war powers to the necessities of successful war-waging, Hughes's "fighting constitution" theory offered a pragmatic scheme for addressing the immediate security challenges of World War I. For Hughes, the most important limit was a strict temporal one, which he assumed would flow naturally from the formula itself: A "successful" war would, upon victory, turn off the very powers that enabled it. While focusing on the challenges of how to wage successful war, he failed to develop a workable understanding of success, especially one that could withstand new developments in American security strategy.

#### CONCLUSION: OUR FIGHTING CONSTITUTION 100 YEARS LATER

Studying Hughes's 1917 speech today, almost exactly a century after he delivered it, one is struck by both its timeless and anachronistic features. The details of Congress's conscription and economic powers and the concomitant limits on individual and economic freedoms are of a bygone era, but the central claim that our "fighting constitution" confers flexible powers to "wage war successfully" still holds. Hughes was right that, especially with regard to national defense, the Constitution

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384. See *supra* section III.B.

385. See, e.g., Griffin, *Long Wars*, *supra* note 43, at 96 (noting that throughout the Cold War there was not a clear distinction between "wartime and peacetime").

386. See *supra* section III.A.2.

387. See *supra* notes 259–267 and accompanying text (addressing Hughes's conception of the role of courts in determining the need for emergency powers).

388. See Richard Ned Lebow & Janice Gross Stein, *Deterrence and the Cold War*, 110 *Pol. Sci. Q.* 157, 166–74 (1995) (discussing difficulties of measuring whether Cold War deterrence was succeeding or exacerbating superpower tensions and measuring how much deterrence was sufficient).

“marches.” It adjusts to strategic context, and to the means and ends of American military power. In World War I, the Constitution marched at a very fast clip.

Keeping that depiction in mind, examining Hughes’s early twentieth-century war powers speech today helps put some features of our twenty-first-century “fighting constitution” in perspective. First and foremost, the main focus of Hughes’s speech—on the absolute scope of Congress’s substantive powers to wage war once initiated—was until only recently almost extinct from constitutional debates.<sup>389</sup> Open a modern treatise or casebook on constitutional powers and foreign affairs and you will see chapters on “war powers” that are devoted nearly entirely to unresolved *interbranch* questions: how the power to initiate conflict is distributed between Congress and the President, and the extent to which Congress can bind the President’s commander-in-chief discretion.<sup>390</sup> You will find little discussion of Congress’s substantive war-waging powers themselves.<sup>391</sup>

This is not because the scope of Congress’s war powers has receded. It has certainly not, at least not in an absolute sense. It is because the government’s normal, everyday powers—what Hughes called the constitutional “methods of peace”<sup>392</sup>—are now so capacious that the constitutional war powers are rarely needed (at least not as a standalone basis) to justify many actions beyond direct engagement with enemy forces.

In a relative sense, legislative war powers have diminished because other powers have grown so vastly in the last century. For starters, everyday federal powers have expanded dramatically since Hughes spoke of our wartime Constitution. All of the domestic economic regulations justified during World War I only as an exercise of the constitutional *war* power could, by the end of the Second World War, have been justified under the Commerce Clause—even in peacetime—because of New Deal-era precedents that developed in that interim.<sup>393</sup> Indeed, expansions of

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389. See *supra* section I.A.1.

390. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law: Cases and Materials* 207–309 (4th ed. 2011); Stephen Dycus et al., *National Security Law* 25–131 (6th ed. 2016); Thomas M. Franck et al., *Foreign Relations and National Security Law* 491–700 (4th ed. 2012).

391. But see *infra* notes 399–401 and accompanying text (describing brief treatment in books by Louis Henkin and Arthur Schlesinger).

392. See *supra* notes 260–262 and accompanying text.

393. See Corwin, *Our Constitutional Revolution*, *supra* note 143, at 277 (describing the result of the New Deal and World War II as a “tremendous increase in the powers of the National Government”); see also Corwin, *The War and the Constitution*, *supra* note 362, at 25 (“[T]he operative Constitution of World War I has become since then, under the New Deal, the everyday Constitution of the Country.”).

national government power during World War I served as an explicit legal and political model for New Deal expansions.<sup>394</sup>

Doctrines and the exercise of nonwar emergency legislative powers have expanded, too. Since World War I, Congress has passed hundreds of emergency power provisions—some usually lying dormant, some regularly in use—that the President may activate by proclaiming a national emergency.<sup>395</sup> Furthermore, legislative war powers have grown less important over the past century because the President's Article II powers outside of war contexts have also expanded so dramatically. Besides his commander-in-chief powers, the modern President wields enormous power by virtue of his inherent executive powers to protect the nation's security and his foreign relations powers—during wartime or not.<sup>396</sup> Again, the marginal powers unlocked by a state of war have diminished because the permanent baseline of presidential powers is so high.

Looking back, World War I was very likely the pivotal moment in American history when—by virtue of war powers and the Hughesian notion that the power to wage war was the power to wage total war successfully—the differential between the federal government's war powers and its normal, peacetime powers reached its apex. War has continued to become more complex, but constitutional war powers, especially legislative ones, have not had to keep up in part because other constitutional powers now do so much work.

If questions about Congress's wartime powers have faded, does Hughes's speech tell us anything about the pressing contemporary debate over the President's authority to use force unilaterally? This is, after all, what most people think about today when they hear the term "war powers." Hughes himself barely mentions this issue because World War I was in many ways a textbook war: declared by Congress and fought via traditional battles against a uniformed enemy. It really was not until 1950

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394. See Leuchtenburg, *supra* note 345, at 53 ("Almost every New Deal act or agency derived, to some extent, from the experience of World War I . . .").

395. See Harold C. Relyea, Cong. Research Serv., 98-505 GOV, National Emergency Powers 1-4 (2007), <http://fas.org/sgp/crs/natsec/98-505.pdf> [<http://perma.cc/G4EU-ZHS2>]. The proliferation of emergency-powers laws was so great that in the 1970s the Senate convened a special committee to sort out how many were in use and by virtue of which declared emergency. See *id.* at 9-12. This produced modest procedural reforms. *Id.*

Although some of these emergency-power statutes rest on war powers, others rest on independent legislative powers, such as the Article I powers to regulate interstate and international commerce. Cf. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *Yale L.J.* 1255, 1263-65 (1988) (describing expansive use of the International Emergency Economic Powers Act).

396. Lobel, *supra* note 55, at 1404-07 (discussing vast scope of modern executive powers with regard to foreign affairs and security); see also Harold Hongju Koh, *The National Security Constitution 117* (1990) ("[A] combination of executive initiative, congressional acquiescence, and judicial tolerance explains why the president almost invariably wins in foreign affairs.").

that Presidents consistently asserted the broad unilateral authority to use force that they claim today.<sup>397</sup> Studying Hughes's speech a century later does, however, help put that present controversy in perspective and in a wider constitutional context.

It is often asserted that the constitutional allocation of the power to initiate war—does Congress hold the key, or may the President act unilaterally?—is and has always been among the most consequential constitutional matters.<sup>398</sup> Whereas, for example, Professor Louis Henkin's monumental foreign affairs treatise contains only a single page of text devoted to “[t]he War Power as legislative power,”<sup>399</sup> he begins that section by asserting that “[t]o the Constitutional Fathers, one might guess, the most important power in foreign relations was the power to declare war.”<sup>400</sup> In his account of the Framers' allocation of powers in *The Imperial Presidency*, historian Arthur Schlesinger calls the Declare War Clause “of prime importance.”<sup>401</sup> Treating the question of who may initiate war as of paramount constitutional significance is misleading, though, and the issues Hughes was debating in 1917 undercut this common assertion.

The matter of which branch can take the country to war was for most of U.S. history not even the most consequential war powers question, let alone constitutional question. Through much of that history, the President had limited practical means to initiate unilateral war because he commanded only modest national military power except when Congress declared war and thereby temporarily provided those means. In practice, any power to initiate war was constrained by limited standing military might. Once warfare became “total” in the early twentieth century,<sup>402</sup> by contrast, the Necessary and Proper Clause<sup>403</sup> became the basis for completely transforming a largely laissez faire system into a centrally administered statist one and subordinating a state militia system

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397. See supra note 44 and accompanying text.

398. See William Michael Treanor, *The War Powers Outside the Courts*, 81 Ind. L.J. 1333, 1333 (2006) (“Few areas of constitutional law have produced as much heated debate as the war powers area, heat produced in no small part by the passionate belief that this is a subject of incalculable consequence.”). As Justice Story wrote in 1833: “[T]he power of declaring war is not only the highest sovereign prerogative,” but it “is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation.” 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1166 (Bos., Hilliard, Gray & Co. 1833).

399. Louis Henkin, *Foreign Affairs and the United States Constitution* 67–68 (2d ed. 1996).

400. *Id.* at 67.

401. Schlesinger, supra note 44, at 3.

402. See supra note 37 and accompanying text.

403. See supra notes 75–83 and accompanying text (describing Hughes's interpretation of the Necessary and Proper Clause in his war powers thought).

to the federal government's authority to compel directly anybody into national military service.<sup>404</sup>

Of course war initiation is an important debate, but studying Hughes's "fighting constitution" speech should temper claims about its stakes, at least relative to other constitutional questions. Historically speaking, the absolute scope of substantive powers of the national government unleashed by a state of war—and more broadly whether the extent and allocation of government powers in war are supposed to be optimally effective, minimally necessary, or somewhere in between to defend American security—has probably been the most consequential constitutional issue.

Hughes does not address war initiation other than to note simply that among the "carefully distributed" war powers, "[t]o Congress is given the power 'to declare war.'"<sup>405</sup> That power and substantive powers to wage war successfully are tightly linked, however. Because the federal government now wields so much power regardless of any state of war, it is easy to forget that, historically, war's effects on *internal* constitutional powers often featured heavily in debates about congressional checks on presidential war-making.<sup>406</sup> When war was seen as according extra-energetic government powers domestically, it was something to be especially feared by those generally opposed to centralization.

It is no doubt true that in some respect the stakes in the modern war initiation debate are greater today—especially with respect to effects on foreign relations—than they were earlier in American history. That is largely because U.S. military power is now so permanently formidable. But reading the Hughes speech today is an important reminder that states of war or military hostilities no longer open much otherwise-locked legislative power.

I say "much," not none, because the war against al Qaeda and non-state terrorist organizations has, since 2001, reopened the issue of the

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404. Cf. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 142–44 (1948) (discussing the Necessary and Proper Clause as basis for expansive government powers in World War I).

405. Hughes, *War Powers Under the Constitution*, *supra* note 4, at 233 (quoting U.S. Const. art. 1, § 8, cl. 11).

406. Writing as Helvidius in the 1793 Neutrality Controversy, James Madison—one of the strongest congressionalists among the Founders with regard to war initiation—emphasized the need to remove decisions about going to war from the executive branch because the President stood to gain so much political power in wartime. Helvidius No. 1 (Aug. 24, 1793) in Alexander Hamilton & James Madison, *The Pacificus–Helvidius Debates of 1793–1794*, at 58–60 (Liberty Fund 2007) (arguing that the "nature and operation" of the war power is "deliberative" and "legislative," not "executive"). See generally Robert A. Taft, *A Foreign Policy for Americans* 11–12 (1951) ("The results of war may be almost as bad as the destruction of liberty and, in fact, may lead, even if the war is won, to something very close to the destruction of liberty at home. . . . [War] actually promotes dictatorship and totalitarian government throughout the world.").



scope of the substantive war power.<sup>407</sup> Hughes's axiom, after lying somewhat dormant, made a reappearance in Bush and Obama Administration legal justifications for wartime powers in combating terrorist enemies—powers such as using military force to subdue enemies domestically, trying enemy fighters for war crimes in military commissions, and detaining captured fighters.<sup>408</sup>

On the one hand, these claimed powers seem exceptional because the war against transnational terrorist organizations lacks the geographic, temporal and other boundaries usually associated with modern warfare. On the other hand, these powers are remarkably ordinary and limited; the context in which the government seeks to use them is extraordinary, but these measures themselves are quite traditional to military conflict, more akin to the wartime powers that the constitutional Framers envisioned than those Hughes defended in waging total war. Professor Rosa Brooks, for example, argues that “[s]ince the 9/11 attacks, the blurring of the boundaries between war and peace enabled successful presidential administrations to embrace” a broad range of troubling coercive practices and the militarization of domestic policy and politics.<sup>409</sup> Compared to transformations of World War I America, however, these practices and phenomena are actually quite contained.

This ongoing armed conflict with transnational terrorist groups has also made Hughes's post-armistice concerns about indefinitely protracted war powers seem prophetic. Many critics of invoking war powers to combat al Qaeda and related terrorist groups point to the perpetual duration of this conflict. A war against sprawling terrorist networks, they point out with a faint echo of Hughes's own arguments in *Burleson*, is unlikely to end conclusively in the foreseeable future, so applying legal rules or powers premised on traditional wars among states risks overturning fundamental but fragile value balances.<sup>410</sup> Even in upholding the detention of enemy combatants captured and removed from Afghanistan soon after the 9/11 attacks, Justice O'Connor wrote forewarningly for the Court in 2004 that at some point an indefinite duration might cause traditional legal doc-

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407. Cf. Barron, *supra* note 35, at 386 (“[T]he battle lines with Congress would be drawn over *how*, rather than *whether*, this new [global war on terror] should be fought.” (emphasis added)).

408. See *supra* notes 24–29 and accompanying text.

409. Brooks, *supra* note 256, at 343–44.

410. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 *Yale L.J.* 1029, 1033 (2004) (“[I]f we choose to call this a war, it will be endless. This means that we not only subject *everybody* to the risk of detention by the Commander in Chief, but we subject everybody to the risk of *endless* detention.”); Stephen I. Vladeck, *Ludecke's Lengthening Shadow: The Disturbing Prospect of a War Without End*, 2 *J. Nat'l Security L. & Pol'y* 53, 56 (2006) (“Whether or not the conflict against terrorism is a ‘new’ kind of war, the President’s authority to conduct traditional, temporary wars should not be accepted as justifying the permanent exercise of the war powers.”).

trines to “unravel.”<sup>411</sup> Writing four years later for the Court in holding that Guantanamo detainees have a constitutional right to habeas corpus, Justice Kennedy cautioned: “Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”<sup>412</sup>

One can now see traces of Hughes’s footprints in these words. The temporally indefinite character of the war against al Qaeda and, more recently, the Islamic State—and hence temporally indefinite war powers—is not simply one of attaining a successful military outcome.<sup>413</sup> As with the duration of World War I constitutional powers, it is also a matter of determining politically what a victory looks like.<sup>414</sup>

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411. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

412. *Boumediene v. Bush*, 553 U.S. 723, 797–98 (2008).

413. See Bobbitt, *Terror and Consent*, *supra* note 325, at 212–13 (discussing the need to develop new understandings of “success” in waging war against terrorist organizations).

414. See Blum, *supra* note 323, at 394 (“A successful military campaign . . . is not a sufficient condition for victory, nor is it always a necessary one. Political, economic, and civic forces may all shape the longer-term outcome of the war so as to render it an overall success or failure.”).