

FROM VERSAILLES TO SAN FRANCISCO: THE REVOLUTIONARY TRANSFORMATION OF THE WAR POWERS

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The great question at issue is whether the United States shall reverse the decision it made in 1919 and this time join a world organization having the authority and the force necessary to outlaw aggressive war. Let us not permit some fancied encroachment on the prerogatives of Congress to distract our attention from that major question, Should the United States help preserve peace? . . . The peace of the world and of these United States, for generations to come, may depend on our answer.¹

INTRODUCTION

The subject of my remarks is familiar: the constitutional division of powers between Congress and the President over the initiation of military hostilities. More particularly, I will address a question that has received considerable attention in recent years: whether the President, without the authorization of Congress, may use armed force in carrying out a United Nations Security Council resolution recommending collective action to suppress a breach of the peace. President Bush's comments during the period leading to the Gulf War raised the issue forcefully, and the issue has continued to arise as Presidents have intervened, under Security Council resolutions, in other parts of the world.² Although the subject

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1. 90 CONG. REC. 7921 (1944) (remarks of Sen. Ball).

2. For a variety of conflicting views, compare Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991) (arguing for broad independent presidential authority to use armed forces under Security Council resolutions), with Michael J. Glennon, *The*

is familiar, I hope to address it in a somewhat unfamiliar way.

In my view, the President does have constitutional authority to use armed force once the Security Council has authorized an enforcement action. My aim is to explain the constitutional foundations of this power. Most advocates of unilateral presidential war powers have rested on history—the long history of presidential unilateral uses of force going back to the early years of the Republic.³ In my view, that history does not justify the broad claims of unilateral presidential authority that some have supposed. Nevertheless, I agree that history is relevant. I would point, however, to a very different history—the history of the World War II years and the great internationalist movement, led by President Roosevelt, the culminating achievement of which was the nearly unanimous adoption of the United Nations Charter. The claim I defend today is that the adoption of the Charter constituted a decisive act of popular sovereignty that transformed the constitutional understanding of the war powers.⁴

Although I affirm the President's unilateral power to use armed force in United Nations collective security actions, that authority, on my account, is limited in three critical respects. First, it does not extend to large-scale commitments of the armed forces of the United States in major military actions, only to more limited operations like the planned intervention in Haiti. President Bush was wrong, then, in asserting unilateral

Constitution and Chapter VII of the United Nations Charter, 85 AM. J. INT'L L. 74 (1991) (arguing that Security Council resolutions are irrelevant, at least in absence of Article 43 agreements). See also Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995) (arguing for view similar to Glennon's); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993) (same, although affirmatively supporting constitutionality of congressional delegations of war powers).

3. Professor John Yoo is an exception. He rests on a revisionist view of the intentions of the Framers. See his contribution to this Symposium, John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169 (1999). See also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) (arguing that Framers intended to give President broad powers to use force). For an equally impressive response, see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997) (supporting traditional view that Framers meant to give Congress exclusive power to decide on military hostilities).

4. For brief discussion of the theoretical underpinnings of my argument, see *infra* note 117 and accompanying text.

authority to launch the Gulf War, which involved half a million U.S. troops. Second, the President's authority is always subject to ultimate congressional control. Congress can adopt a resolution prohibiting him from participating in a particular United Nations action or generally in any United Nations action.⁵ Third, I do not premise the President's authority on a general power to make "little" wars. On my account, the existence of a Security Council resolution is key. Thus, the intervention in Haiti would have been constitutional because of the Security Resolution authorizing it.⁶

I. THE CONSTITUTIONAL WORLD OF VERSAILLES

In 1919, when Woodrow Wilson returned from Paris after seven grueling months of negotiations, he promptly made two crucial concessions to the then-prevailing constitutional status quo. First, he called the document that he brought home a "treaty" and hence agreed that it had to be submitted to the Senate for the advice and consent of two-thirds of its members.⁷ Second, he assured the Senate that nothing in the League Covenant worked an executive usurpation of Congress's traditional power to declare war. When the Council of the League advised that members of the League should use force to counter a breach of the peace, the President would be

5. This would require a two-thirds vote in each house were the President to veto such a resolution, as he presumably would in at least some instances.

6. The Security Council resolution is key not because it enables the President to claim that he is carrying out a treaty obligation under his duty faithfully to execute the laws, including treaties, of the United States. *See* U.S. CONST. art. II, § 3. It is doubtful whether the existence of a treaty obligation provides the President with any greater authority to use force than he would have in the absence of a treaty. In any case, it is even more doubtful that a Security Council resolution *authorizing* a collective security action imposes any international law obligation on the United States. On my account, the President's powers as Commander in Chief extend to ordering the participation of (limited) U.S. armed forces in collective security actions under the aegis of the United Nations. Whether his powers as Commander in Chief should be construed to extend to using force in other contexts—and, if so, under what circumstances and to what extent—I do not attempt to answer here. As indicated in the text below, *see infra* notes 38-49 and accompanying text, I do claim that the President's unilateral powers were understood relatively narrowly until World War II. Whether subsequent events justify a broader view of his unilateral authority even outside the United Nations context is another question.

7. The Covenant of the League was, of course, incorporated into the Treaty of Versailles.

powerless on his own to carry out its recommendations. The final decision, Wilson agreed, would ultimately rest with Congress, in the exercise of its exclusive power to declare war.⁸

8. For a transcript of Wilson's famous August 19, 1919 conference with members of the Senate Foreign Relations Committee, see HENRY CABOT LODGE, *THE SENATE AND THE LEAGUE OF NATIONS* 297-379 (1925). The constitutional controversy prompted by Article X of the Covenant has been widely misunderstood. Senator Lodge's principal objection to Article X was not that it constituted an executive usurpation of Congress's power to declare war, but that its mutual guarantee of territorial integrity would impose a legal obligation on the United States to defend other states that were victims of aggression. Lodge and his supporters insisted that Congress must be free to exercise its discretion without any constraints imposed by treaty. Despite the broad wording of the Lodge reservation to Article X, however, Wilson never denied that, obligated or not, only Congress could make the ultimate decision to authorize the use of U.S. armed forces. See, e.g., *id.* at 301-02, 323-25, 357-58 (remarks of President Wilson) ("Nothing could have been made more clear to the conference than the right of our Congress under our Constitution to exercise its independent judgment in all matters of peace and war. No attempt was made to question or limit that right."). Those who claimed otherwise were irreconcilables bitterly opposed to the League, who, in an apparent effort to undermine support for the treaty, simply disregarded Wilson's explicit and repeated concessions to the contrary with specious argumentation. See, e.g., 58 CONG. REC. 7942-49, 8201-05 (1919) (remarks of Sen. Borah). Wilson even agreed to accept a proposed substitute for the Lodge Reservation that made this point explicit. See DENNA FRANK FLEMING, *THE UNITED STATES AND THE LEAGUE OF NATIONS, 1918-1920*, at 434 (1932) (quoting substitute reservation by Senator Hitchcock, Wilson's leading ally in Senate, providing, with Wilson's consent, that "the advice mentioned in Article 10 of the covenant of the league which the council may give to the member nations as to the employment of their naval and military forces is merely advice which each member nation is free to accept or reject according to the conscience and judgment of its then existing Government, and in the United States this advice can only be accepted by action of the Congress at the time in being, Congress alone under the Constitution of the United States having the power to declare war").

It was also widely understood, however, that in a narrow range of cases the President would have constitutional authority to use force unilaterally. The President had recognized authority to act without the authorization of Congress in limited circumstances, principally to defend against attack and to protect American lives and property abroad, and this authority, it was presumed, would also have applied to actions under the League. See, e.g., 58 CONG. REC. 8194-95 (1919) (remarks of Sen. Walsh of Montana) (recognizing limited presidential authority, as in Boxer uprising in 1900, to use armed forces unilaterally); FLEMING, *supra*, 435 (same); 2 THEODORE MARBURG, *LEAGUE OF NATIONS: ITS PRINCIPLES EXAMINED* 60-61 (1919) (same). See also 1 THEODORE MARBURG, *LEAGUE OF NATIONS: A CHAPTER IN THE HISTORY OF THE MOVEMENT* 5 (1919) (declaring that "the Congress alone, under the Constitution, may declare war, and when the conditions contemplated by the treaty have arisen the Executive Branch of the Government must await the pleasure of the Congress before it can make war in fulfilment [sic] of the country's treaty obligations"). Despite the Lodge Reservation's broad assertion that Congress, "under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States," 58 CONG. REC. 8777 (1919), it is uncertain whether the

It is hardly surprising that Wilson never challenged these fundamental constitutional postulates. To be sure, they imposed nearly insuperable obstacles to the realization of his dream of a league that could safeguard the peace. By recognizing the requirement of super-majority approval in the Senate, Wilson was forced to concede the power of a "little group of willful men,"⁹ as he called the Senate isolationists, to thwart his plans and "break the heart of the world."¹⁰ Likewise, leaving the ultimate decision whether to defend the League Covenant to Congress undermined the whole theory of collective security that underlay his design. It was only the certainty of a prompt response to each and every breach of the peace that could make the League effective, but Congress was the last institution that could be counted upon to act swiftly and surely.¹¹ Wilson was thus forced to acknowledge that the United States was constitutionally incompetent to make the institutional commitments necessary to render the League fully capable of achieving its purposes. The understandings that necessitated these devastating concessions, however, were so deeply ingrained in the constitutional culture that Wilson never sought to contest them.

Twenty years later, when Wilson's prediction of a second world war within a generation proved prophetic, Franklin Roosevelt undertook the monumental task of vindicating Wilson's vision through the creation of a new league.¹² Only this time, mixing pragmatism with Wilsonian idealism, he was determined not to repeat Wilson's catastrophic errors.¹³ This meant that Wilson's constitutional status quo had to be radically transformed. A minority group of Senate isolationists

reservation was intended to limit the President's recognized, though limited, unilateral authority. See 58 CONG. REC. 8195 (1919) (remarks of Sen. Reed). In any case, the sweeping language of the Lodge Reservation underscores how narrowly the President's unilateral authority was then conceived to be.

9. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 240 (1948) (quoting Wilson).

10. 17 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 8735 (James D. Richardson ed., 1927).

11. See INIS L. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROGRESS OF INTERNATIONAL ORGANIZATION* (4th ed. 1971).

12. For a general history of the Administration's efforts, see TOWNSEND HOOPES & DOUGLAS BRINKLEY, *FDR AND THE CREATION OF THE U.N.* (1997).

13. Wilson's mistakes, and the perfidy of his opponents, have been the subject of innumerable books. See, e.g., RUHL J. BARTLETT, *THE LEAGUE TO ENFORCE THE PEACE* (1944); FLEMING, *supra* note 8.

could not be permitted once again to block the plans for an international organization to maintain the peace. Nor could "outmoded" constitutional scruples over congressional prerogatives stand in the way of building effective new institutional structures that history had demonstrated were vital to the preservation of world peace. Roosevelt and his internationalist allies thus self-consciously embarked on a long-term project to transform fundamentally the constitutional understandings that had proved fatal to Wilson's vision.

II. THE GREAT TRANSFORMATION, CHAPTER I: THE RISE OF THE CONGRESSIONAL-EXECUTIVE AGREEMENT

I have elsewhere examined one-half of this story of constitutional transformation, arguing that the constitutional foundations for the so-called interchangeability doctrine are rooted in the World War II years, rather than, as has conventionally been believed, in practice and precedent dating back to the Founding.¹⁴ Even before the entry of the United States into the war, the Roosevelt Administration began planning for the postwar peace and, recalling Versailles, anticipated a fierce struggle in the Senate over the establishment of a successor to the League of Nations. Fearing that isolationism might still retain enough strength to block a treaty in the Senate, the Administration embarked upon an extended campaign to legitimize a new method of approving even major international accords.¹⁵ Under this method—the so-called congressional-executive agreement—the President could forego submitting an agreement to the Senate for supermajority advice and consent and instead submit it to Congress, where simple majority approvals in both houses would suffice.

Sensing the shift in the public's mood wrought by Pearl Harbor, internationalists organized a vast political movement, which rapidly succeeded in convincing the great majority of the American public to repudiate isolationism and endorse the

14. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

15. See *id.* at 861-96 (describing Administration's extended campaign to legitimize congressional-executive agreement).

imperative for a new League. As the movement became more widespread, the two-thirds rule itself widely came to be seen as a "fatal defect"¹⁶ in the Framers' design and the constitutional embodiment of a dangerous and reactionary isolationism. Leading legal academics, moreover, began to devise long historical pedigrees for the congressional-executive agreement, which they claimed demonstrated that it had been valid as an alternative procedure from the beginning of the Republic.¹⁷ By 1944, the Senate's standing had been seriously undermined, and following the elections of 1944, in which the public decisively rejected many of the leading isolationists remaining in Congress,¹⁸ the House overwhelmingly adopted a constitutional amendment proposal to strip the Senate of its traditional treaty prerogative.¹⁹ In the meantime, the Administration applied increasing pressure on the Senate, letting it be known that the President was contemplating submitting the United Nations Charter to Congress as a congressional-executive agreement.²⁰ With public opinion mobilized against it, a constitutional amendment pending, and the Roosevelt Administration threatening an end-run around it, the Senate blinked. It accepted the constitutional validity of the congressional-executive agreement as an alternative to the treaty procedure and proceeded to approve a host of important agreements, including the Bretton Woods Agreements,²¹ as congressional-executive agreements. Having thus demonstrated its good faith, and with a further promise to turn its back on the Versailles precedent, the Senate convinced the Administration that the President could safely submit the

16. DENNA F. FLEMING, *THE UNITED STATES AND THE WORLD COURT* 156 (1945).

17. See, e.g., EDWARD S. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* 31-54 (1944); WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* (1941); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1 & 2), 54 *YALE L.J.* 181, 534 (1945); Quincy Wright, *The United States and International Agreements*, 38 *AM. J. INT'L L.* 341 (1944).

18. See KENNETH COLEGROVE, *THE AMERICAN SENATE AND WORLD PEACE* 202-09 (1944); Denna F. Fleming, "Is Isolation Dead?" *Only an Alert Public Can Defend the November Verdict*, in 11 *VITAL SPEECHES OF THE DAY* 110 (1944).

19. See 91 *CONG. REC.* 4349-50 (1945). The vote was 288-88. See *id.* at 4367.

20. See Ackerman & Golove, *supra* note 14, at 875-83, 889-96.

21. See Bretton Woods Agreements Act, ch. 339, 59 Stat. 512 (1945).

Charter as a treaty.²² Thus, revolutionary transformation—not historical pedigree, as the conventional wisdom has long maintained—provided the constitutional foundations for the modern congressional-executive agreement.

III. THE GREAT TRANSFORMATION, CHAPTER II: THE NEW WAR POWERS REGIME

This focus on the congressional-executive agreement tells only one-half of the story of constitutional transformation. For if Chapter I was the history of the rise of interchangeability and the congressional-executive agreement, then Chapter II is the story of the transformation of the war powers. Interchangeability leveled the democratic playing field on which the battle over the postwar international system could be fought. After the triumphant approval of the United Nations Charter in 1945 by a vote of 89-2,²³ the Executive had also won the constitutional right to use the armed forces of the United States in United Nations collective security actions without first obtaining the approval of Congress. Wilson's constitutional dilemmas had been fully resolved.

For present purposes, I wish to focus on the second part of the constitutional story of Versailles and San Francisco, a story that has largely been overlooked in contemporary discussions of the war powers. Of course, I am not the first to have noted the importance of the Senate's historic debate over the United Nations Charter for the war powers. In my view, however, the many historians and legal scholars who have revisited the debate in recent years have not fully appreciated its dynamics or the wider context in which it took place and, as a result, have misunderstood its implications for constitutional law. Some have sought to downplay its significance, arguing that no constitutional innovations were involved. In this category, ironically, are both proponents of executive unilateralism, who claim that the President already had all of the powers he needed to justify the Charter and more,²⁴ and proponents of congressional exclusivity, who fail to see the revolutionary

22. See Ackerman & Golove, *supra* note 14, at 889, 896.

23. See 91 CONG. REC. 8190 (1945).

24. See, e.g., Abraham D. Sofaer, *The Power over War*, 50 U. MIAMI L. REV. 33 (1995) (arguing that unilateral presidential power to use force is consistent with Framers' intent and early practice under Constitution).

implications of their own rationalizations for the Charter.²⁵ Others, however, have implicitly recognized the constitutional significance of the historic debate but have misread it by failing to appreciate the political context in which it took place and which grounds its legitimacy.²⁶

A. The Constitutional Dilemma at the Core of the Charter

From the vantage point of 1945, the constitutional problem raised by the Charter's collective security scheme was quite simple. To understand it fully, however, requires a somewhat intricate appreciation of how the Charter was originally designed to operate. Under Chapter VII of the Charter, when the Security Council declares that a dispute constitutes a threat to international peace,²⁷ it has the authority under Article 42 to order the use of force to remove that threat.²⁸ Of course, the framers of the Charter recognized that the power to order the use of force would be of limited significance if the Council had no armed forces at its disposal. Indeed, the failure to provide any international police forces to the League was one of the central defects in the League Covenant that the framers of the Charter sought to correct.²⁹ Hence, in Article 43, they obligated all members of the United Nations to enter into special agreements that would set aside a portion of their national armed forces to be on call for the use of the Security Council under Article 42.³⁰ Once these agreements were

25. See, e.g., Fisher, *supra* note 2; Glennon, *supra* note 2.

26. See, e.g., Franck & Patel, *supra* note 2.

27. See U.N. CHARTER art. 39. Article 39 provides: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore peace and security." *Id.*

28. See U.N. CHARTER art. 42. Article 41 of the Charter gives the Council power to impose economic and diplomatic sanctions. Article 42 then provides: "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." *Id.*

29. See RUTH B. RUSSELL & JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945, at 235 (1958).

30. See U.N. CHARTER art. 43. Article 43 provides:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make

concluded, the Security Council could pass an Article 42 resolution directing a member to use those portions of its armed forces specified in its Article 43 agreement in accordance with the Council's wishes. It could, in other words, order a member to use its Article 43 forces to defend a country in, say, the Middle East from an aggression by its neighbor.

Insofar as the United States was concerned, this scheme did not necessitate a transfer of the war powers to an international body, because the United States, as a permanent member of the Security Council, retained a veto over Security Council resolutions.³¹ The United States, then, could never be ordered by other members of the Council to use its armed forces without its consent. The Charter did, however, require a transfer of war powers from Congress to the Executive, because the U.S. delegate to the Security Council would be the representative of the Executive, not of Congress. Thus, in voting for a resolution directing the United States to use its Article 43 armed forces, the delegate would be acting solely under the instructions of the President.³² Congress's only involvement would be in approving *ab initio* (as a congressional-executive agreement!) the Article 43 agreement.³³ Thereafter, the President could decide on his own

available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

Id. The Charter's framers included Article 43 not only to ensure that the Council would have armed forces available to it on its call, but also to limit the extent of the obligation each member state would undertake.

31. See U.N. CHARTER art. 27.

32. See United Nations Participation Act § 6, 22 U.S.C. § 287a (1994).

33. See *id.* The parallel debates over the war powers and the congressional-executive agreement came to a head at the same remarkable moment in the debates over the Charter and the United Nations Participation Act. During the Charter debate, there was considerable—and acrimonious—discussion over whether Article 43 agreements should be approved as treaties or congressional-executive agreements. See, e.g., 91 CONG. REC. 7987, 7990-93, 7999-8000, 8021-29, 8074-79 (1945). The United Nations Participation Act put an end to the discussion, though not the debate, see, e.g., 91 CONG. REC. 11,167-78, 11,239-304 (1945), with Congress opting for the congressional-executive agreement path. The issue was particularly important for internationalists in Congress because, even after the virtually unanimous adoption of the Charter, many still feared that isolationists would attempt a rearguard counterattack when presented with an

authority whether to use the reserved Article 43 forces. However elegant, this scheme clearly violated the old constitutional order to which President Wilson had perforce deferred. In 1919, it was clear that even when the League Council advised that the United States should participate in cooperative action against aggression, Congress, not the President, would in each case have had to authorize the use of American armed forces.³⁴

It is well known, of course, that Article 43 agreements were never negotiated. They fell victim to the burgeoning Cold War in the years immediately following the establishment of the United Nations, and with them fell the core of the Charter's collective security scheme.³⁵ This development only served to obscure the constitutional issues that had been resolved in 1945, when hopes remained high that Great Power unity would persist after the war and enable the Security Council to perform its functions effectively. Yet, even with the demise of Articles 42 and 43, the United Nations system quickly adapted to changed circumstances and reemerged, if ever so briefly, in 1950 when North Korea invaded South Korea. In sending U.S. forces to defend South Korea, President Truman claimed constitutional authority by virtue of a Security Council resolution recommending that states come to South Korea's defense.³⁶ At that moment, the constitutional solution of 1945 dramatically reasserted itself in what has now become one of the most contested examples of unilateral presidential war-making in our history.³⁷ With the end of the Cold War, these same constitutional questions have once again confronted the nation, and they will continue to do so as the Security Council slowly awakens from its forty-year slumber.

Article 43 agreement. They wanted to ensure that the battle would be fought without the isolationists having the advantage of the two-thirds rule. *See id.*

34. As previously noted, Wilson went out of his way to assure the Senate on this point. *See supra* note 8 and accompanying text.

35. The permanent members of the Security Council did engage in extended negotiations among themselves in an effort to conclude Article 43 agreements. *See, e.g.,* U.N. Doc. S/394 (1947). Ultimately, however, these efforts came to nought.

36. There were actually two resolutions, adopted in quick succession. *See* S. Res. 82, U.N. SCOR, 5th Sess., 473d mtg. at 4, U.N. Doc. S/INF/4/Rev.1 (1950); S. Res. 83, U.N. SCOR, 5th Sess., 474th mtg. at 5, U.N. Doc. S/INF/4/Rev.1 (1950). For further discussion of Korea, *see infra* notes 112-16 and accompanying text.

37. For an argument that Truman's action in Korea was unconstitutional, *see* Fisher, *supra* note 2, at 32-37.

B. The Insufficiency of Past Precedents to Justify the Charter

How did the Senate in 1945 reach the point where it could virtually unanimously abandon one of Congress's most cherished prerogatives, fully self-conscious of the constitutional implications and the momentous importance of its decision? How did the people of the United States come so widely to agree that the isolationism of the past had been grievously misguided and to be so grimly determined to win the postwar peace through assuming a leadership role in the United Nations? The answers to these questions are complex, but, in my view, they provide the grounding and legitimation for a constitutional revolution provoked by the bitter experience of two world wars.

Perhaps, though, I exaggerate. Perhaps nothing out of the ordinary occurred in 1945 because the Charter scheme was perfectly consistent with the existing constitutional regime. This was certainly the official position of the Roosevelt and Truman Administrations and their supporters in and out of Congress,³⁸ and this view would no doubt be vigorously defended by pro-Executive unilateralists today.³⁹ Those who attacked the constitutionality of the Charter, it was charged in 1944-45, were merely bad faith isolationists determined to wreck the Charter as they had wrecked the League twenty-five years before. Although I believe that this argument is unconvincing, for reasons of space I confine myself to a few brief observations in reply. Arguments of this kind are for the most part based on the long history of unilateral presidential uses of force. Of course, how best to interpret that history is still hotly debated, as is its significance for constitutional law.⁴⁰ I concede, moreover, that the pre-World War II history is at times murky, especially in the first part of the twentieth

38. See *infra* notes 44, 46, 50, 81, 84-86, 103-08 and accompanying text.

39. See, e.g., Sofaer, *supra* note 24; Peter J. Spiro, *Old Wars/New Wars*, 37 WM. & MARY L. REV. 723, 734-35 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) and WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994)).

40. Compare Sofaer, *supra* note 24 (arguing pro-Executive position), with LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995) (arguing pro-Congress position), and Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (reviewing FISHER, *supra*, and defending pro-Congress view, with nuances).

century, when the United States began to emerge as a world power and presidents began to assert their prerogatives more aggressively. But even liberally construed, that history has only scant relevance to the constitutionality of the Charter, which contemplated executive uses of force well beyond anything presidents had ever previously attempted or claimed authority to undertake.⁴¹ The genealogy of the pro-Executive position is quite revealing, for what is often overlooked is how thoroughly it owes its contemporary shape and contours to the creative historical arguments first widely formulated during the very debates over the United Nations Charter.⁴² Rather than providing a sturdy foundation for the Charter scheme, those arguments are best understood in their historical setting, as artifacts of the epochal struggle over the Charter itself. As Senator Scott Lucas, an ardent proponent, conceded during the Charter debate:

While I agree that these [past precedents] have some relevance to the problem at hand, it is my view that what we are discussing here is a much broader concept which cannot be limited by reference to specific precedents which have occurred in the past. The truth of the matter is there are no precedents.⁴³

41. The Security Council was to be responsible for global security, with the United States, along with the other four permanent members, having the dominant role. In contrast, presidents had in the past used only quite limited force to protect U.S. lives and property and to police internal disorders, mostly in small, disorganized Caribbean countries. In none of these cases was there any conceivable danger of a wider conflict, as there would inevitably be in Security Council operations. That the United States anticipated using substantial numbers of troops and weaponry is indicated by its position during the Article 43 agreement negotiations after the ratification of the Charter. Indeed, the United States urged that the permanent five make contributions far in excess of what any of the other permanent members proposed. See U.N. Doc. S/394, *supra* note 35, at 4, 12 (reporting U.S. proposal for permanent five to provide Security Council with 20 ground divisions, 3,800 aircraft, and extensive naval warships, including 90 submarines, and indicating U.S. view that these armed forces could not be supplied on basis of equality among five permanent members, thus making inevitable that United States would have to supply disproportionate share of Article 43 armed forces); Eric Grove, *UN Armed Forces and the Military Staff Committee, A Look Back*, 17 INT'L SECURITY 172, 179-80 (1993).

42. See *infra* notes 81, 84-86, 103-08 and accompanying text.

43. 91 CONG. REC. 8031 (1945). Somewhat inconsistently, Senator Lucas did later claim that the precedents supported unilateral presidential uses of force in the execution of treaty obligations. See *id.* at 8032.

The truth of the matter, as Senator Lucas put it, is that the Senate debate over the United Nations Charter is best understood as a moment of intense constitutional creativity and the widely varying, and sometimes conflicting, theories put forward in support of the Charter's constitutionality, as much efforts at forging the constitutional regime of the future as grasping the constitutional law of the past. In this respect, the virtually simultaneous debates over the war powers and the congressional-executive agreement are remarkably similar and mutually reinforce the conclusion that a veritable constitutional revolution was in process, rather than simply a searching effort for a more correct understanding of our constitutional past.⁴⁴ Indeed, the degree to which these two great debates proceeded in parallel is one of the most striking features of the constitutional transformations of 1945. In both cases, the executive branch purported to discover a rich past history that underwrote radically unexpected findings.⁴⁵ In both, former State Department officials led the charge on the legal front, writing book-length works propounding elaborate lists of past precedents that purportedly justified the new constitutional order and, in both cases, adopting the same rhetorical strategy: the exhaustive listing of obtuse past precedents, shorn from

44. Almost all proponents of both the President's unilateral authority to use force and the congressional-executive agreement claimed that their constitutional views were supported by history—the past uses of force by presidents, in the one case, and the past agreements entered into outside the treaty process, in the other. It is unnecessary to claim that proponents were being disingenuous, although that is certainly a possibility. Caught up in the heat of battle—and in the then-dominant jurisprudential mode that treated constitutional law much like the common law—some may well have believed their own rhetoric. See Ackerman & Golove, *supra* note 14, at 813-45 (describing historical claims in support of congressional-executive agreement made by proponents in 1940s). Even if so, the external historical perspective may properly reject the internal understanding of participants. Although participants may have believed their positions to be supported by a long line of historical practice, we must assess that practice from a detached point of view. When we do, it becomes clear that those participants were engaged in a transformation of constitutional meanings, rather than simply an exercise in historical exegesis.

45. For executive branch arguments in support of the congressional-executive agreement, see, for example, *Bretton Woods Agreements Act: Hearings on H.R. 3314 Before the Senate Comm. on Banking and Currency*, 79th Cong. 529-62 (1945) (reprinting lengthy State Department memorandum on constitutionality of using congressional-executive agreement procedure to approve International Monetary Fund and World Bank agreements). For similar arguments in the war powers debate over the Charter, see *infra* notes 81, 84-86, 103-08 and accompanying text.

their historical context and denuded of their contemporary justifications, in an effort to overwhelm the reader with a mass of undigested historical detail.⁴⁶ In both, the same constitutional law scholars wrote on both sides of the issue (on behalf of the congressional-executive agreement and the war powers of the President were Edward Corwin⁴⁷ and Quincy Wright;⁴⁸ on the side of the Senate and the Congress was the redoubtable, and tireless, Edwin Borchard⁴⁹).

Edward Corwin, undoubtedly one of the most sensitive interpreters of the dynamics of American constitutional law,

46. Wallace McClure's book was the opening salvo in the battle over the congressional-executive agreement. See MCCLURE, *supra* note 17. For the parallel book arguing the case for the President's unilateral power to use force in the United Nations context, see JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION* (1945), which was published on the eve of the Senate debate over the Charter. Both McClure and Rogers were former officials of the State Department. For discussion of McClure's methodological approach, see Ackerman & Golove, *supra* note 14, at 868. The executive branch utilized this approach throughout the struggle to legitimize the congressional-executive agreement. See *id.* at 891-95. Rogers's book was similar, discussing the precedents at length but never explaining them in their historical context and in accordance with contemporaneous understandings.

47. Corwin argued in favor of the congressional-executive agreement in a short book, *The Constitution and World Order*, which he published a year before the Charter debate. See CORWIN, *supra* note 17, at 31-54. He defended the Charter on the war powers question in a published address shortly before the Senate debate. See Edward S. Corwin, *The Constitution and the Charter*, Address Before the Institute of Government at the University of Washington, reprinted in 91 CONG. REC. A3705-09 (1945).

48. Wright reversed his own earlier position on the congressional-executive agreement, writing in 1944 in anticipation of the Charter. See Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341 (1944). Likewise, along with other prominent international lawyers, Wright defended the Charter's war powers scheme in an influential letter to the *New York Times* in 1944. See John W. Davis et al., Letter to the Editor, *Our Enforcement of Peace Devolves upon the President—Congress May Authorize Extraterritorial Use of Force, but Constitution Is Held to Place Responsibility for Prompt Action Directly upon the Executive*, N.Y. TIMES, Nov. 5, 1944, at E8. The other signers of this letter were W. W. Grant, Philip C. Jessup, George Rublee, James T. Shotwell, and, as noted above, Quincy Wright. The letter was later placed in the *Congressional Record*. See 91 CONG. REC. 8065 (1945).

49. Borchard was indefatigable in his efforts against the congressional-executive agreement. See, e.g., Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Edwin Borchard, *Treaties and Executive Agreements—A Reply*, 54 YALE L.J. 616 (1945). For citations to other articles and his congressional testimony on the subject, see Ackerman & Golove, *supra* note 14, at 806 n.17, 888 n.405, 893 n.429. Borchard likewise attacked the Charter on war powers grounds. See Edwin Borchard, *The Charter and the Constitution*, 39 AM. J. INT'L L. 767 (1945).

captured the deeper spirit of the debate over the war powers:

Any student of American constitutional law and theory must have been especially struck by one great difference between the reception given at Washington, and more particularly in the Senate, to the United Nations Charter and that which was extended a quarter of a century ago to the League of Nations Covenant. The Covenant instantly stirred up in many bosoms all kinds of doubts as to the constitutional competence of the treaty-making authority to put the United States into such an organization. The Charter provoked very few such reactions even in the Senate. One explanation of the difference is probably to be found in those enlarged conceptions of the constitutional powers of the National Government which are one result of the New Deal, *and even more in an enlarged conception of the adaptability of the Constitution to problems of government in the modern era, all of which had been confirmed and reinforced by the developments of World War II.*⁵⁰

The Charter, in other words, did not owe its constitutional validity to history, as some of its proponents claimed. Its constitutionality was grounded in the "adaptability" of the Constitution to the grim lessons of the war. The Charter was constitutional because of the profound popular sentiment demanding full U.S. participation in the United Nations as the most effective available means of avoiding World War III.⁵¹

50. CORWIN, *supra* note 9, at 265-66 (emphasis added); *see also* Corwin, *supra* note 47. Corwin went on to note that the Senate's good behavior was also attributable to the great weakening of its standing with the American public.

The Senate's triumph in 1919 was the most spectacular in its history; but indeed that was its fatal defeat. For as the years wore on and the world seemed to be getting into worse and worse shape, . . . people . . . began pointing the finger of reproach at the body that had so lightheartedly assumed responsibility for keeping the United States out of the League.

CORWIN, *supra* note 9, at 266. He also observed that the development of the congressional-executive agreement as an alternative method for approving the Charter tamed the more rebellious hearts in the Senate. *See id.* at 266-67.

51. Public opinion polls suggested that the American public remained skeptical about whether even the United Nations would be able to prevent war in the future. *See* ROBERT A. DIVINE, *SECOND CHANCE: THE TRIUMPH OF INTERNATIONALISM IN AMERICA DURING WORLD WAR II* 182-83 (1967).

C. *The Great Transformation Realized*

What, then, was the character of the extraordinary political movement whose culminating achievement was the virtually unanimous adoption of the Charter? It hardly need be said that American public opinion was not always so decidedly internationalist, as the bloody battle over the League had both reflected and decisively reaffirmed. In the wake of the League's defeat, isolationism dominated American foreign policy throughout the 1930s. Most important were the series of Neutrality Acts⁵² that tied Roosevelt's hand during the rise of Nazism in Europe.⁵³ Still, internationalists had never given up on the League, even as their focus shifted in the 1930s to the brewing conflicts in Europe and the need to support nations threatened by the Axis powers.⁵⁴ By the time war broke out in Europe, they had already begun to turn their attention to the problem of organizing the postwar peace and the imperative to establish an international organization with sufficient power to enforce and maintain international security.⁵⁵ The task ahead would be monumental. The isolationist instincts of the American people were still strong enough in 1940 to force Roosevelt to campaign on a promise to keep the country out of the war.⁵⁶ But the internationalists had some key advantages in the coming struggle for the hearts and minds of the American public. Roosevelt himself had been a veteran of Wilson's epic struggle for the League and was a confirmed internationalist, as were many other members of his Administration.⁵⁷ The ensuing alliance between the Administration and the bipartisan internationalist movement provided a powerful mechanism for influencing public opinion. To succeed, however, this alliance needed something more to make patent the fallacies of isolationism. It did not need to wait long. Japan's attack on Pearl

52. See Neutrality Act of 1939, ch. 2, 54 Stat. 4 (1939); Neutrality Act of 1935, ch. 837, 49 Stat. 1081 (1936); Neutrality Act of 1936, ch. 1, 49 Stat. 3 (1936).

53. For historical accounts of the isolationism of the 1930s and the Neutrality Acts, see, for example, HOOPES & BRINKLEY, *supra* note 12, at 8-9, 17-21; ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 94-99 (1973).

54. See, e.g., DIVINE, *supra* note 51, at 25-32.

55. See *id.* at 27-46.

56. See SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 235-37 (1952).

57. See, e.g., FRANK DONOVAN, *MR. ROOSEVELT'S FOUR FREEDOMS* 4-5 (1966); HOOPES & BRINKLEY, *supra* note 12, at 9-11, 26-42. These writers explore the complexities in Roosevelt's views and his shifts over time.

Harbor was the decisive event. From then on, isolationism was on the defensive. With the war in full swing, internationalists in and out of the Administration launched one of the most impressive and sophisticated political movements in American history.⁵⁸

Even before Pearl Harbor, Roosevelt had hinted in the Atlantic Charter at his support for an international peace organization.⁵⁹ By 1942, internationalists had begun a widespread public education campaign, and their efforts had been greatly invigorated by high Administration officials. Taking the lead were Vice-President Henry Wallace; Roosevelt's close adviser, State Department Under-Secretary Sumner Welles; and, to a lesser extent, Secretary of State Cordell Hull. All made speeches in which they outlined their support for an international organization with sufficient power to maintain international peace.⁶⁰ The movement picked up steam in early 1943 with the introduction of the so-called Ball (or B₂H₂) resolution in the Senate.⁶¹ Senator Ball, an internationalist Republican, together with a bipartisan group of Senators, proposed that the Senate go on record with a clear statement of support for an international organization with police powers. They sought to capitalize on the growing and increasingly vocal support for internationalism throughout the country and were willing, even against the advice of the Administration, to brave the substantial controversy in the Senate that such a reso-

58. The best account of the internationalist movement is DIVINE, *supra* note 51. Of course, the division of views into "internationalists" and "isolationists" is highly oversimplified. There were a wide range of tendencies within both camps. Included among the isolationists, for example, were "America-firsters," "nationalists," and in some cases "realists." Internationalists ranged from advocates of world government or international confederation, to supporters of highly egalitarian versions of international organization, to promoters of Great Power-dominated conceptions of international organization, and to realists of different stripes who supported traditional balance of power diplomacy either within or without a loose association of states. *See id.*

59. *See, e.g.,* DONOVAN, *supra* note 57, at 27-40; HOOPES & BRINKLEY, *supra* note 12, at 26-40. The Atlantic Charter made reference to "the establishment of a wider and permanent system of general security." RUSSELL & MUTHER, *supra* note 29, at 975 (quoting the Joint Declaration of the President of the United States of America and the Prime Minister, Mr. Churchill, representing His Majesty's Government in the United Kingdom, Aug. 12, 1941).

60. *See, e.g.,* DIVINE, *supra* note 51, at 47-86; HOOPES & BRINKLEY, *supra* note 12, at 55-63.

61. *See* S. Res. 114, 78th Cong. (1943).

lution would inevitably provoke.⁶² Their resolution proved to be a lightning rod for internationalist sentiment⁶³ and encouraged the introduction of a similar resolution in the House by then-freshman Representative William Fulbright, which was ultimately adopted by an overwhelming vote.⁶⁴ Then, at Roosevelt's urging, Senator Connally, the Chairman of the Senate Foreign Relations Committee, pushed a resolution of his own, which would officially declare the Senate's support for an international organization to keep the peace.⁶⁵ Just before the Connally Resolution was adopted virtually unanimously in the Senate,⁶⁶ the United States, Britain, the Soviet Union, and China jointly issued the Four-Power Moscow Declaration, in which for the first time they explicitly endorsed the formation of a general international organization to keep the peace.⁶⁷ The process had reached a critical juncture, with the upper hand clearly in the internationalist camp.

Reflecting the success of their energetic efforts, public opinion polls throughout 1942 and 1943 showed remarkable and growing internationalist sentiment.⁶⁸ In 1937, when asked "Do you think the United States should have joined the League of Nations after the last war?" only 33% of voters answered "Yes."⁶⁹ But, by 1942, that number had increased to 73%.⁷⁰ Beginning in 1942, and continuing until the Senate's approval of the Charter in July 1945, the public consistently supported by wide margins U.S. participation in an international organization to keep the peace, from a low of over 60% with only minimal opposition to a high of 90%.⁷¹ Of the 81% who

62. See, e.g., DIVINE, *supra* note 51, at 91-95; HOOPES & BRINKLEY, *supra* note 12, at 65-66.

63. See, e.g., DIVINE, *supra* note 51, at 98-103, 107-13.

64. See H.R. Con. Res. 25, 78th Cong. (1943); see also DIVINE, *supra* note 51, at 110-13, 141-44; HOOPES & BRINKLEY, *supra* note 12, at 86.

65. See S. Res. 192, 78th Cong. (1943); see also DIVINE, *supra* note 51, at 144-54; HOOPES & BRINKLEY, *supra* note 12, at 87-88.

66. See 89 CONG. REC. 9221-22 (1943).

67. See *Declaration of Four Nations on General Security*, 9 DEP'T ST. BULL. 308, 309 (1943).

68. For a thorough compilation of public opinion polls on the question of U.S. participation in an international organization during the war years, see PUBLIC OPINION 1935-1946, at 905-15 (Hadley Cantril ed., 1951).

69. Harry H. Field & Louise M. Van Patten, *If the American People Made the Peace*, PUB. OPINION Q., Winter 1944-45, at 500, 502 (reporting American Institute of Public Opinion polls).

70. See *id.*

71. See PUBLIC OPINION 1935-1946, *supra* note 68, at 905-15. In most polls

thought in April 1945 that the United States should join a world organization with police power to maintain world peace, 83% thought doing so "very important."⁷² These figures, moreover, were confirmed by the enormous attention paid to the issue in the national press and by the increasingly well-organized character of the internationalist movement. Its leadership included not only public officials in the Roosevelt Administration, Congress, and state and local governments, but prominent private citizens from business, the professions, the academy, and many other walks of life. They organized mass public rallies, gave speeches and radio addresses, sponsored town-hall debates, initiated letter writing campaigns, prepared and distributed pamphlets, orchestrated speaking tours, and organized support through all of the main associations of civil society, including the labor unions and churches.⁷³

Indicative of the public's keen interest in the postwar peace plans was the enormous popularity of the book *One World*⁷⁴ by Wendell Willkie, the Republican presidential candidate in 1940 and a deeply committed internationalist.⁷⁵ Published in 1943, his book told the story of his trip around the world in 1942 and was an elaborate defense of internationalism and the need for U.S. participation in an international organization to keep the peace. Widely praised, it sold over half a million copies in three weeks and immediately became one of the best-selling nonfiction works ever published in the United States.⁷⁶ A large number of similar books, pro and con, followed suit.⁷⁷ By the time of the Republican and Democratic

between 1942 and July 1945, opposition to U.S. participation in an international organization was below 25% and in most cases below 15%. *See id.* On March 20, 1945, an American Institute of Public Opinion poll showed 90% favoring U.S. membership in a world organization to maintain the peace, with only 6% opposed. *See id.* at 908. The numbers did vary, however, from poll to poll.

72. *Id.* at 910.

73. *See* DIVINE, *supra* note 51, at 98-242.

74. *See* WENDELL L. WILLKIE, *ONE WORLD* (1943).

75. *See* HOOPES & BRINKLEY, *supra* note 12, at 22, 62-63, 161, 163.

76. Published in April 1943, it sold over one million copies by June, making it only the third nonfiction work to do so and accomplishing this achievement in record time. *See* DIVINE, *supra* note 51, at 103-05, 119-20. Willkie sold the film rights to Twentieth Century-Fox; Pocket Books sold over half a million paper copies; and 107 daily newspapers ran condensed versions of the book. *See id.* at 120.

77. *See id.* at 58-61, 119-27, 171-82; HOOPES & BRINKLEY, *supra* note 12, at

National Conventions in 1944, both parties were avid in their support for an internationalist foreign policy, adopting planks supporting U.S. membership in an international organization.⁷⁸

Both Roosevelt and his Secretary of State Cordell Hull shared an impeccable sense of political timing, and both strongly preferred to keep potentially controversial issues in the background for as long as possible. Hoping to avoid divisive debates before public opinion was sufficiently prepared, they sought to educate and convince the public about the broad policy issues at stake before raising potentially problematic technical "details."⁷⁹ In line with this approach, the Administration chose in the early war years to keep the constitutional problems that membership in an international organization would pose largely in the background. Although keenly aware that a solution to the dilemma would ultimately have to be worked out, they chose to await events rather than provoke immediate constitutional controversy.⁸⁰

Nevertheless, the constitutional difficulties were well known and could not be kept out of public discussion for long. During the debate over the Connally Resolution in the Senate,

56-57. In July 1943, Simon & Schuster, Doubleday, Reynal & Hitchcock, and Columbia University Press jointly published a symposium that included *One World* by Willkie, *The Problems of Lasting Peace* by Herbert Hoover and Hugh Gibson, and excerpts from speeches, which were to be incorporated into forthcoming books, by Vice-President Henry Wallace and Sumner Welles. One of the most interesting and widely followed exchanges was between Sumner Welles, an avid Wilsonian who published *The Time for Decision* (1944) after leaving the Administration, and Walter Lippmann, whose *U.S. War Aims* (1944) adopted a realist stance. *The Time for Decision* sold half a million copies. See HOOPES & BRINKLEY, *supra* note 12, at 129. *Newsweek* ran a symposium in which the two authors restated their views in a more succinct format. See DIVINE, *supra* note 51, at 178-82.

78. For accounts of both conventions and their platforms, see DIVINE, *supra* note 51, at 209-13. The Republicans were more hedged in their support, largely reaffirming the Mackinac Declaration, which party leaders had issued some months before at a foreign policy retreat. See *id.* As the campaign wore on, both parties became even more enthusiastic, vying for the internationalist vote. See *id.* at 233-42.

79. See HOOPES & BRINKLEY, *supra* note 12, at 64 (quoting Roosevelt's statements at a press conference in early 1943); see also *id.* at 58, 66-67, 123-24, 126-29, 133-36.

80. See, e.g., *id.* at 144, 157-58.

Senator Pepper, an ardent New Dealer and internationalist, broached the subject when queried by Republican Senator Millikin. Pepper's analysis presciently foreshadowed the contours of the constitutional solution that would ultimately be effected. It was imperative, he made clear, that the President have authority to use a limited number of troops in cooperation with the organization to suppress acts of aggression. To be sure, he agreed, under the Constitution only Congress has the power to declare war, and, as even Wilson recognized, Congress has no constitutional authority to delegate that power to any other body. But war is the commitment of the full strength of the nation, and what the new international organization would require was of a different order: limited contributions of armed forces from member states to act as a police force to suppress acts of aggression, not to make war. Hitler's movement into the Rhineland, for example, would have been an appropriate occasion for the intervention of international police forces. Congress, moreover, would always retain the right to revoke the President's authority to use our armed forces in such cases by refusing to appropriate funds.⁸¹

Shortly after Senator Pepper's speech, Secretary Hull began intensive bipartisan consultations with select members of the Senate Foreign Relations Committee—the so-called Committee of Eight—led by Senators Connally and Vandenberg. Hull kept them apprised of the Administration's plans and even gave them a copy of a draft Charter, which the Administration planned to use as the basis for the upcoming Dumbarton Oaks talks with Britain and the Soviet Union.⁸² This draft already contained the basic scheme for collective security that would ultimately be incorporated into the United Nations Charter, and the Senators soon raised the war powers issue directly with Hull.⁸³ Hull, in turn, sought to reassure them by providing them with a legal memorandum prepared by

81. See 89 CONG. REC. 8741-42 (1943) (remarks of Sen. Pepper).

82. See, e.g., ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 57 (1990); 2 CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 1657-59 (1948); RUSSELL & MUTHER, *supra* note 29, at 193-97, 263-64.

83. See THOMAS M. CAMPBELL, *MASQUERADE PEACE: AMERICA'S UN POLICY, 1944-45*, at 43-45 (1973); HILDERBRAND, *supra* note 82, at 149-51; HULL, *supra* note 82, at 1665, 1696-98; RUSSELL & MUTHER, *supra* note 29, at 264, 468-70.

the State Department's Legal Adviser, Green Hackworth.⁸⁴ Arguing in a somewhat more pro-Executive vein than Pepper, Hackworth asserted a broad conception of the President's unilateral power to use force as Commander in Chief and explicitly relied on an early version of a "list" of prior presidential unilateral uses of force, which he set forth at length in an appendix.⁸⁵ He also concurred in Pepper's distinction between war, on the one hand, and the use of armed force to prevent or suppress a breach of the peace undertaken as part of a collective effort by an international organization to keep the peace, on the other hand. The latter was "but a police measure taken by the international community in the common interest."⁸⁶

Debate over these constitutional questions, however, could not be confined to secret talks between leading senators and the Secretary of State. When the Administration's Dumbarton Oaks proposals became public, discussion of the issues became widespread both in the press⁸⁷ and on the floor of the Senate.⁸⁸ The Administration, however, feared that taking a public stand on the issue during the height of the 1944 presidential campaign might unnecessarily provoke controversy and damage the prospects for bipartisan support of the Charter. It therefore decided to continue its public silence, with Roosevelt

84. See HILDERBRAND, *supra* note 82, at 150-51; HULL, *supra* note 82, at 1696-97; RUSSELL & MUTHER, *supra* note 29, at 469-70.

85. See Letter from Green Hackworth to Cordell Hull, *Use of Armed Force in the Maintenance of Peace and Security* (Aug. 31, 1944) (on file with author and Library of Congress, Cordell Hull Papers, MSS). Hackworth also played a prominent role in developing the Administration's legal arguments purporting to justify the congressional-executive agreement. See Ackerman & Golove, *supra* note 14, at 888-90.

86. Letter from Green Hackworth to Cordell Hull, *supra* note 85, at 5.

87. See, e.g., CAMPBELL, *supra* note 83, at 44. For a sampling of commentary on the issue in the *New York Times* during September 1944, see James B. Reston, *U.S. Security Plan Debated in Senate*, N.Y. TIMES, Sept. 6, 1944, at 1; Arthur Krock, *The Senate Clarifies a Post-War Security Issue*, N.Y. TIMES, Sept. 7, 1944, at 22; James B. Reston, *Security Planners Look to the Senate*, N.Y. TIMES, Sept. 7, 1944, at 16; Warren Moscow, *Dewey Backs Force to End War Peril; Hits Isolationism*, N.Y. TIMES, Sept. 9, 1944, at 1; James B. Reston, *Peace Talks Turn to Congress' Role in the Use of Force*, N.Y. TIMES, Sept. 13, 1944, at 1; Arthur Krock, *Mr. Hull Nears the End of a Long Quest*, N.Y. TIMES, Sept. 14, 1944, at 22; James B. Reston, *Dumbarton Oaks Defended by Hull*, N.Y. TIMES, Sept. 20, 1944, at 14.

88. See, e.g., 90 CONG. REC. 7522-28 (1944) (colloquy between Sens. Bushfield, Connally, Vandenberg, Millikin, White, and Hill); *id.* at 7919-22 (remarks of Sen. Ball).

dismissing the question as a mere "detail,"⁸⁹ while the State Department privately organized a massive public education campaign.⁹⁰ The Administration's strategy shifted, however, late in the campaign, when Senator Ball, a Republican who had assumed the internationalist mantle from Wendell Willkie after his sudden death, announced that he would support the candidate who gave the most satisfactory answer to the question: "Should the vote of the United States' representative on the United Nations security council commit an agreed upon quota of our military forces to action ordered by the council to maintain peace without requiring further congressional approval?"⁹¹ When Governor Dewey balked, Roosevelt grabbed the unexpected opportunity. In his major foreign policy address of the campaign, on October 21, 1944, he berated the Republicans for their isolationist past, doubted the sincerity of the conversion of a number of long-time isolationists to the internationalist perspective, traced the history of his own internationalism, culminating in his plans for the United Nations, and then specifically answered Ball's query with a vintage bit of folksy wisdom:

The Council of the United Nations must have the power to act quickly and decisively to keep the peace by force, if necessary. A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the Town Hall and call a town meeting to issue a warrant before the felon could be arrested.

So to my simple mind it is clear that, if the world organization is to have any reality at all, our American representative must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act.

89. See, e.g., CAMPBELL, *supra* note 83, at 64; DIVINE, *supra* note 51, at 222-28; James B. Reston, *Peace Talks Turn to Congress' Role in the Use of Force*, N.Y. TIMES, Sept. 13, 1944, at 1. For Hull's intensive efforts to prevent the issue of postwar participation in an international organization from becoming a partisan issue in the 1944 campaign, see, for example, DIVINE, *supra* note 51, at 216-20; HOOPES & BRINKLEY, *supra* note 12, at 162-63; HULL, *supra* note 82, at 1686-95.

90. See, e.g., CAMPBELL, *supra* note 83, at 62-65.

91. DIVINE, *supra* note 51, at 238 (quoting Kathleen McLaughlin, *Ball Challenges Nominees in Peace*, N.Y. TIMES, Oct. 13, 1944, at 5); see also *id.* at 236-38.

If we do not catch the international felon when we have our hands on him, if we let him get away with his loot because the Town Council has not passed an ordinance authorizing his arrest, then we are *not* doing our share to prevent another world war. I think, and I have had some experience, that the people of this Nation want their Government to work, they want their Government to act, and not merely to talk, whenever and wherever there is a threat to world peace.⁹²

Roosevelt's strategy worked brilliantly. Ball immediately announced his support for Roosevelt, and, despite scathing criticism from his party leadership, stuck by his decision even after Dewey followed Roosevelt's lead in endorsing the need for unilateral presidential action.⁹³ Indeed, Ball's endorsement may have proved decisive in what had appeared to be an extremely close election campaign, leading to further endorsements by the *New York Times*, Walter Lippmann, Russell Davenport (Willkie's former campaign manager), and many other influential groups and citizens.⁹⁴ When election day yielded solid victories not only for Roosevelt, but for a wide range of internationalists in both houses, and the defeat of most of the remaining isolationists in the Congress,⁹⁵ the *New York Times* declared that the election was the "great and

92. 13 FRANKLIN D. ROOSEVELT, *Peace Like War, Can Succeed Only Where There Is a Will to Enforce It, and Where There Is Available Power to Enforce It—Radio Address at Dinner of Foreign Policy Association, New York, N.Y. (Oct. 21, 1944)*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 342, 350 (Samuel I. Rosenman ed., Harper Bros. 1950).

93. See, e.g., DIVINE, *supra* note 51, at 236-41; HOOPES & BRINKLEY, *supra* note 12, at 163-64; ROSENMAN, *supra* note 56, at 480-86; SCHLESINGER, *supra* note 53, at 119-21.

94. See, e.g., CAMPBELL, *supra* note 83, at 65-67; DIVINE, *supra* note 51, at 240; HOOPES & BRINKLEY, *supra* note 12, at 163-64. Willkie was thought to have several million followers, and he was skillfully using the keen interest of both candidates in his endorsement to wheedle further and more unequivocal internationalist commitments from them. See DIVINE, *supra* note 51, at 236-37; Arthur Krock, *Mr. Willkie's Course of Watchful Waiting*, N.Y. TIMES, Aug. 25, 1944, at 12. When Willkie unexpectedly died in early October 1944, Ball assumed his role as the leading independent-minded Republican committed to the internationalist cause. Many believed that his endorsement could prove decisive in several Midwestern states where the race was in a dead heat. See DIVINE, *supra* note 51, at 237-38.

95. See, e.g., COLEGROVE, *supra* note 18, at 202-09; DIVINE, *supra* note 51, at 241-42; HOOPES & BRINKLEY, *supra* note 12, at 164-65; Fleming, *supra* note 18, at 110.

solemn referendum that President Wilson asked for and failed to get."⁹⁶

96. *Peace Is Not Partisan*, N.Y. TIMES, Nov. 12, 1944, at E8. The *Times*'s reference was to Wilson's famous call to make the 1920 election "a great and solemn referendum" on U.S. participation in the League. 64 THE PAPERS OF WOODROW WILSON 258 (Arthur S. Link et al. eds., 1991).

Although the 1944 election could perhaps be seen as a "referendum" on the Charter, I do not claim that it was a referendum on the constitutional division of the war powers. Indeed, it is uncertain how fully the narrow constitutional issue was then understood by the general public. An internal State Department poll taken immediately prior to the publication of the Dumbarton Oaks proposals in early October 1944—and before Roosevelt's October 21, 1944 speech—showed the public evenly divided on the issue of who should decide whether to use force in implementing collective security actions by an international organization. See CAMPBELL, *supra* note 83, at 61. A December 1944 poll showed the public favoring the traditional congressional method by a ratio of two to one. See DIVINE, *supra* note 51, at 252-53. The later poll, however, was taken at a moment of acute public disillusionment with Great Britain and the Soviet Union over their exercise of what was widely seen as traditional sphere of influence and power politics—in the case of Britain, in its heavy-handed interference in Italian democratic politics and in its brutal suppression of a popular communist uprising in Greece in favor of Greek monarchists, and in the case of the Soviet Union, in its portentous conduct in Poland and elsewhere. See CAMPBELL, *supra* note 83, at 73-88. In any case, these polls were of doubtful probity given the understandable lack of public appreciation of the institutional details of the Dumbarton Oaks proposals. What the polls did clearly demonstrate was that only a portion of the public was even familiar with the Dumbarton Oaks proposals or the mechanisms proposed for the new international organization and for implementing the United States's role in it. See DIVINE, *supra* note 51, at 252-53. The war powers question, as such, thus seems not yet to have deeply penetrated the general public's consciousness. It was precisely in this period, however, that the State Department's massive, and remarkably successful, public education campaign in support of the Dumbarton Oaks proposals was beginning to pick up steam. So far as my research to date reveals, no further polls were taken addressing the war powers question. As a result, there is no simple means of gauging the movement of general public opinion. The increasingly intense public interest in the Administration's proposals for the United Nations and the virtual unanimity on the war powers issue ultimately displayed during the Senate debate on the Charter nevertheless provide strong indications of popular endorsement of the Administration's position. See *supra* notes 87-95 and accompanying text; *infra* notes 97-108 and accompanying text. In any case, it would hardly be surprising, if true, that the public's focus during this period was on more momentous, and less technical, questions: whether to follow the country's traditional policy of isolation going back to the Framers or, instead, abandoning the Versailles precedent, to assume a leading role in an international peace organization with the authority and ability to use force to preserve international peace and security. For purposes of a theory of popular sovereignty—like the one which underlies the argument of this article, see *infra* note 117 and accompanying text—it is enough that the people were overwhelmingly in favor of U.S. participation in an international organization with police powers that could effectively enforce the peace; that the war powers issue itself was thoroughly debated and discussed; that its airing played a crucial role in the 1944 elections; that the need for the President to have

The stage thus was set for the long-anticipated Senate debate over the Charter. Only with the remarkable unanimity of public opinion arrayed in support of the Charter, and with the outcome of the 1944 elections shifting the balance of power in the Congress even further toward the internationalists, any substantial opposition to the Charter was swept away, leaving only a handful of senators even to raise the constitutional objections that only a short time before would have proved conclusive.⁹⁷ The spirit of the debate was perhaps best captured in a colloquy between Senator Wheeler, one of the few remaining isolationists (who, notwithstanding his own vigorously pressed objections, voted for the Charter),⁹⁸ and Senator Pepper. Responding to Wheeler's call for a constitutional amendment to be submitted to the people and his contention that "the American people will never support any Senator or any Representative who advocates" giving the President power to "send troops all over the world to fight battles anywhere,"⁹⁹ Pepper launched an all-out offensive. "Has the able Senator from Montana," he demanded,

seen any poll or any determination of American public opinion which has not shown that a vast majority of the American people were in favor not only of there being an international organization, but that such international organization should have teeth in it, which means that it

unilateral power to use force was thought essential if the international organization was to be effective ("have any reality at all"); and that the people's representatives in the Senate, the Congress, and the Administration, interpreting the mandate of the people, came almost unanimously so to conclude. It was inevitably left to the political elites to translate the people's general convictions into specific constitutional solutions, and the virtual unanimity in the Senate leaves little doubt that the senators clearly believed that, to carry out the deepest convictions of the people, it was essential to recognize the President's authority to use force in carrying out the decisions of the Security Council, without having to obtain congressional authorization in each case.

97. Senator Wheeler was the only senator to press the constitutional objection seriously. *See* 91 CONG. REC. 7987-89 (1945) (remarks of Sen. Wheeler). A few others joined his cause in the later debate over the United Nations Participation Act. *See, e.g.,* 91 CONG. REC. 11,083-84, 11,240 (1945) (remarks of Sen. Taft); *id.* at 11,398-99 (remarks of Sen. Willis); *id.* at 11,400-01 (remarks of Sen. Revercomb).

98. The irony was not lost on proponents. *See* 91 CONG. REC. 7988-89 (colloquy between Sen. Wheeler and Sen. Pepper).

99. *Id.* at 7988.

should have force and power which might be employed against an aggressor nation?¹⁰⁰

The air of constitutional creation hung heavy over the Senate chamber. Senator after senator rose to give solemn speeches affirming the world historical importance of the Charter and comparing it to Magna Carta, the Declaration of Independence, the Constitution, and other momentous constitutive documents.¹⁰¹ Senator after senator acknowledged the unanimity of public opinion—indeed world opinion—supporting the Charter.¹⁰² They offered many different explanations for the constitutionality of the Charter. Some emphasized the supposed breadth of the President's unilateral powers as Commander in Chief, citing the list of precedents Hackworth had included as an appendix to his memorandum and that had subsequently been made public in modified form in a book by James Grafton Rogers, a former State Department official, published on the eve of the debate.¹⁰³ Others emphasized the difference between police actions by an international peace organization and war.¹⁰⁴ Still others

100. *Id.* Pepper's reply demonstrates how conclusively proponents believed that the public's overwhelming support for an international organization with "teeth in it" fully answered any war powers objection. *See supra* note 96.

101. *See, e.g.*, 91 CONG. REC. 7962, 7964 (1945) (remarks of Sen. Fulbright) (declaring that Charter "ranks in importance alongside the Declaration of Independence, the Constitution of the United States, the Emancipation Proclamation, and the League of Nations, as one of the most important documents in the history of our country"); *id.* at 7968-69 (remarks of Sen. Barkley) (declaring that Charter "will take its place alongside Magna Carta, the Declaration of Independence, the Constitution of the United States, Lincoln's Gettysburg Address and his Second Inaugural Address as one of the great documents of human history"); *id.* at 8001 (remarks of Sen. Ferguson) (similar); *id.* at 8019 (remarks of Sen. Lucas) (declaring that Charter "will rank among the greatest documents of history"); *id.* at 8082 (remarks of Sen. McClellan) (declaring that Charter "is possibly the most momentous document ever produced by man").

102. *See, e.g.*, 91 CONG. REC. 7951-55 (remarks of Sen. Connally) (demonstrating "practical unanimity of the people" in support of Charter); *id.* at 7957 (remarks of Sen. Vandenberg) (same); *id.* at 7962 (remarks of Sen. Fulbright) (claiming that public was twenty-to-one in favor of Charter); *id.* at 7967-68, 7971 (remarks of Sen. Hill) (recognizing that "[s]eldom in our history has there been an issue on which there has been a greater degree of unanimity of opinion among the people and their elected representatives" and noting unanimity of both American and world public opinion in support of Charter).

103. *See* ROGERS, *supra* note 46. *See also, e.g.*, 91 CONG. REC. 7957, 7967, 7992 (1945) (remarks of Sen. Vandenberg); *id.* at 7988 (remarks of Sen. Barkley); *id.* at 7990-91 (remarks of Sen. Connally); *id.* at 8100 (remarks of Sen. Tunnell).

104. *See, e.g.*, 91 CONG. REC. 8031 (1945) (remarks of Sen. Lucas); *id.* at

thought the President could use force in executing the provisions of a treaty,¹⁰⁵ or even in executing the law of nations.¹⁰⁶ Most made a combination of these arguments and arrived at a common view that confirmed the position Senator Pepper had outlined during the debate over the Connally Resolution two years before: the President, subject to the ultimate control of Congress, could, on his own authority, use limited force in cooperation with the United Nations to suppress acts of aggression and breaches of the peace.¹⁰⁷ The constitutional solution for the postwar had been found. As the Senate Foreign Relations Committee recommending the Charter put it:

The virtual unanimity with which the results of the Dumbarton Oaks and the San Francisco Conferences have been approved by the people of the United States and now by this committee, is the best proof now available that a sound and practicable foundation has been achieved on which to work for peace and security. . . . The question of our membership in an international organization to preserve peace has been debated throughout our country and in this Congress as fully as any public issue in our history has ever been discussed. The committee feels that the people and the members of the Senate understand clearly the consequences and the requirements of our membership in the United Nations and that they are

8032 (remarks of Sen. Millikin); *id.* at 8074-76 (remarks of Sen. Pepper).

105. *See id.* at 7988 (remarks of Sen. Barkley); *id.* at 7990-91 (remarks of Sen. Connally); *id.* at 8022, 8031-32 (remarks of Sen. Lucas).

106. *See id.* at 8064-65 (remarks of Sen. Austin).

107. The Senate Foreign Relations Committee, in its report recommending the Charter, adopted a strikingly broad approach. Reflecting the view taken by Legal Adviser Hackworth, it proclaimed:

Preventive or enforcement action by [Article 43] forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of Congress to declare war.

S. REP. NO. 79-8, at 9 (1945); *see supra* note 85 and accompanying text. It also recognized that "the President has well-established powers and obligations to use our armed forces without specific approval of Congress." S. REP. NO. 79-8, at 9.

Nevertheless, interpreting the constitutional solution arrived at in July 1945 is more complicated than the text above suggests. It is beyond the scope of this short article to critique the various interpretations that have been offered, *see supra* notes 2, 24-26 and accompanying text, and to defend my own view in detail. A fuller version of my argument, which will address these points, will be forthcoming.

prepared to undertake the responsibilities of membership in order to enjoy the privileges which that membership may ultimately bring in the form of world security.¹⁰⁸

D. The Constitutional Solution of 1945 in the Postwar Period

The new constitutional understandings that were achieved in 1945 continued to be reflected in postwar events.¹⁰⁹ The situation was, of course, seriously complicated by the failure of the Security Council ever to negotiate Article 43 agreements successfully, due to the outbreak of the Cold War. Nevertheless, the basic parameters for the division of war powers continued to retain vitality in the following years. On the one hand, Congress's retention of its exclusive power over large scale conflicts was reflected in its fierce efforts to preserve its prerogatives in the debates over the NATO Treaty.¹¹⁰ On the other hand, its willingness to allow the President scope for unilateral action when cooperating with the United Nations was reflected first in its tolerant attitude toward the Truman Administration when it raised the possibility of U.S. participation in a United Nations intervention in the Palestine conflict in 1949.¹¹¹ And it was reflected far more dramatically in connection with the Korean War. President Truman specifically justified his response to North Korean aggression on the basis of Security Council resolutions calling on member states to aid South Korea in repelling the incursion.¹¹² The virtual unanimity of the Senate in defending the President's constitutional prerogatives¹¹³

108. S. REP. NO. 79-8, at 14-15.

109. For lack of space, I cannot explore the post-World War II history further here. I will do so in a forthcoming article. See *supra* notes *, 107.

110. See MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 209-14 (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 203 n.106, 259-60 (2d ed. 1996).

111. See 94 CONG. REC. 4745-50 (1948); SCHLESINGER, *supra* note 53, at 131.

112. See 96 CONG. REC. 9228 (1950) (reprinting President Truman's statement on basis for his actions in responding to North Korean invasion of South Korea); SCHLESINGER, *supra* note 53, at 131-32. For citations to the relevant Security Council resolutions, see *supra* note 36.

113. See, e.g., 96 CONG. REC. 9229-30, 9233, 9327-29, 9542 (1950) (remarks of Sen. Lucas); *id.* at 9230, 9333-34 (remarks of Sen. Smith); *id.* at 9231 (remarks of Sen. Morse); *id.* at 9234, 9544 (remarks of Sen. Connally); *id.* at 9315, 9540-41

becomes far less puzzling when understood in the context of the debates of 1944-45. Neither the Senate nor the President initially believed that the action would require the sustained and extensive American commitment that later proved unavoidable.¹¹⁴ Thus, the Senate had every reason to affirm the President's actions as consistent with the constitutional scheme it had widely endorsed only five years earlier. As the war wore on and the largely unilateral character of the rapidly growing U.S. commitment became more evident, the Senate correctly began to realize that Truman's actions had, after all, violated the consensus of 1945.¹¹⁵ Thus, rather than being (only) a craven turnabout when public opinion about the war had shifted, the later widespread congressional criticisms of the President's actions as unconstitutional were wholly justified once it became apparent that he had gone beyond the authority accorded him in 1945 but had still refused to come to Congress to obtain its authorization.¹¹⁶

CONCLUSION

In this brief article, I have not sought to justify the underlying premises of my argument from a theoretical perspective—the claim that we ought to recognize the validity of constitutional transformations when they arise from decisive acts of popular sovereignty, notwithstanding the failure of the people to follow the procedure prescribed in the constitutional text for amendments. The defense of that claim is a larger project that I cannot undertake here. My more limited aim has instead been to uncover some crucial constitutional history that has largely been overlooked in more conventional accounts of the war powers and to demonstrate its intimate connection to the constitutional history that gave birth to the congressional-executive agreement (also largely overlooked). This history has been enormously influential in shaping the constitutional separation of powers in foreign affairs and is important on this

(remarks of Sen. Flanders); *id.* at 9347, 9540 (remarks of Sen. Knowland); *id.* at 9541 (remarks of Sen. Millikin). All relied heavily on the United Nations Security Council resolutions.

114. See, e.g., T.R. FEHRENBACH, *THE FIGHT FOR KOREA; FROM THE WAR OF 1950 TO THE PUEBLO INCIDENT* 67-73 (1969); SCHLESINGER, *supra* note 53, at 134.

115. See FEHRENBACH, *supra* note 114, at 79-91.

116. See SCHLESINGER, *supra* note 53, at 134-38.

ground alone. As I have hinted throughout—again without defending—it also provides what I believe is the best available normative grounding for our current practices and, at the same time, gives us powerful reasons for conforming our practices to the constitutional solutions reached in these extraordinary periods of constitutional politics.¹¹⁷

These same constitutional issues are very much with us today. The North American Free Trade Agreement and the World Trade Organization Agreement are only the most obvious examples of the impact of the congressional-executive

117. Although I cannot defend the theoretical presuppositions that underlie my general argument, I should at least provide a brief explanation. Broadly speaking, I ally myself with the well-known views of Bruce Ackerman on the subject of constitutional change. *See, e.g.*, 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). I rest, however, on a narrower claim than he has sometimes defended. I believe that it is unnecessary to speak of informal constitutional amendment, rather than simply informal constitutional change or transformation. No one claimed, for example, that adopting the United Nations Charter constituted an "amendment" to the Constitution. What occurred was a reinterpretation of the war powers that, in my view, was discontinuous with settled constitutional understandings. My claim is simply this: one important reason we have for affirming such a reinterpretation as legitimate is that it accords with the demands of the overwhelming majority of the people for a fundamental change in their political identity or, stated somewhat differently, that it results from a self-conscious, considered, and decisive act of popular sovereignty. In my view, such a reinterpretation may be justified even when it is inconsistent with the "best" reading of the text from a linguistic or structural perspective or departs from original intent, long-standing practice, or underlying constitutional understandings. It is another question whether a formal amendment ought to be accorded greater interpretive weight in the future than a reinterpretation justified by an act of popular sovereignty. The answer to that question depends not only on the weight one would give to such an act of reinterpretation but on the degree of interpretive rigidity with which one would approach construing an amendment. In my view, the treatment accorded each ought to be similar, although in certain instances differences might properly emerge. For example, consider my argument that the proper interpretation of the Treaty Clause was justifiably transformed by a parallel act of popular sovereignty in the mid-1940s, also connected to the United Nations Charter. *See supra* notes 14-22 and accompanying text. This act of popular sovereignty required that the preexisting exclusive construction of the Treaty Clause be abandoned in favor of a new non-exclusive reading, under which international agreements could interchangeably be approved either as treaties or as congressional-executive agreements. Had this change been formalized in a constitutional amendment, it likely would have undermined any argument today that the Constitution requires something less than full interchangeability. In contrast, it might be argued—although I state no view on the question—that given the practice during the past several decades, and notwithstanding the act of popular sovereignty of the mid-1940s, some exclusive realm for treaties ought now to be recognized.

agreement on our agreement-making practices. In fact, over 90% of our agreements since World War II have been concluded in this form, a form which did not exist prior to the New Deal and which was only legitimated for use in major international agreements in the struggle over internationalism in the 1940s. Likewise, with the rebirth of the Security Council, the constitutional solution of 1945 has been, and will probably become even more relevant, as the new international order develops apace. In my view, we ought to be cognizant of the history I have described here, and elsewhere, when we reflect upon the constitutional controversies that these practices continue to engender.

