

## WAR POWERS AND THE MILLENNIUM

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We live with an eighteenth century constitution in a twenty-first century world. In many areas, we have managed to overcome the limits inherent in an anachronistic legal order through judicial interpretation and political accommodation. When the courts have resisted change too long, failing to adjust legal text to social and political reality, they have brought about crises that threatened the legitimacy of the entire constitutional order. This is the lesson of *Scott v. Sandford*<sup>1</sup> and of judicial resistance to the New Deal. Alternatively, when judicial interpretations have been guided by a compelling moral vision, we have a sense of the grandeur of the American political mission to realize itself as a country under law. This is the lesson of *Brown v. Board of Education*,<sup>2</sup> and of *Reynolds v. Simms*.<sup>3</sup>

Yet, no one thinks it is easy to draw guidance from these different perceptions of triumph and disaster in American constitutional jurisprudence. We cannot say that the courts must continually adjust the Constitution to contemporary political and moral realities, any more than we can say that they must insist on a changeless constitution. We cannot say this because we harbor too many divisions over our own principles. We understand that *Lochner v. New York*<sup>4</sup> was

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1. 60 U.S. (19 How.) 393 (1856).

2. 349 U.S. 294 (1955).

3. 377 U.S. 533 (1964).

4. 198 U.S. 45 (1905).

no less principled than *Brown*.<sup>5</sup> We cannot be sure in advance how the pursuit of a moral vision by the Court will be seen in the long run—witness, for example, our current controversies over “color-blindness” and abortion.

We have no neutral way out of these conflicts over the path of the law because there is no line separating these disagreements over the content of the law from deeper conflicts over the nature of the rule of law itself. Our conflicts go directly to the place and meaning of law in our common life. For example, those who hold to an originalist view of constitutionalism argue from a vision of law that is deeply bound up with realizing a common meaning across generations. They understand the duties and meaning of citizenship within a legal framework that puts at its foundation the idea of maintaining the achievements of earlier generations and transmitting them to the future. They thrill to Lincoln’s Gettysburg Address where he spoke of the achievement of the founding fathers and of the present as a test of endurance for the children of that generation; they read Burke on political culture as a project in the intergenerational transmission of meanings.<sup>6</sup> Others, however, see this as rule by the dead hand of the past. They thrill to the ideas of populist democracy. Still others think of our law as the positive expression of a moral vision of rights, and of legal interpretation as the effort to realize the full meaning of such norms as equality, liberty, and due process.<sup>7</sup>

If this is true, we are not going to make much progress in understanding the constitutional provisions establishing Congress’s war powers simply by adopting one or another interpretive stance. As in most of constitutional law, there is no neutral ground. Instead, there are multiple paths leading to multiple meanings. We cannot expect

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5. See OWEN M. FISS, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910*, at 389-95 (1993).

6. See Anthony T. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029, 1055-56 (1990); see also PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 32-35 (1992) (discussing Lincoln’s understanding of political psychology).

7. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

agreement, when in fact we are proceeding on principles of interpretation that are themselves deeply controverted.

We should be clear on just how great our principled disagreements in this area are. We are at that point in our constitutional deliberations where the often repeated warning that the Constitution “is not a suicide pact”<sup>8</sup> confronts an equal and opposite warning that “[e]xtraordinary conditions do not create or enlarge constitutional power.”<sup>9</sup> We are treading very close to ultimate values: values of national survival, on the one hand, and of the meaning of the American political order as a community under law, on the other. With such large stakes, there is a tendency to yield to intuition and moral sentiment. At that point, conflict threatens to become irresolvable.

If the principles are all controverted and intuition is an inadequate ground of interpretation, what is left? To begin with, we need a better description of the setting within which the elaboration of American constitutional standards respecting issues of use of force takes place today. This will not tell us what to do with our Constitution, but it will enable us to understand better what is at stake.

We are at an extraordinary moment in which there is a fundamental competition between our understanding of ourselves as citizens and our understanding of ourselves as moral agents in an emerging global order. This finds expression in a confrontation between legal orders: the domestic constitutional order, on the one hand, and the international order of human rights, on the other. This conflict, not some unspoken requirements of American hegemony, makes this such a troubling and difficult area to think about today. But we will never even get to this conflict, if we attempt to interpret the meaning of Congress’s war powers by looking only to the ordinary sources of constitutional interpretation: our text and constitutional structure, our history and legal precedents.

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8. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

9. *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495, 528 (1935).

I. WAR-DECLARATION: FROM EIGHTEENTH CENTURY LAW TO  
TWENTIETH CENTURY POLITICS

Until well into this century, war was a legitimate means of changing entitlements under international law.<sup>10</sup> A state could, for example, change its borders, its possessions, and its population by means of war. The declaration of war provided notice that such issues were now open; it announced that such basic entitlements were about to be “renegotiated” through force of arms. The declaration, to some degree, reflected an increasingly antiquated etiquette of war that required respect for an adversary. More importantly, however, the declaration had the function of providing legal notice to third parties, as well as to one’s own citizens, of a change in their legal standing vis-a-vis others.<sup>11</sup> A state at war entered into a new set of legal relationships not just with its adversary, but to all other states as well. The international law of war was as much about neutrality as about the use of force.

To enter into a state of war was to change the legal rules with respect to the law of the sea, the right to use ports, the openness of private shipping to search and seizure of contraband, and the right to use the territory of third parties.<sup>12</sup> Neutral states had rights and obligations with respect to the warring parties. They had a “procedural” right, therefore, to notice that these rules had come into effect. This choice of law function of a declaration was distinguishable from the decision to use force. In this world of classic international law, war

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10. The first formal prohibition on the use of force was the General Treaty for the Renunciation of War. *See* Kellogg-Briand Pact, Aug. 27, 1928, 94 L.N.T.S. 57.

11. Chancellor Kent described this function well, stating it “is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations, and duties growing out of a state of war, and which should equally apprise neutral nations of the fact.” JAMES KENT, COMMENTARIES ON AMERICAN LAW 55 (2d ed. 1832); *see also* WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 397 (1917) (discussing manifestos and declarations of war between countries).

12. For example, Hall devotes some 200 pages to the law of neutrality. *See* HALL, *supra* note 11, at 397. Hannis Taylor also devotes close to 200 pages to the same subject. *See* HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 617-792 (1901).

did not refer to the use of force, but rather to a legal regime. States at war might or might not be engaged in actual fighting at any given moment. Nevertheless, their legal relations to each other and to third parties—as well as the relations among the citizens of all these states—were determined by a set of rules different from those applicable to states at peace.

Just as states at war were not necessarily using force against each other, states using force were not necessarily at war. International law included a number of categories collectively called “uses of force short of war.”<sup>13</sup> For example, a state did not have to enter the legal status of war to engage in acts of reprisal, blockade, or self-defense.<sup>14</sup> What distinguished a use of force short of war from war itself was the object in view, that is, the end for which force was deployed. Uses of force short of war were forms of self-help intended to enforce existing legal rights; they were limited by this idea of enforcing a vested legal right.<sup>15</sup> Thus, when British forces preemptively attacked forces on the American side of the Saint Lawrence River, which were preparing for an invasion of Canada, both sides agreed that acts of self-defense were not acts of war. They disagreed about whether this was a legitimate act of self-defense, but not about the category. Secretary of State Daniel Webster provided what became the classic definition of self-defense: a government that claims self-defense as the justification of a use of force must “show a necessity [that is] . . . instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>16</sup>

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13. See TAYLOR, *supra* note 12, at 431.

14. See FRITZ KALSHOVEN, *BELLIGERENT REPRISALS* 3-9 (1971). By the end of the eighteenth century, private reprisals, including the use of “letters of marque and reprisals,” were substantially an antiquated form, while public reprisals were a growing practice. See also John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1188-89 (1999) (discussing Framers’ intent with respect to the marque and reprisal clause of the Constitution).

15. Compare this idea of law-enforcement to Von Clausewitz’s views on the irrelevance of law to war: “Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.” CARL VON CLAUSEWITZ, *ON WAR* 577 (Michael Howard & Peter Paret trans., Princeton Univ. Press 1832).

16. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L L. 82,

Law enforcement was not war. War sought to change the distribution of legal rights. In the first half of the nineteenth century, the United States engaged in many acts of force short of war, most commonly reprisals against groups that were unlikely to respond through an organized governmental decision to pursue war.<sup>17</sup> The predicate for these actions was always a claim of a prior violation of an international legal right. Of course, what began as a limited act of law enforcement could become a full-blown war entailing all of the legal consequences for third parties.<sup>18</sup> And, there was always the unresolved conundrum that what looked like law-enforcement to one party might look like aggression to the other.<sup>19</sup> For this reason, caution, as well as executive appeals for congressional support, were standard aspects of American foreign policy when dealing with nations that could respond with force.

Thinking about the issue as one of choice of law rather than use of force helps us to understand the original framework for the constitutional division of responsibility between the president and Congress. If to declare war was to move from one international legal order to another, i.e., from the law of peace to the law of war, then from the perspective of the sovereign law-making power, the issue was one of choice of law. Congress was the appropriate institutional location of that power. This was simply an extension of Congress's general law-making power.

Today, the choice of law represented by a declaration of war is no longer an available option under international law. Since the advent of the United Nations (UN) Charter, war has been abolished as a

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89 (1938); Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325, 325 (1999) (quoting 1841 letter written by United States Secretary of State Daniel Webster to British minister Harry Fox).

17. See ABRAHAM SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 208-27 (1976).

18. For example, the Jefferson administration's conflict with the Barbary powers escalated into an officially declared war. See *id.* at 208-16.

19. This problem persists to the present day when states act on a contested claim of self-defense, as long as the Security Council fails to act under Article 51. See Kearley, *supra* note 16, at 345. In the *Nicaragua* case, the International Court of Justice (ICJ) claimed the authority to evaluate a claim to self-defense. See *Military and Paramilitary Activities (Nicar. v. United States)*, 1986 I.C.J. 102 (June 27).

category of international law.<sup>20</sup> A declaration of war serves no purpose under international law; it can have no bearing on the underlying legal situation. No longer a performative utterance, it is only a meaningless utterance—not even descriptive—from the perspective of international law. For example, however one assesses the international legality of the United States' invasion of Panama, the fact that Panama had earlier declared war, whereas the United States never made such a declaration, is irrelevant to that assessment.<sup>21</sup>

War has disappeared from international law because force is no longer a legitimate means of changing state entitlements. The fundamental rule of postwar international law was the prohibition on the use or threat of force. This was enshrined in Article 2(4) of the UN Charter: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ."<sup>22</sup> Furthermore, there is a doctrine, as well as a supporting practice, of nonrecognition of achievements gained through force. Iraq could not change its borders with Kuwait through force, Indonesia never received international recognition of its occupation of East Timor, and the Baltic states have reverted to their independent status after more than fifty years of occupation by the Soviet Union.

In place of a law of war, the Charter established a general prohibition on the use of force, along with a narrow set of exceptions. These exceptions are limited to: (1) an act of individual or collective self-defense, or (2) a police action authorized by the Security Council.<sup>23</sup> These exemptions continue the traditional idea that a limited use of force to enforce legal rights is not war.<sup>24</sup> Under these changed legal circumstances, the declaration of war no longer has any bear-

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20. See Stephen Neff, *Towards a Law of Unarmed Conflict: A Proposal for A New International Law of Hostility*, 28 CORNELL INT'L L.J. 1, 14-15 (1995).

21. But see Abraham Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 284-85 (1991).

22. U.N. CHARTER art. 2, para. 4.

23. See U.N. CHARTER arts. 42, 51.

24. Because they are law enforcement, not war, the law of neutrality has been considered inapplicable with respect to such uses of force. See Georgios Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT'L L. 575, 580-81 (1998).

ing. War is not an option and self-defense requires no formal declaration.

The point is not that the choice of law function offers a complete account of Congress's power to declare war. After all, to declare war was to make an extraordinary choice of law. The declaration had substantial implications for domestic politics and citizen rights and responsibilities, wholly apart from its implications for the nation's foreign relations. Yet, the context within which this political decision was considered was one in which international law required a declaration of war, and in which that declaration served a critical transnational purpose. Congress's power over the budget,<sup>25</sup> over creation of a standing army and navy,<sup>26</sup> over the use of the militia,<sup>27</sup> as well as its power to regulate military forces and to confirm officers,<sup>28</sup> gave it ample power over the military instrument, even without the power to declare war. All of these powers remain, regardless of how we interpret the war declaring provision. That provision, which was originally a vehicle for managing the intersection of the domestic political order and the international legal order, today can serve only a domestic function.

The war declaring provision has been reinterpreted within a framework of national politics and a theory of democratic legitimacy. Its justification now lies not in its choice of law function, but in the idea that congressional approval is a necessary condition of a legitimate call for national sacrifice. We pour into this constitutional provision our beliefs about the political conditions under which individuals can be asked to sacrifice their lives and property. Just as there can be no taxation without congressional action, so, the thought is, there can be no demand for sacrifice without Congress's consideration and approval.<sup>29</sup> In short, going to war is too important a de-

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25. See U.S. CONST., art. I, § 8, cl. 1.

26. See *id.* cls. 12, 13.

27. See *id.* cl. 15.

28. See *id.* cl. 16.

29. Joseph Story already made this connection: "The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its . . . time, and the ways and means of making it effective." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE U.S. § 1171 (5th ed. 1891).

cision to be left to the president alone. This theory of democratic legitimacy is often coupled to a sub-theme of political effectiveness: a deployment of force without prior congressional approval is more likely to be undermined by a subsequent withdrawal of congressional and popular support.<sup>30</sup> These practical arguments, however, are primarily strategic; they apply regardless of the resolution of the constitutional issue. Whatever the constitutional requirement, it remains generally good policy for the president to obtain congressional approval.

For two reasons, the war declaring provision has proven to be a poor vehicle for realizing this view of the democratic conditions of a legitimate use of force. First, the character of force can no longer be cabined within this legal structure. This is the problem of nuclear weapons. Second, the legal form no longer offers a useful political vehicle. This is a problem of institutional accountability and of the structure of congressional decision-making. In the area of national defense, law is inevitably a weak force compared to the risks and possibilities created by weapons developments, on the one hand, and political processes, on the other. We are not going to put the country at nuclear risk for the sake of an eighteenth century understanding of law, and our political institutions are not going to be forced by law to make decisions that they perceive as beyond their capacities. No such changes are going to happen without a major effort by the courts to enforce a contrary legal rule.<sup>31</sup> The courts, however, have no more reason than any other politically responsible actor to demand such a change.

More importantly, this whole approach rests on a misdiagnosis of the legitimacy problem with respect to the use of force in the post-Cold War era. The problem today is not insufficient attention to public opinion in executive decisions to commit military forces. Rather, it is just the opposite. We may already suffer from too much democracy and too much attention to domestic politics, in light of our responsibilities to a global order of human rights.

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30. See Colin Powell, *U.S. Forces: Challenges Ahead*, FOREIGN AFF., Winter 1992-93, at 32.

31. See JOHN ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 47-67 (1993).

## II. NUCLEAR WEAPONS AND PRESIDENTIAL RESPONSIBILITY

There has been general agreement that the president has constitutional authority to use nuclear weapons in self-defense without prior congressional authorization. Scholars and politicians have thought that they have no choice with respect to this issue. This has served as a kind of “reality check” on constitutional interpretation: the Constitution could not impose a legal rule that would subject the nation to substantial risk of nuclear destruction. In a MAD (Mutually Assured Destruction) world, interpretation could be a bit mad. That it was a bit mad becomes clear when we consider how much is given away in this seemingly uncontroversial step. Most obviously, the president has the power to bring on a world-destroying Armageddon without prior congressional approval.<sup>32</sup>

Of course, it has always been true that the president has the authority to respond immediately when self-defense requires it. This is implicit in Webster’s formulation of the test in the *Caroline* case,<sup>33</sup> which speaks of an “instant, overwhelming” necessity, leaving “no moment for deliberation.”<sup>34</sup> That test, however, imagined discrete, limited actions. Self-defense would preserve the status quo and thus enable congressional deliberation to go forward with respect to the larger issues of whether or not to go to war.<sup>35</sup> In his correspondence concerning the *Caroline* case, Secretary of State Webster speaks to this issue, noting that while the British act was purportedly justified on the grounds of self-defense, the act invited the United States to consider whether escalation of the affair was appropriate: “the attack

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32. See Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1259-60 (1991).

33. See *supra* note 16 and accompanying text.

34. See Jennings, *supra* note 16, at 89.

35. Jefferson provided the classic example of this reasoning in his message to Congress on military action with Tripoli:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries.

11 ANNALS OF CONGRESS 12 (1802).

on the *Caroline* case is avowed as a national act which may justify reprisals, or even general war, if the Government of the United States . . . should see fit to decide.”<sup>36</sup>

To say that today the president controls the decision whether to execute the nuclear threat, or even whether to raise the nuclear threat, is to say that the president sets the conditions of life and death for the entire nation. There may be no subsequent moment for congressional deliberation. This has become the ordinary condition of our existence. In a nuclear age, the lives of all citizens are put at risk in the conduct of foreign policy.<sup>37</sup> It is no longer a question of foreign entanglements subject to the check of congressional control. We are deeply and unavoidably entangled; we live our lives against the background risk of nuclear destruction. Primary responsibility for management of that risk lies squarely with the president. This is the political and institutional meaning of the fact that we sit astride thousands of nuclear warheads. Much as we may try not to think about this, recognizing this fact is the only place from which to begin assessing the reality of the war-making power.

In law, it is not always the case that the greater includes the lesser. Unable to control behavior at the extremes, law may still try to control behavior short of the extreme. Nevertheless, the fact that the lesser instances of the use of force, throughout the era of the Cold War, were a function of the same ideological confrontation that threatened to produce the extreme meant that there was no point outside of that conflict from which it was possible to view deployments of force. Every deployment of force was a step in a single, grand confrontation. Hanging over all of the smaller conflicts was the nuclear threat. Thus, the start of the Cold War marked not only the start of the nuclear confrontation, but also the commitment to a permanent standing army to be deployed by the president in the strategy of move and countermove. There was a single policy of national defense that extended directly from nuclear weapons through the tacti-

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36. Letter from Daniel Webster, Secretary of State, to John Crittenden, Attorney General (Mar. 15, 1841), in 29 *BRITISH AND FOREIGN STATE PAPERS 1840-1841*, at 1140 (1857).

37. See Paul Kahn, *Nuclear Weapons and the Rule of Law*, 31 *N.Y.U. J. INT'L L. & POL.* 349 (1999).

cal uses of the standing army.

This was very clearly true in the Korean conflict, but it was equally clear in the Cuban blockade, the war in Vietnam, and directly before us in 1973 when President Nixon put the country's nuclear forces on alert in response to Soviet actions in the Middle East. Even in the mid-'80s, the Reagan administration sought to justify its intervention in Nicaragua by invoking the prospect of Soviet military jets that could be stationed there. These same jets figured in the invasion of Grenada in 1983. The same nuclear threat and counter-threat were present in actions not taken by the United States: we did not directly intervene in East Germany in 1953 or Hungary in 1956, or in Poland and Afghanistan two decades later. Because every use of force could threaten nuclear confrontation—and nuclear weapons strategy was the responsibility of the president—Congress was incapacitated not just where the threat was greatest, but in innumerable places in which that threat was latent. The president's twin responsibilities for nuclear weapons and the standing army, reflecting the fact that both were instruments and expressions of the Cold War, left Congress in a weak, reactive position.

With the end of the Cold War and the de-escalation of the nuclear confrontation, military deployments may be regaining a more discrete quality. The typical, contemporary deployment of U.S. forces as part of a multilateral intervention is no longer perceived as a skirmish in a larger battle. Even now, however, the Russian race to the airport in Kosovo certainly suggests that the longer postwar history of confrontation is not fully behind us, just as a confrontation with China may loom in our future. Yet, even if the Cold War has ended, there has not been a return to the global order that existed before the Cold War. American power operates today within a distinctly different global regime of legal rights. We can no longer think of the use of force as primarily a matter of domestic decision-making; globalization has arrived.

### III. CONGRESSIONAL STRUCTURE AND POLITICAL RESPONSIBILITY

There is a tradition in constitutional-law scholarship that requires analysis to treat political institutions as if they always operate

in their ideal forms.<sup>38</sup> This would mean, for example, imagining Congress acting as a rationally deliberative body of politicians devoted to the public good, or administrative agencies pursuing bureaucratic rationality to the exclusion of the interests of the regulated parties. But when constitutional responsibilities are to perform a legitimating function, analysis without reference to political reality may give us little that relates to the intended constitutional function. Congress's power to legitimate cannot extend beyond its capacity for responsible action.

#### *A. Tactical Advantages of the President*

No matter what scholars might write or say about congressional responsibility, the fact is that throughout the postwar period Congress was generally unwilling to exercise its power with respect to the use of force.<sup>39</sup> When Congress did act, it was only after public opinion had dramatically formed against a particular foreign entanglement. For example, Congress did not act to cut off funds for military use in Southeast Asia until 1973.<sup>40</sup> Similarly, it did not act comprehensively to prohibit funds for use by the Contras in Nicaragua until after the 1984 mining of Nicaraguan harbors, which dramatically moved public opinion against U.S. policy.<sup>41</sup>

This political weakness of Congress was directly addressed in the War Powers Resolution of 1973.<sup>42</sup> Enacted in light of the experience with Vietnam, the Resolution attempted to shift to the president the burden of obtaining congressional approval of the use of force. Instead of leaving Congress in the position of having to take the initiative to stop presidential action, it required termination of all non-

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38. See James Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149 (1893).

39. See ELY, *supra* note 31, at 48-52; HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117-34 (1990).

40. See Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 24, 87 Stat. 732.

41. See Joint Resolution of Oct. 12, 1984, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1837, 1935; Andrew Hayes, *The Boland Amendment and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1567-70 (1988).

42. See Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541-1548 (1994)).

congressionally approved military deployments after sixty days.<sup>43</sup> But the War Powers Resolution has not worked. Instead of a limitation, it came to be seen as a grant of discretionary authority, allowing the president to commit forces for a period of sixty days.<sup>44</sup> In those instances in which the president has judged longer military deployments to be necessary, the Resolution has not been an obstacle.<sup>45</sup> At no point has it forced a president to terminate a deployment of force. In the recent engagement in Kosovo, the Resolution barely entered the public debate. Hardly anyone even noticed when the sixty day period had run. Indeed, Congress's failure to insist upon its legislative prerogatives led a district court to dismiss a lawsuit filed by Representative Tom Campbell and thirty other members of Congress, seeking enforcement of the Resolution.<sup>46</sup>

Three events are particularly forceful markers of congressional weakness in the face of the war-making powers of the modern chief executive. First, President Johnson used the Gulf of Tonkin Resolution to manipulate Congress into giving him the discretion to conduct

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43. See 50 U.S.C. § 1544(b) (1994). Congress can extend the sixty day period to ninety days if the president "determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces . . ." *Id.*

44. The Resolution explicitly states that it does not create any presidential authority to deploy troops. See *id.* § 1547(d)(2). During the debate in 1973 on the War Powers Resolution, Representative William Green of Pennsylvania remarked that the Resolution has "popularly been interpreted as limiting the President's power to engage our troops in a war . . ." 119 CONG. REC. 36,204 (1973) (statement of Rep. Green). But, he said, a careful reading of the bill indicated that it is "actually an expansion of Presidential warmaking power, rather than a limitation." *Id.* Representative Vernon Thomson of Wisconsin also recognized that his colleagues were misperceiving the actual impact of the Resolution: "The clear meaning of the words certainly points to a diminution rather than an enhancement of the role of Congress in the critical decisions whether the country will or will not go to war." 119 CONG. REC. 36207 (1973) (statement of Rep. Thomson).

45. For instance, the Act was not an impediment preventing the President from deploying armed forces in Lebanon and the Persian Gulf. See KOH, *supra* note 39, at 39-40; see also Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 30 (1995) ("It is difficult to identify any instance in which the Executive desired to undertake a military initiative but did not because of the Resolution.").

46. See *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999).

the war in Vietnam as he saw fit.<sup>47</sup> This illustrates the capacity of the president to control the flow of information—if not to manufacture information—and thus to shape political reactions to events. Second, the Reagan administration decided to take the Nicaraguan war private. Here, Congress tried periodically to assert limits on the conduct of military activity, but the Executive was able to pursue its military policies by other means.<sup>48</sup> This illustrates the malleability of policy implementation.<sup>49</sup> The War Powers Resolution did not speak to covert or paramilitary uses of force by intelligence agencies. This became a preferred method of military operations throughout the 1980s. Third, Congress approved the Gulf War on the eve of the commencement of the bombing campaign.<sup>50</sup> This illustrates the president's ability to control the calendar, and thus force congressional decision-making to occur within a context that he has created. The president can successfully put Congress in a position from which it would be seen as abandoning an on-going military deployment were it to withhold consent.<sup>51</sup> President Clinton had clearly learned this lesson from President Bush, when he committed U.S. air forces to the Kosovo campaign. By the time Congress took up the issue, the forces were already engaged.

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47. The House of Representatives passed the Tonkin Gulf Resolution by a unanimous vote; there were only two votes in opposition in the Senate. This support was based solely on President Johnson's report of the facts—since discredited. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 104-16 (Univ. Press of Kan. 1995). In fact, a number of House members and Senators did not think it was Congress's role to question the information or authority of the President on such matters. See ELY, *supra* note 31, at 15-23; Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 958-61 (1999).

48. See Dr. Anthony Simones, *The Iran-Contra Affair: Ten Years Later*, 67 UMKC L. REV. 61, 74-76 (1998).

49. The President could do this, even when those other means were illegal. In the end, no one was criminally punished, and the main perpetrators of the policy are successful entrepreneurs of public opinion today, as is exemplified by Oliver North's run for the Senate in Virginia.

50. Authorization For Use of Military Force Against Iraq Resolution, H.R.J. Res. 77, 102nd Cong., 105 Stat. 3 (1991). The Resolution passed by a margin of five votes in the Senate and sixty-seven votes in the House.

51. See KOH, *supra* note 39, at 117-33; Paul Kahn, *Lessons for International Law from the Gulf War*, 45 STAN. L. REV. 425, 432 (1993); see also ELY, *supra* note 31, at 50-52.

Congressional war-making powers will never be an effective device for forcing political accountability unless the president is disabled at a far earlier point, before he had taken control of the calendar, the agenda, the flow of information, and the popular perception, as well as the actual initial deployment of forces. No such change is about to happen as long as the perception of military risk continues. In a nuclear world that is not going to happen.

*B. Congressional Decision-making and Foreign Policy*

The treaty-making power has a kind of isomorphic quality with the war-making power. There is an obvious relationship between law and force that is just as true internationally as domestically. We try to use law to prevent conflict; we often use force to respond to failures of law. Yet during the same period in which Congress has withdrawn from effective use of its war-powers, Congress has asserted itself strongly to block United States participation in several new international law regimes favored by the president; it has also refused to meet national commitments under existing international regimes. Looking at the most recent Congress, we find just this mix of action and inaction. This Congress acquiesced to a presidential decision to conduct a major military campaign in Kosovo. It refused to vote an explicit authorization of the action, but it also failed to vote an explicit prohibition.<sup>52</sup> This same Congress, however, continued to deny the President fast-track authority with respect to trade agreements, while the Senate dramatically rejected the President's plea for approval of the Comprehensive Nuclear Test Ban Treaty.<sup>53</sup>

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52. On April 28, 1999, Congress voted against declaring war against Yugoslavia, H.R.J. Res. 44, 106th Cong. (1999), and concurrently voted against authorizing air and missile strikes, S. Con. Res. 21, 106th Cong. (1999). Congress also defeated a resolution which would have directed the President to remove U.S. forces from Yugoslavia, H.R. Con. Res. 82, 106th Cong. (1999). See Major Geoffrey S. Corn, *Campbell v. Clinton: The "Implied Consent" Theory of Presidential War Power Is Again Validated*, 161 MIL. L. REV. 202, 205-07 (1999) (describing sequence of congressional actions).

53. The President's fast-track authority to negotiate trade agreements expired in early 1994. In September of 1997, the President proposed legislation to renew fast-track authority. See H.R. 2621, 105th Cong. § 101 (1997). However, the bill was headed for certain defeat, and the President decided not to push for its passage. In 1998, the President attempted again to pass the fast-

We have to add to this, congressional refusal to fund foreign aid at levels requested by the President; the Senate's failure to act on numerous executive appointments in this field; and the long failure to meet financial obligations to the United Nations.<sup>54</sup>

None of this is surprising in light of the isolationist history of the country and the generally isolationist tendencies of Congress in particular.<sup>55</sup> Warnings about foreign entanglements date back to the Founding.<sup>56</sup> Even when the Senate has approved multilateral con-

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track legislation, but failed on a vote of 180-243. See Lenin Guerra, *The Use of Fast Track Authority in the Negotiations of the Free Trade Area of the Americas*, KAN. J.L. & PUB. POL'Y, Spring 1999, at 172, 186-87 n.32. On October 13, 1999, the Senate rejected the Comprehensive Nuclear Test Ban Treaty. The final vote was forty-eight in favor of the treaty and fifty-one against it. See Sen. Jon Kyl, *Maintaining "Peace Through Strength": A Rejection of the Comprehensive Test Ban Treaty*, 37 HARV. J. ON LEGIS. 325 (2000). The Senate rejected the treaty even though the President spent two weeks aggressively lobbying for its passage. See Jane Perlez, *Ailing Foreign Policy*, N.Y. TIMES, Oct. 17, 1999, at 16.

54. For example, in 1998, the House approved only \$12.7 billion for foreign aid in H.R. 2606. This was fourteen percent less than President Clinton requested. The President vetoed the bill. The President and Senate have also disagreed about paying back UN dues. In 1997, Ambassador Bill Richardson testified before Congress that the United States should pay nearly \$1 billion in back dues. See William Scally, *U.N. Ambassador Nominee Says U.S. Plans to Pay Debt; Helms Demands Reforms Before Settling Past Dues*, ROCKY MTN. NEWS, Jan. 30, 1997, at A33. But, in both 1997 and 1998, Congress did not meet the administration's funding request. Finally, in 1999, Congress and the White House reached a compromise, and Congress passed the Helms-Biden provision which authorizes \$819 million for arrears payment and would forgive \$107 million that the UN currently owes the United States. The payment is contingent, however, on the UN meeting many conditions of reform, including reducing the U.S. financial contribution from twenty-five percent to twenty percent of the regular UN budget. See S. REP. NO. 106-43 (1999); S. 886, 106th Cong. (1999).

55. More broadly, the Senate refused to ratify the International Covenant on Political and Civil Rights until 1993, and the Genocide Convention until 1986. The United States is one of two countries that has refused to accede to the Convention on the Rights of Children; it has refused to ratify the American Convention on Human Rights and the Convention on the Elimination of All Forms of Discrimination Against Women. See Jorge A. Banales, *On Eve of Summit, Rights Issues Listed*, UNITED PRESS INT'L, Apr. 14, 1998; see also *A Lens on Children*, BOSTON GLOBE, Dec. 19, 1994, at 12.

56. The most famous of the early warnings was in Washington's Farewell Address. See GEORGE WASHINGTON, FAREWELL ADDRESS (1796), reprinted in GEORGE WASHINGTON: A COLLECTION 524-26 (W.B. Allen ed., Liberty

ventions, it has often insisted on limiting their reach and effect, particularly any effect that would subject the United States to the compulsory jurisdiction of an international court.<sup>57</sup> What is surprising, however, is that a Congress so wary of international entanglements has nevertheless been reluctant to confront the president when he commits forces abroad. So far, I have argued that the president has certain tactical advantages over Congress in this area, but the problems are deeper. They go to the structure of congressional decision-making.

Domestically, Congress often works best through a process of articulation of policy differences and then compromise. The parties set out widely divergent positions as an initial matter. This allows them to establish distinct identities, which in turn allows appeals to different groups of constituents. Difference is then overcome through a process of negotiated compromise. Compromise is often made possible by the fact that it can be multidimensional: in seeking to achieve a compromise in one area, bargains can be made in other areas. Compromise occurs not only within Congress, but in the process of negotiation between the Congress and the executive.<sup>58</sup> To fully understand the act of negotiating compromise, moreover, one

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Classics 1988). In the first part of the twentieth century, we saw the disastrous failure of Wilson to obtain Senate approval of U.S. participation in the League of Nations, and Roosevelt's battle with Congress over intervention in the early years of the Second World War. See F.P. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* 68-72 (1967).

57. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278; David J. Scheffer, *Non-Judicial State Remedies and the Jurisdiction of the International Court of Justice*, 27 STAN. J. INT'L L. 83, 144-50 (1990).

58. Fiorina argues that members of Congress have a political interest in compromise: "[T]he struggle for political credit sometimes makes both parties as likely to compromise behind some legislation as to allow the process to stalemate." MORRIS FIORINA, *DIVIDED GOVERNMENT* 90 (2d ed. 1996); see also Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 52-55 (noting that Congress is more likely to compromise than to pass a programmatic agenda). Kristy Carroll argues that the legislative process reveals that the president has a role in negotiating legislative compromises and suggesting the substantive scope of legislation. See Kristy L. Carroll, *Whose Statute Is It Anyway? Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 518-21 (1997).

must consider the role of Washington lobbyists who provide information and coordinate interest group positions.<sup>59</sup>

This process of party differentiation followed by compromise produces consensus around the middle, which is generally the safest position in American politics. Americans tend to distinguish between politics and government, and do not like it when government is driven too explicitly by political ends.<sup>60</sup> They generally expect their politicians to shed the party differentiating ideologies that get them elected and to tend to the task of governance under standards of policy rationality. When this process of compromise appears too risky, when it cuts too deeply into the entrenched political positions of the parties, we have seen appeals to bipartisan, expert commissions, the responsibility of which is to articulate the middle ground and so to relieve the pressure on the politicians as they move toward a common ground.<sup>61</sup>

With respect to foreign affairs, however, these techniques of congressional decision-making work poorly. The differentiation that marks the parties as distinct and separate, and is domestically an initial step toward compromise, serves the same differentiating function in foreign policy, but there it tends to freeze party positions. Treaties come before the Senate too late in the process for compromise to be

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59. See, e.g., JEAN-MARIE GUÉHENNO, *THE END OF THE NATION STATE* 20-22 (1995); Elizabeth Garret, *Harnessing Politics: The Dynamics of Offset Requirements in the Tax Legislative Process*, 65 U. CHI. L. REV. 501 (1998).

60. This norm appears in constitutional law as the ubiquitous rationality test: public policy must be founded on a public rationale that represents more than political interests. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); see also Michael Tackett & William Neikirk, *GOP Facing its Own Trial*, CHI. TRIB., Dec. 23, 1998, at N1 (noting that the Republican party received its lowest approval rating in over one decade as a result of the highly partisan impeachment of President Clinton).

61. This was the technique successfully used on social security reform, military base closing, and restructuring medicare. See generally Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL'Y REV. 311, 316, 319 (1998) (discussing use of appointed councils and bipartisan commissions on social security and medicare issues); Natalie Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. COLO. L. REV. 331, 339 (1991) (discussing use of commissions in military base closings).

an option, particularly when they are multiparty covenants.<sup>62</sup> Moreover, compromises can look like concessions of U.S. interests to foreign states, rather than a distribution among competing elements of the polity. Nor is there a great deal of pressure to compromise. Rejecting foreign policy initiatives is a way of preserving the status quo, and preserving the international status quo is rarely a policy for which one is held politically accountable. It is hard to make an issue out of a failure to change the conditions that prevail internationally, when the country is enjoying power, prestige, and wealth. Unable to compromise, the Senate can end up doing nothing, and then treaty ratification fails. Difference leads to stalemate, rather than to negotiation. The problem is greatly exacerbated by the two-thirds requirement for ratification.<sup>63</sup> This structural bias toward inaction accounts in part for the use of executive agreements in place of treaties.<sup>64</sup> These agreements make use of some of the tactical advantages of presidential initiative. Many of the structural problems remain, however, when executive agreements require subsequent congressional approval.

If the issue involves the use of force, compromise is particularly difficult. A compromise that produces a less substantial response to a foreign policy crisis can look like a lack of commitment. Disagreement now threatens to appear to offer an “exploitable weakness” to adversaries. Congress cannot simply give the president less of what he wants, when what he wants is a military deployment.

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62. Not controlling the origins of the text, the Senate will sometimes try to control future readings of the text by adding unilateral “declarations”—not quite “reservations”—to its ratifications. See Phillip R. Trimble, *All Fall Down: The Treaty Power in the Clinton Administration*, 16 BERKELEY J. INT’L L. 55, 62-63 (1998).

63. See U.S. CONST. art. II, § 2, cl. 2.

64. See KOH, *supra* note 39, at 41-42. Bruce Ackerman and David Golove have shown that precisely because of the difficulties in adjusting this eighteenth-century mechanism of Senate consent to a twentieth-century world of American global leadership, a new form of international commitments has evolved. Under this alternative, the president leads through the formation of executive agreements, which are then subject to congressional—not only Senate—approval. The president, accordingly, sets the starting point of the debate, by making a commitment to other states. This is just the pattern of the War Powers Act. See generally Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995).

There cannot easily be compromises on a range of unrelated issues in order to achieve support for a military deployment. While that may happen, it has the look of disregard for the national interests and of putting politics ahead of the public interest. Nor can Congress easily adopt the technique of the expert commission.<sup>65</sup> The timeframe of a crisis usually will not allow it. More importantly, the military—particularly in the form of the Joint Chiefs of Staff—has already pre-empted the claim of expertise, as well as the claim to be “apolitical.” Finally, there is little room for the private lobbyist with respect to these decisions.

Congress, in short, is not capable of acting because it only knows how to reach compromise across dissensus. When disagreement looks unpatriotic, and compromise appears dangerous, Congress is structurally disabled. This produces the double consequence for American foreign policy of a reluctance to participate in much of the global development of international law—outside of those trade and finance arrangements that are in our immediate self-interest—and a congressional abdication of use of force decisions to the president. The same structural incapacities are behind these seemingly contradictory results.

The vices of congressional decision-making in this area are balanced by the corresponding presidential virtues. The president can formulate a policy; the president need not compromise to act; the president can publicly claim responsibility for a position without having to distinguish his position from that of his political opponents; and the president almost inevitably can speak with the support of military experts. Because the president can do all of this, he is uniquely accountable for foreign policy decisions, especially on the use of force.<sup>66</sup>

There is little doubt that the president believes he will be held politically accountable for American foreign policy decisions to use force. The recent loss of seventeen servicemen in Somalia deeply affected the methods of military deployment, precisely because of a

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65. *See supra* note 61 and accompanying text.

66. This is true as long as he acts openly—a principle violated by the Reagan policies in Central America and in the Iran-Contra affair. *See KOH, supra* note 39, at 118.

fear that the public would not approve military losses outside of a narrow range of vital national interests.<sup>67</sup> The Clinton policy on the use of force, whatever else we may think about it, is directly responsive to an assessment of what is politically acceptable.<sup>68</sup> This dynamic of public accountability is not likely to be improved by requiring congressional action.

If the president is publicly accountable, then it is not necessarily the case that Congress's failure has produced a sort of democracy deficit. Indeed, our most compelling problem today is not democratic accountability for the use of force, but Congress's structural weakness in assessing American participation in an emerging global order. To insist that the constitutional text requires congressional approval of any commitment of American military forces that places them at risk would put the war-declaring function in the same position as the treaty-making function. The consequence would be an effective withdrawal of American forces from an active international role.

One unfortunate consequence of our domestic, ideological wars of the '60s and the '70s, and particularly of our experience over Vietnam, is an academic tendency to argue for the further democratization of use of force decisions. This is the lens through which the war-declaring power of Congress is viewed. For the reasons sketched above, however, the political and institutional underpinnings for such a view are unrealistic. More importantly, we are already at a point at which there is too much "public accountability," given the ends for which force is deployed today. The democratization of the war powers is a Cold War agenda that no longer makes sense in a post-Cold War era. To understand this we have to investigate the changing character of the international legal order.

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67. Compare the earlier tragedy in Lebanon. On October 23, 1983, a suicide bombing of the U.S. Marine barracks killed 239 American servicemen. The bombing generated a political backlash against the mission. See Christopher A. Ford, *War Powers as We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609, 649-53 (1995) (discussing the ways the bombing induced the administration to consider a quick Lebanon withdrawal in the hope that the political damage would subside before the 1984 election).

68. See Trimble, *supra* note 62, at 60.

## IV. THE CHANGING CHARACTER OF INTERNATIONAL LAW

If the drafters of the UN Charter hoped to inaugurate an era of non-use of force in international relations, they failed. The law of the Charter not only prohibited the use of force, but even the “threat” to use force.<sup>69</sup> Nevertheless, the world of the postwar era rapidly became one in which the threat to use world-destroying force set the basic conditions of all international relations, and much of our domestic political order as well. We characterize this era as that of the Cold War precisely because international relations were organized around the use of force. However, we may judge the actual likelihood of recourse to nuclear force during this period, it surely is uncontroversial to say that this was not the world that the substantive law of the Charter had imagined. Nevertheless, it was a world that the institutions of the UN system permitted to develop.

Invented in the aftermath of the Second World War, the Charter system represented a balance between ideal form and political reality. Formally, the resolution of disputes among states was to occur within a framework in which law specified rights and obligations. The underlying vision was Hobbesian. States—the subjects of international law—had existed in a state of nature, settling their disagreements by force of arms. Through law they would now enter into a new political order in which each abandoned an entitlement to use force against the others. Just as law displaced force domestically, so it would on the international level. Change, were it to come at all, would come through consent.<sup>70</sup>

This ideal of law, however, never had much to do with the institutions created by the Charter system. While the new international law established rights, it did little to establish legal procedures and institutions for the adjustment of rights or the resolution of conflicts. In this sense, the Charter declared an end to war too soon, before all the parties were content with the distribution of entitlements that the law would attempt to preserve.<sup>71</sup> Thus, the law of the Charter was

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69. See U.N. CHARTER art. 2, para. 4.

70. See Paul Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT'L L. 1, 30-32 (1987) (discussing the domestic analogy).

71. Justice Pal made a similar point in his dissenting judgment in THE

wholly inadequate to the movement for decolonization that began almost immediately after the war.<sup>72</sup>

More importantly, the Charter failed to establish anything resembling the Hobbesian sovereign that would enforce the law of the new international order. Instead, the new institutions privileged the interests and views of particular states. No supra-state agency with any effective power of legal enforcement was established.<sup>73</sup> There may have been a supra-national law on the use of force, but there were only inter-national institutions. The supra-national institutions that did develop tended to be in technical areas, for example, regimes of communication, banking, and commercial transactions.<sup>74</sup>

The institutions of the Charter were not designed to break the link between a state's perception of its vital interests and its policies on the use of force. The veto's concentration of power in the permanent members of the Security Council made this palpably self-evident. Thus, the contradiction of the Charter World: it was simultaneously a world in which use of force was legally prohibited and in which spending on and deployment of domestic military forces wildly escalated.<sup>75</sup> We had an international law of non-use of force

INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 101-04 (1953).

72. In particular, Chapter XII of the United Nations Charter, establishing an International Trusteeship System, failed to operate effectively in the transition of colonies to statehood. *See* U.N. CHARTER art. 76.

73. In contrast, European Community law and the judgments of the European Court of Justice interpreting that law have supremacy over conflicting municipal laws as well as direct effect in municipal systems. *See* PAUL CRAIG & GRÁINNE DE BURCA, *EU LAW: TEXT, CASES AND MATERIALS* 163-67, 255-64 (2d ed. 1998); *see also* J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2413-15 (1991).

74. For example, in the mid-1940s the Allied governments created the Bretton Woods System—the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the General Agreement on Tariffs and Trade (GATT). The purpose of these institutions was to facilitate economic transactions and to promote a stable economic order. *See* INT'L MONETARY FUND, *ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND* (1968); INT'L BANK FOR RECONSTRUCTION AND DEV., *ARTICLES OF AGREEMENT OF THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT* (1966); *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

75. Worldwide military spending peaked in 1987 at \$1.36 trillion. *See* U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS* 53 (1995).

and an institutional order structured around constant warfare of one form or another.

This gap between law and institutions went to the heart of the Hobbesian vision of a global rule of law that would displace the global state of nature. Putting the Security Council at the top of this system of law was like trying to establish a Hobbesian domestic order with a council of war lords at the top, instead of a decision-maker whose interests did not align with any particular factional interest. International institutions, rather than voicing the new international law, became new fora for the traditional, political clash of nation-states. The only specifically legal institution created by the Charter, the International Court of Justice (ICJ), was rendered ineffective, and in fact almost invisible, by the consensual character of its jurisdiction.<sup>76</sup> For most of the Cold War, it never occurred to anyone that the court could have a useful role to play because there was no sense that international law was normatively superior to international politics. Indeed, the structure of the Charter's provisions on the court seemed to emphasize the opposite, making enforcement of ICJ judgments a political responsibility of the Security Council.<sup>77</sup>

These institutional failures to advance from politics to law were not the result of poor design decisions; these were not technical problems in the drafting process. In the political reality that was the Cold War, there was no alternative to the veto because there was no agreement on the idea that international law could and should displace politics. The Security Council was not a forum for law beyond politics, but only another forum for a politics that had become war by other means. As the majority in the General Assembly shifted in response to decolonization throughout the 1950s and early 1960s, the

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76. Under Article 36 of the Statute of the ICJ, the court does not have jurisdiction over a dispute without the consent of the state parties involved in the dispute. See *Monetary Gold Removed from Rome in 1943 (Italy v. Fr.)*, 1954 I.C.J. 19 (June 15). When the ICJ has been aggressive in construing consent, states, including the United States, have simply refused to participate further in the merits stage of the case. See Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 288 (Lori Fisher Damrosch ed., 1987).

77. See U.N. CHARTER art. 94, para. 2.

same characterization became true there. The state was not asked to transform itself or its agenda insofar as it participated in international institutions. The Charter merely changed the fora within which the battles of the international state of nature were played out. Thus, the prohibition on the use of force admitted one explicit exception: self-defense.<sup>78</sup> This was not so much an exception to the rule as the revelation of the purpose of the rule. The rule prohibiting use of

force was all about the defense of the state. The era of the Charter rapidly became the era of the nation-state.

The Charter world was not Hobbes's world of law, but rather a world of threat and counter-threat, maintaining stability by delineating spheres of influence controlled by hegemonic powers. The Cold War confrontation produced competing military alliances that were reminiscent of European politics of the nineteenth century. These alliances determined the actions, and failures to act, of the Charter institutions. Indeed, one would be hard pressed throughout this period to find evidence that the international law on the use of force was determining state behavior. There is far more evidence the other way: the threat of force was determining interpretations of the meaning of the legal rules. Thus, it was not particularly incongruous to see the deployment of the Brezhnev Doctrine, on one side, and the Reagan Doctrine on the other.<sup>79</sup> This was the world in which the president assumed responsibility for American deployments of force and Congress acquiesced.

The late twentieth century addition to the balance of power politics of the nineteenth century was effectively to globalize the idea of the nation-state. The superpower rivalry allowed third-world nation-

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78. See Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 811 (1970).

79. Under the Brezhnev Doctrine, the Soviet Union claimed the right to intervene militarily to defend international socialism. See PETER ZWICK, *SOVIET FOREIGN RELATIONS: PROCESS AND POLICY* 92 (1990). Under the Reagan Doctrine, the United States claimed the right to intervene militarily to defend or to restore self-government. See generally W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171, 175-80 (1988) (explaining an explicit doctrine and security responsibility against communist penetration in the Western Hemisphere, evolving from the Monroe Doctrine).

alists a space within which to manage decolonization. Thus, despite the fact that this was a period of spheres of influence, it was also a period in which the nation-state emerged as the only acceptable political form. Every territory and colony—indeed every secessionist movement—sought the same thing: statehood. Only in law were all of these new states equal. Many were the accidental legacies of colonialism, with no basis in a national community and no independent economic or military base.<sup>80</sup> These were “quasi-states” supported by external powers militarily and economically, and maintained formally through an international law that insisted on state sovereignty and formal equality.<sup>81</sup> Legal appearances were hardly reality. An international law founded on an idea of state sovereignty was in large part a vehicle for maintaining a post-colonial order divided into spheres of influence within which a kind of imperial order was maintained between hegemon and client states.

Decolonization was inextricably linked to the Cold War. These new states rapidly became the sites of superpower conflict. Legally, these wars were funneled through the sole exception for use of force: self-defense and collective self-defense.<sup>82</sup> This proved a remarkably malleable concept, as each side deployed the claim of self-defense against its opponents.<sup>83</sup> In retrospect, we can see just how much the post-colonial wars were a function of the superpower confrontation. With the collapse of the Soviet Union in the late 1980s, there has been an end to the proxy wars. Latin America, except for Columbia, is substantially at peace; Southeast Asia has turned dramatically toward western economic forms—and, increasingly, political forms as well. Parts of Africa remain a disaster, but no one believes that we can understand the collapsed states there in terms of the ideological conflict that shaped the disputes a generation ago. This is not to say that peace has broken out all over. Rather, the conflicts we find can no longer be analyzed as proxy wars: they have to be understood on local terms, as conflicts among indigenous groups.

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80. See ROBERT H. JACKSON, *QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD* 21 (1990).

81. See *id.* at 21-26.

82. See Franck, *supra* note 78, at 811.

83. See *id.*

As one war after another filled the first fifty years of the Charter's life, and as the era that some had hoped would be that of a global community under law instead witnessed the apotheosis of the armed state, no one quite wanted to admit that the law of the Charter

had completely broken down.<sup>84</sup> Under these conditions, a new focus or goal of the international community emerged: human rights.

Encouraging respect for human rights was listed among the original purposes of the Charter.<sup>85</sup> Yet, human rights were not described there as elements of a global *legal* regime.<sup>86</sup> The Charter was committed to a positivist view of the origins of international law, i.e., the law was a product of state consent. At the time of the drafting, there was as yet no such consent with respect to human rights.<sup>87</sup>

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84. We need to remember that some eighty-six million people died in the military conflicts of this period, that at least 220 wars raged, and that even those societies that seemed secure—including our own—lived a hair's breath away from sudden and complete destruction. See Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591 (1998); Dr. Roy Lee, *The International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS. 505 (2000).

85. See Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901, 912-14 (1984).

86. The preamble to the United Nations Charter requires member states to "reaffirm faith in fundamental human rights." U.N. CHARTER pmb. In addition, Article 1(3) lists one of the purposes of the Charter as "promoting and encouraging respect for human rights." U.N. CHARTER art. 1, para. 3. However, no Article in the Charter imposes a legal duty on member States not to infringe upon any particular human right.

87. This is evidenced by the fact that states would only consent to the Universal Declaration of Human Rights as long as it did not establish a "treaty" obligation. See generally Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996) (discussing the significance of the Declaration of Human Rights on customary international law and its application by international and

It was, after all, still largely a world of colonial powers and colonies. At most, the Charter assumed that if states were protected from outside intervention, the governments that emerged would ordinarily be representative of the people's interests.<sup>88</sup> Human rights would develop, in other words, within secure borders. Once again, it did not work out that way.

Respect for human rights was a goal that was easy to agree to in the abstract, but difficult to make effective as a rule of law. Throughout the Cold War, agreement on human rights was purchased through an institutional commitment to nonaction. Just as governments that never disarmed agreed to a prohibition on even the threat to use force, so governments that existed in substantial part only through their suppression of human rights agreed to abstract principles of human rights. Of course not all states that agreed to the human rights agenda were hypocritical. Some thought the new focus on human rights was a necessary response to the character of those new governments that had emerged through the politics of decolonization, as well to the recent past of Europe itself; others genuinely believed in an emerging transnational community which needed to establish a normative vision against which governmental behavior could be measured; others thought the rhetoric of human rights offered a useful tool for criticizing the behavior of political adversaries.<sup>89</sup> While all these reasons operated, the critical fact was that once again the norms of international law were developing independently of international institutions.

In an era in which the entire world was held hostage to state perceptions of vital national interests, there was the birth and then substantial growth of human rights law. The great project of international law for the past fifty years has been to define the rights that accrue to individuals simply by virtue of their membership in the global community of humanity. This project of law-creation was pursued largely by academics and non-governmental organizations, even as the world continued to witness one authoritarian regime after

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national courts).

88. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 48-49 (1982).

89. See generally JACKSON, *supra* note 80, at 44-46, 139-63 (discussing the expectation of humanitarian conduct in international law).

another use the tools of state power to abuse its citizens. There was never any explanation of how the emerging international law of human rights would somehow manage to bypass the political reality of a world of nation-states gathered in hostile camps that continued to threaten each other militarily.<sup>90</sup>

Thus, we had the odd juxtaposition of law and its violation throughout this period. There were legal prohibitions on genocide, torture, murder, and discrimination; guarantees of civil and political rights including freedom of thought and religion; protections of non-combatants from the dangers of war; as well as specific protections for women and children.<sup>91</sup> Yet, there was an endless succession of conflicts in which murder, torture, and disappearances were common, in which noncombatants were targeted, in which entire groups—ethnic, religious, and political—were suppressed, dispossessed, and driven from their homes. Women were raped and abused, while children were compelled to bear arms. Governments squandered their resources on arms, while their populations suffered. The puzzle of the postwar period is to understand the relationship of law and its violation. Was it the age of human rights law or the age

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90. The Conference on Security and Co-operation in Europe began with the Helsinki Accords in 1973. The Final Act of the Helsinki Accords was signed on August 1, 1975. Conference on Security and Co-operation in Europe: Final Act, *adopted* Aug. 1, 1975, 14 I.L.M. 1292. Principle VII of the Final Act states, “participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.” *Id.* at 1295. To the surprise of the signators, the Helsinki Accords came to play a powerful role in the internal political developments in Eastern Europe, leading to the events of 1989. See Michael F. Rinzler, Comment, *Battling Authoritarianism Through Treaty: Soviet Dissent and International Human Rights Regimes*, 35 HARV. INT’L L.J. 461, 467, 482-84 (1994).

91. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 6 I.L.M. 368 (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 5 I.L.M. 350; Draft Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment, Mar. 9, 1984, 23 I.L.M. 1027 (draft only); Convention on the Rights of the Child, *adopted* Nov. 20, 1989, 28 I.L.M. 1448 (entered into force on Sept. 2, 1990).

of human rights abuse? The age of the prohibition on the use of force, or the age of war? We have to see it as both and to understand the matrix of elements that produced this paradoxical situation.

With the end of the Cold War, there has been a fundamental change. Today, the uses of force that actually threaten world order are overwhelmingly internal; they are civil, not international wars.<sup>92</sup> What is wrong with these civil wars is not that they produce large refugee flows across their borders—although they do this and it is certainly a problem. The justification for international concern, however, is not found in these consequences for other states, but in the profound offense to a moral sense—to human rights—that these conflicts produce. The fundamental, normative sense of international order has shifted from a world in which Article 2(4) is to be respected—a world of secure, sovereign states—to a world in which moral norms of individual rights are to be respected.

The international law of human rights, which owes its very existence to an institutional situation in which it was not and could not be effective, has suddenly become the normative core of a new post-Cold War global order. The gross violations of human rights in Haiti, West Africa, the states of the former Yugoslavia, Cambodia, Somalia, and Rwanda have prompted international responses. Those responses have often been inadequate, and there have been numerous failures to respond, but that there *should be* a response is now accepted. That there can be a response comes well within the range of the ordinary political imagination. Increasingly, it is the failure to intervene, not intervention that requires explanation. We saw this most dramatically, for example, in the recent intervention in East Timor.

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92. For instance, fighting in the former Yugoslavia began as an internal conflict but became internationalized when its internal borders became international borders. See CONFERENCE FOR PEACE IN YUGOSLAVIA ARBITRATION COMMISSION: Opinion Nos. 8 & 11, *reprinted in* 2 THE INTERNATIONAL CONFERENCE ON THE FORMER YUGOSLAVIA, OFFICIAL PAPERS 1284-86, 1290-93 (B.G. Ramcharan ed., 1997). The great harm inflicted upon innocent civilians through the use of force in internal conflicts is recorded in the indictment filed in the case of *Prosecutor v. Tadic*, No. IT-94-I (Int'l Crim. Trib. for the former Yugoslavia Feb. 13, 1995), <http://www.courtiv.com/casefiles/warcrimes/documents/borov.html> (indictment from the International Criminal Tribunal for the former Yugoslavia).

We are, of course, far less certain about the relative ordering of human rights and state sovereignty norms when we deal with China and Russia than when we deal with states of Africa, Southeast Asia, and Latin America. Yet the change is undeniable: the relentless discourse—academic, popular, and official—on the emerging global order continually holds up a vision of international human rights. The Cold War is a receding memory; the only deployments of force that we imagine in the short and medium term are those that would enforce human rights norms.<sup>93</sup> Even those we cast as “enemies”—for example, the regimes of Iraq, Serbia, or perhaps North Korea—we understand, within a human rights framework: it is not the people of the state, but the regime that we oppose. The people, we believe, suffer from the human rights abuses of their governments. They too are victims. These are not enemy states, but “rogue” regimes. Intervention is seen as a matter of enforcing human rights norms, even if it is the case that innocent people suffer the consequences of the intervention.

The pressing question today is not “what is the distribution of foreign affairs power between Congress and the president?” but rather, “what is the institutional mechanism through which the United States will assume its role in the emerging global order?” Too often, American constitutional lawyers see the issue here as one that rests merely on differences of political belief: is the U.S. role one of forceful, international leadership or is it one of withdrawal from entanglements abroad? Following Holmes’s dictum that the Constitution is made for people of widely different views on issues of policy,<sup>94</sup> there is a tendency to believe that interpretation of the war powers provisions must proceed in a way that is independent of such policy considerations. But this distinction between law and policy disables the debate from the beginning. The deep and complex issue here involves the manner in which two different conceptions of the rule of law will intersect in the next generation.

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93. Some international theorists worry that China may pose an emerging threat to the United States. *See generally* RICHARD BERNSTEIN & ROSS H. MUNRO, *THE COMING CONFLICT WITH CHINA* (1997).

94. *See Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

## V. CHANGING INTERPRETATIONS OF CONGRESSIONAL WAR POWERS

Every interpretation of the constitutional distribution of war powers occurs against a sense of the imaginable uses of force—the kinds of force that can be used and the ends for which it would be used. This was true at the time of the drafting, and it remains true today. A reading that renders the United States unable to defend itself or to pursue its vital interests fails a test of minimal plausibility.<sup>95</sup> Equally, however, an interpretation develops against a perception of the possible abuses of power, which a constitutional structure should be designed to mitigate. The authority to deploy force, like every other constitutional power, is simultaneously the power to pursue national interests and to commit abuses—indeed, particularly dangerous abuses. Arguments often occur because where one interpreter sees vital national interests, another sees an abuse of power.

Whether a deployment of force is perceived as necessary or abusive depends, in substantial part, on the way in which one perceives American interests to align or fail to align with the norms of the international order. Those norms, however, do not remain stable. The world of 1900—at least the developed world—was still largely structured by the Peace of Westphalia, while today's norms increasingly express a global order of human rights. In between, we experienced the rise of ideological politics, leading first to the Second World War, and then to the Cold War. To think that the vision of *United States v. Curtis-Wright Export Corp.*,<sup>96</sup> let alone the drafters' vision of 1787, is particularly relevant to the American position in this new world order is to come to the debate with a wholly inadequate set of intellectual tools, unless one is so deeply committed to an idea of American exceptionalism that nothing that actually happens in the world can make any difference. Our problem today is that scholars of constitutional law too often maintain an interpretive framework appropriate for the Cold War, insensitive to the new law of human rights.

The modern history of interpretation of the constitutional distribution of war powers begins with the war in Vietnam, and its secret

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95. *See supra* Part II.

96. 299 U.S. 304 (1936).

extension to Cambodia and Laos. The American legal scholar of the Vietnam-war era understood the problem of the use of force abroad within a broader Cold War framework.<sup>97</sup> He or she saw military intervention in Southeast Asia as yet another form of legal abuse brought about by the passions of ideological confrontation.<sup>98</sup> Just as the fear of communism led to McCarthyism and the violation of First Amendment rights at home—as well as to domestic uses of internal police forces in violation of constitutional norms—that same fear led to coercive interventions abroad. There was a single continuum of illegal behavior brought about by an ideologically induced panic. That behavior might be wiretapping at home or subversive activity abroad. Beyond subversion of political institutions abroad—for example in Guatemala, Iran, and the early years of Vietnam<sup>99</sup>—was the actual commitment of American forces. Thus, the *Pentagon Papers* case<sup>100</sup> appeared as the domestic side of a single phenomenon, the outward manifestation of which was the war in Vietnam.<sup>101</sup>

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97. See *The Legality of U.S. Participation in the Defense of Viet-Nam* (1966), reprinted in 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 583, 597 (Richard A. Falk ed., 1968); Phillip Bobbitt, *Courts and Constitutions: War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 *MICH. L. REV.* 1364, 1370 (1994).

98. See Bobbit, *supra* note 97, at 1364-66; Major Michael P. Kelly, *Fixing the War Powers*, 141 *MIL. L. REV.* 83, 88 (1993); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 *YALE L.J.* 1385, 1423 n.206 (1989).

99. See Francis A. Boyle, *International Crisis and Neutrality: United States Foreign Policy Toward the Iran-Iraq War*, 43 *MERCER L. REV.* 523, 540 (1991). See generally ZALIN GRANT, *FACING THE PHOENIX: THE CIA AND THE POLITICAL DEFEAT OF THE UNITED STATES IN VIETNAM* (1991) (describing coup attempts staged by the CIA to oust South Vietnamese President Ngo Dinh Diem); Mark Gibney, *United States' Responsibility for Gross Levels of Human Rights Violations in Guatemala from 1954 to 1996*, 7 *J. TRANSNAT'L L. & POL'Y* 77 (1997) (characterizing U.S. aid in Guatemala as covert CIA operations that advanced counter-insurgency plans).

100. *N.Y. Times v. United States*, 403 U.S. 713 (1971).

101. Those scholars that did not take this position found themselves accused of being apologists for American foreign policy. See Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 *YALE L.J.* 1991, 2001 (1995) (book review) (arguing that McDougal's position on Vietnam had an uncomfortable tendency to coincide with the outlook of the U.S. government and was more polemical than scientific); see also Detlev Vagts, *Jurisprudence For a Free Society: Studies in Law, Science, and Policy*, 87 *AM. J. INT'L L.* 335, 338 (1993) (book review) (claiming McDougal lost students be-

For the legal scholar of the Vietnam era, there was an easy assumption that international law and domestic constitutional law worked in the same alignment. They had to because law represented principled commitments above the short-term fray of political battles here and abroad. Law represented the appeal to reason as the source of social order, and the aspiration of reason is always universal. If law expresses universal principles, there must be fundamental agreement between the norms of domestic and of international law.<sup>102</sup> The task of the scholar-lawyer, then, was to affirm the norms of law in order to bring the nation back to its core principles. In doing so, law would protect those suffering from the abuses of governmental power at home and abroad.

Military intervention was viewed as a problem of power slipping out of the control of law: domestic and international. Both the domestic and the international legal orders established institutional, procedural checks on the threat of military action. Just as the Constitution set up the check of congressional approval on executive adventurism,<sup>103</sup> so the Charter set up the check of Security Council approval.<sup>104</sup> Domestically, force is only legitimate if approved by Congress; internationally, force is only legitimate if approved by the Security Council. Of course, the Security Council was not a particularly democratic institution. Nevertheless, agreement among its members would represent consensus across widely divergent systems of political beliefs: a task at least as difficult as obtaining a consensus across the different beliefs and factions represented in Congress.

Institutionally, at both the national and the international level, there were built-in biases against the use of force. Agreement to use force would always be exceptional. This mind-set produced much of

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cause of his view of expanded presidential powers).

102. American political thought to this day cannot grasp the idea that there might be substantive disagreement between international law and our own constitutional norms. *See* United States: Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, Jan. 30, 1992, 31 I.L.M. 645, 650, 659. This belief was, in part, behind the appeal of the world federalist project for a powerful world government under law. *See, e.g.,* GRENVILLE CLARK & LOUIS B. SOHN, *WORLD PEACE THROUGH WORLD LAW* (3d ed. 1966).

103. *See* U.S. CONST. art. I.

104. *See* U.N. CHARTER art. 51.

the legal scholarship on the use of force beginning with Vietnam and going right through the end of the Cold War. Scholars wrote about “foreign affairs law,” by which they meant that mix of international and constitutional law that restrained the use of force.<sup>105</sup> In checking presidential uses of force, Congress would simultaneously affirm the international legal norm prohibiting the use of force. The legal scholar was speaking to one audience when he or she insisted on adherence to both the constitutional norm of congressional responsibility and the international legal norm of Security Council approval. Neither Congress nor the Security Council was likely to be enthusiastic about the use of force in situations short of self-defense. Ironically, in just that situation of self-defense, affirmative action was required of neither institution.

In the face of a Cold War militarization of foreign policy both here and abroad, legal scholars generally found themselves arguing for an increasingly formalist view of the law of the Charter, as well as of the war-declaring power of Congress. Article 2(4)’s prohibition on the use of force was just that: a strict ban on any and all use of force outside of the mechanisms of Chapter Seven.<sup>106</sup> Similarly, the congressional war-declaring power was a ban on the use of force without congressional approval. Both were subject to a single exception: self-defense in response to armed attack.<sup>107</sup>

This straightforward appeal to text as the limit of legal interpretation had a similar effect in both dimensions of law: throughout this period there was a growing division between the law of academics and political reality. Arguments about the legal prohibition on the use of force under the Charter regime had the same air of unreality as arguments in the 1930s to the effect that the Kellog-Briand Pact had made recourse to war illegal.<sup>108</sup> The Cold War was an era of milita-

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105. See, e.g., LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); SOFAER, *supra* note 17.

106. U.N. CHARTER art. 2, para. 4.

107. Appealing to text and formalism may have been an odd position for these scholars, who in other fields of legal interpretation were more likely to pursue “dynamic” forms of interpretation. But here formalism was the key to invoking the rule of law virtues as restraints on the executive’s tendency to act unilaterally.

108. In Article 1 of the Kellog-Briand Pact the parties “condemn recourse to

rization on both the macro-level of superpower conflict and the micro-level of post-colonial regimes. Similarly, there was no relationship between the claim that only Congress could commit American forces and the actual deployments of American forces throughout the Cold War. In many places around the world, the Cold War was a hot war, and in all of those places it was the president who committed American forces. Congress rarely objected and with very few exceptions continued to fund those deployments.<sup>109</sup> Nor did the War Powers Resolution, which every president declared unconstitutional, shift the domestic balance of power with respect to the use of force.<sup>110</sup> Just as there were no international institutions able to enforce Article 2(4)'s prohibition on the use of force, there were no domestic institutions willing and able to pursue the congressional power to declare war as an enforceable rule of law. Courts steadfastly refused to get involved in this dispute.<sup>111</sup> Nevertheless, the more war slipped the bonds of law, the more the legal scholars insisted on their formal approach to law's requirements.<sup>112</sup>

The first serious assault on the idea of a symmetry of constitutional and international law occurred with the Gulf War.<sup>113</sup> The academic argument over the Gulf War was not commensurate with the

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war . . . and renounce it as an instrument of national policy in their relations with one another." Treaty for the Renunciation of War, Aug. 27, 1928, art. 1, reprinted in MANLEY O. HUDSON, BY PACIFIC MEANS: THE IMPLEMENTATION OF ARTICLE TWO OF THE PACT OF PARIS 154 (1935). Article 2 of the Pact states that the settlement of disputes will only be "by pacific means." *Id.* Hudson, like many jurists of his time, regarded Article 2 as not "a mere expression of pious hope" but as a "compulsive force of international law." *Id.* at 93.

109. See KOH, *supra* note 39, at 131-33.

110. See *id.* at 126-28.

111. In large part they declined because Congress itself was divided over its role. See generally MARTIN S. SHEFFER, THE JUDICIAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS (1999) (stating that in times of necessity, Congress will draw upon its war powers to give the president authority to act in defense of the United States).

112. The Owl of Minerva of this position is John Ely's book on Vietnam, which, though a generation too late, perfectly expresses the academic mentality of the time. See ELY, *supra* note 31.

113. See Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63 (1991); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991).

underlying issue of that conflict. After all, Iraq had invaded and annexed Kuwait. Nothing quite like this had occurred in the postwar era. The action fell squarely under Article 2(4)'s prohibition on the use of force, just as the use of force in response fell squarely within the norm of collective self-defense. Procedurally as well, the war met the academics' conditions of legitimacy—it was approved by both the Security Council and by Congress.<sup>114</sup>

Nevertheless, the war occasioned a substantial debate over the relationship of these institutions. Could the president commit American forces to a Security Council approved action in the absence of congressional approval? Did the constitutional requirement of a congressional declaration of war extend to American participation in multilateral enforcement actions authorized by the Security Council? The reason for the debate was not hard to find: this was the first post-Cold War war. The stalemate in the Security Council had been breached, and this raised entirely new possibilities. To realize these possibilities, however, required confronting the asymmetry between the constitutional order and the emerging order of international law.

One of the unanticipated benefits of the Cold War had been the dramatic development of a formal law of human rights.<sup>115</sup> If the Security Council were to take up these contemporary international law norms as the ground for a post-Cold War agenda, there would be a radical reconstruction of the ideas of state sovereignty, government

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114. For a review of the history of authorization, see J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 29-31 (1991). There is ambiguity over whether the Persian Gulf War was authorized under Article 51. Article 51 appears to subject the right of self-defense to superseding Security Council action by recognizing the right of self-defense "until the Security Council has taken the measures necessary to maintain international peace and security." U.N. CHARTER art. 51.

Whether the right of self-defense exists even after the Security Council has acted is a matter of academic debate. See, e.g., Malvina Halberstam, *The Right to Self-Defense Once the Security Council Takes Action*, 17 MICH. J. INT'L L. 229 (1995); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506 (1991); Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Interventionism*, 154 MIL. L. REV. 27, 52 (1997).

115. See *supra* Part IV.

autonomy, domestic jurisdiction, and indeed of the very nature of an international rule of law. Suddenly, international law scholars could imagine a Security Council pursuing an agenda informed by a truly transnational perspective. The center of gravity of the international legal order was shifting from Article 2(4)'s prohibition on the use of force to a regime of international human rights.

Were the Council to adopt such a program of enforcing an international law of human rights, an emphasis on Congress's war-declaring power could amount to a serious, and possibly fatal, institutional barrier. It would impose on the Council the burden of the American division of power between Congress and president. The president would be disabled from committing the United States to participate in "enforcement actions." Without the United States, the Security Council was likely to do little. Holding Security Council action hostage to the United States Congress would be a prescription for failure of the emerging vision of an enforceable, transnational order of human rights.

By 1991, there was substantial reason to believe that the Security Council might become an enthusiastic supporter of such international norms. Indeed, through the following years this is exactly what we have seen. The Security Council has repeatedly intervened in order to protect human rights. It intervened to manage transitions away from authoritarian regimes in Haiti, El Salvador, Angola, and Cambodia.<sup>116</sup> It deployed forces, or authorized such deployments, in

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116. For a selection of relevant Security Council Resolutions, see the following: S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993); S.C. Res. 1048, U.N. SCOR, 51st Sess., 3638th mtg., U.N. Doc. S/RES/1048 (1996); S.C. Res. 1063, U.N. SCOR, 51st Sess., 3676th mtg., U.N. Doc. S/RES/1063 (1996); S.C. Res. 1123, U.N. SCOR, 52d Sess., 3806th mtg., U.N. Doc. S/RES/1123 (1997); and S.C. Res. 1141, U.N. SCOR, 52d Sess., 3837th mtg., U.N. Doc. S/RES/1141 (1997) (on Haiti); S.C. Res. 673, U.N. SCOR, 45th Sess., 2949th mtg., U.N. Doc. S/RES/673 (1990); S.C. Res. 714, U.N. SCOR, 46th Sess., 3010th mtg., U.N. Doc. S/RES/714 (1991); S.C. Res. 961, U.N. SCOR, 49th Sess., 3465th mtg., U.N. Doc. S/RES/961 (1994); S.C. Res. 991, U.N. SCOR, 50th Sess., 3528th mtg., U.N. Doc. S/RES/991 (1995) (on El Salvador); S.C. Res. 696, U.N. SCOR, 46th Sess., 2991st mtg., U.N. Doc. S/RES/696 (1991); and S.C. Res. 1055, U.N. SCOR, 51st Sess., 3662d mtg., U.N. Doc. S/RES/1055 (1996) (on Angola). For a good account of UNTAC's mission on Cambodia, refer to MICHAEL W. DOYLE, U.N. PEACEKEEPING IN CAMBODIA: UNTAC'S CIVIL MANDATE

Bosnia, Croatia, Rwanda, Haiti, Somalia, and Iraq.<sup>117</sup> The reason for these interventions has not been the protection of states from violations of Article 2(4). Rather, these have been actions to defend the human rights of citizens against repressive domestic regimes. These interventions would have been inconceivable a generation earlier, either because the sites of intervention fell within the spheres of influence of the superpowers, or because the situations would have been actively contested by the superpowers.

During this same period, i.e., up until the intervention in Kosovo, no American ground forces were placed at serious military risk outside of such Security Council authorized actions.<sup>118</sup> There could not have been a sharper sign of the end of the Cold War. American forces were effectively becoming an element—the most important element—of a multilateral approach, acting under the authority of the Security Council and pursuing a human rights agenda.

During the 1990s, a practice developed of American participation in such UN approved missions. Most obviously, there has been a substantial deployment of American military forces in Bosnia as a result of the Dayton Peace agreements, and there has been a continuing deployment of American forces “policing” the Iraqi no-fly zones.<sup>119</sup> American troops participated disastrously in Somalia and

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(1995).

117. See, e.g., Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Postwar Era*, 50 U. MIAMI L. REV. 145 (1995).

118. Since 1990, the United States has committed ground troops five times, all with Security Council authorization: in Iraq (Desert Storm), Haiti, Somalia, Bosnia, and Kosovo. See *id.* at 145 n.2. There are a number of instances, however, where the United States has conducted bombing without specific Security Council authorization, including the 1993 bombing of Iraq in response to the assassination attempt on George Bush, and the 1998 strikes against Iraq for its failure to comply with UNSCOM. The United States also sent missiles into Sudan and Afghanistan without Security Council authorization. See Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19, 34-35 (2000).

119. S.C. Res. 819, U.N. SCOR, 48th Sess., 3199th mtg., U.N. Doc. S/RES/819 (1993); S.C. Res. 824, U.N. SCOR, 48th Sess., 3208th mtg., U.N. Doc. S/RES/824 (1993); and S.C. Res. 836, U.N. SCOR, 48th Sess., 3228th mtg., U.N. Doc. S/RES/836 (1993) authorized the deployment of troops following the Dayton Peace Agreements. The American policing of the no-fly zone in Iraq is pursuant to S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg.,

with mixed success in Haiti. Despite party differences, Congress allowed the President to take the political responsibility for these policies. Its typical action has been neither to support nor to prohibit the policy, but to declare its support for American forces and to provide appropriations.<sup>120</sup>

The emerging rule of the 1990s seemed to be that the president could commit American forces to participate in duly authorized enforcement actions by the Security Council.<sup>121</sup> Congress did not act to prevent such engagements; it did not insist on prior approval, and it did not press claims under the War Powers Resolution. Congressional acquiescence to American participation in such enforcement actions signified a shift in the constitutional baseline from which the use of force was measured. It was no longer plausible to argue that every substantial use of force fell within Congress's war-declaring authority. The War Powers Resolution was dying a quiet death.

As of 1998, arguably there had been an adjustment of constitutional magnitude in the manner in which American political institutions intersected with the global regime of law. United States forces were now regular elements in international police forces deployed under the authority of the Security Council. Such deployments did not fall within the traditional category of war, and were, therefore, not subject to a requirement of prior congressional authorization.<sup>122</sup> The president's duty to execute the law had expanded to include the international legal order.<sup>123</sup> That order was no longer about the protection of state sovereignty, but about the advancement of human rights. The effective check on the abuse of force would come from the Security Council, not Congress. Congress, of course, retains an ultimate authority to prohibit American participation in such police actions. It can deny funding and it has the power to issue regulations

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U.N. Doc. S/RES/678 (1990).

120. See Andrew K. Schiff, *The War Power Resolution: From the Halls of Congress to the Hills of Bosnia, Inertia Should Give Way to Post Cold-War Reality*, 11 AM. U. J. INT'L L. & POL'Y 877, 880-84 (1996).

121. See Franck & Patel, *supra* note 113, at 74.

122. See Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 111-17 (1995).

123. See generally Jordan J. Paust, *The President Is Bound By International Law*, 81 AM. J. INT'L L. 377 (1987) (explaining the president's constitutional authority and obligation to faithfully execute international law).

on the use of the armed forces.

The intervention in Kosovo, however, went well beyond this emerging institutional practice. The military action in Kosovo was not an enforcement action approved by the Security Council; it was not a police action under Chapter Seven of the Charter. Nor did it fit within the traditional norm of collective self-defense, which applies to cross-border transgressions. This was a humanitarian intervention by NATO, acting under the leadership of the United States. This was not just another post-Cold War UN authorized action; it was effectively the first post-Charter action. In this sense, it burst the parameters of the balance of domestic and international institutions that had been reached in the course of the 1990s. While Congress may have adjusted to a situation in which its war declaring functions were no longer applicable to police actions pursuant to Security Council authorizations, there were no grounds to believe it had acquiesced to executive decisions to deploy force outside of the UN framework.<sup>124</sup>

For those international law scholars that grew up in the era of Vietnam, Cambodia, Nicaragua, Grenada, and Panama, the intervention in Kosovo fit into a familiar pattern. Once again, the United States was intervening militarily in the domestic politics of a sovereign state. Once again, the U.S. intervention lacked the approval of the Security Council, and once again the intervention was fundamentally an Executive decision—that is, Congress had not passed a declaration of war. Indeed, the effort to pass a resolution supporting the action failed on a tie vote in the House.<sup>125</sup> Instead of American prestige and power being at stake in Latin America or Southeast Asia, it was now at stake in Eastern Europe. That this area was now incorporated into our zone of vital national interests was a function of Cold War developments, i.e., the dissolution of the Soviet Empire. Yet,

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124. Nor does citation to the NATO Charter help in this regard. For fifty years, NATO had been an organization of collective self-defense, operating within the parameters of Article 51 of the UN Charter. The Kosovo intervention was not action in self-defense. NATO may have assumed a new institutional role, but legal grounds for that change are no easier to discern.

125. See S. Con. Res. 21, 106th Cong. (1999) (authorizing the president of the United States to conduct military air operations and missile strikes against the Federal Republic of Yugoslavia). The resolution failed by the vote 213-213.

the pattern was as old as the Monroe Doctrine: we were once again setting out to control political developments within our unilaterally declared sphere of influence. As in the past, we had the support of reluctant allies, providing a patina of internationalism for what was essentially a United States' action.

Judged by the postwar standards of Charter law, these scholars were right to see the Kosovo intervention as illegal. Previous unilateral claims of humanitarian intervention, when pursued beyond short-term rescue missions, had met with skepticism.<sup>126</sup> If illegal under international law, there could be little argument that the president had the power to commit American forces without congressional approval—and surely he could have no such power after the “grace period” of the War Powers Resolution had run.

Nevertheless, the legal rhetoric from the Cold War was strikingly out of place in the discussion of the Kosovo intervention. The threat to the international order could not reasonably be seen as arising from the NATO intervention, unless one had an inordinate fear of the Russian response. Rather, the threat came from the policies of the Milosevic regime. Cold War categories no longer described the reality of the politics of intervention, and therefore those categories did not offer any obvious direction for legal analysis.

There is little doubt that the intervention in Kosovo had as its basis a concern for human rights. There was no good reason for the intervention from the perspective of national self-interest. It represented a substantial political risk, with little direct domestic benefit. Of course, arguments can be made that the defense of human rights and regional political stability are in the long-term interests of the United States. But if those are the national interests, then the Cold War is quite dead and national security interests are now aligned with global human rights interests. The difficulty for the critics, then, was that the human rights motives of this intervention were visible on their face; it was not credible to argue that they were a pretext for some other set of motives. To apply the Cold War law on the

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126. See STEPHEN A. GARETT, *DOING GOOD AND DOING WELL: AN EXAMINATION OF HUMANITARIAN INTERVENTION* (1999); A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* (1997).

use of force now appeared to be a kind of category mistake. This was not an extension of the Reagan Doctrine to Eastern Europe, and it was not a “humanitarian” intervention like that of India in East Pakistan.

This does not mean that the reasons for the intervention were simply the advancement of human rights, as if military interventions can now be expected wherever human rights are challenged. How NATO got to the position of intervening to defend these interests *in this case* is a different story. That is a complex history of previous failures in Bosnia, of diplomatic frustration, and of the forces of public opinion generated by media access. We should not, however, confuse this account of “why here” with the separate question of the end for which intervention occurred. That domestic politics supports an international human rights end does not somehow “taint” the end.

Neither does it challenge that end to argue that the outcome has been deficient when measured against those same rights: the returning Kosovars have committed their own violations of the rights of the Serbs. But the lack of success in this respect does not suggest that the end of the intervention was “really” the same as the ends of those who benefited from the intervention. NATO intervened to protect the human rights of those who had a political agenda that the interveners did not support: independence for Kosovo. This disagreement has continued with mixed policy results.<sup>127</sup> Yet it is a familiar lesson from domestic civil rights law that human rights often count the most when we act to protect the rights of those with whom we disagree.

In just ten years, we have learned that the institutional structure of the Charter is not adequate for the advancement of this new, substantive, international legal order of human rights. We find ourselves with a Cold War structure in a post-Cold War world. This mismatch between institutions and law was bound to come to a crisis point when the global regime of human rights intersected too closely with

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127. See Milo Branic, *Politics-Yugoslavia: Two Divergent Views of “Collateral Damage”*, INTER PRESS SERVICE, June 27, 2000; Allan Massie, *Only Way to Repair the Balkan Damage*, THE SCOTSMAN, Sept. 28, 2000, at 14; Betsy Pisik, *Clinton Pushes for More Robust U.N. Peace Force*, WASH. TIMES, Sept. 8, 2000, at A12.

the remnants of the Cold War system of alliances and spheres of influence. This is what happened in Kosovo. NATO intervened without seeking Security Council approval because there was no possibility that such approval would be forthcoming. Russia, a traditional ally of the Serbs, would have vetoed any such effort. That the United States was willing to risk its relationship with Russia through such an intervention deep into its traditional sphere of influence—and unexpectedly risk its relationship to China as well—is just another mark of how far we have come from the Cold War.

Kosovo, however, did not become a Russian Cuban Missile Crisis. Intervention in the defense of human rights does not pose the same sort of threat as the Cold War interventions. International law no longer serves to protect state sovereignty as if that is the only barrier to an anarchical return to a state of nature. Contemporary international law mitigates claims of state sovereignty by marking the point at which those outside the community have a right to express concern and even a responsibility to take action to assure that the human rights of individuals are respected.

By the time of the Gulf War, the war declaring power of Congress was effectively being challenged by an emerging global legal order in which the use of force was managed by the Security Council. By the time of Kosovo, the emerging law of human rights had become sufficiently strong to stand on its own. That law could now serve as a standard by which to measure the performance of international, as well as domestic, institutions. By that standard, the Security Council had failed in Kosovo.<sup>128</sup> The NATO intervention was, in this sense, corrective: it remedied not just the substantive violation of law by the Milosevic regime, but also the institutional failure of the Security Council.

That this corrective action was effective is suggested by the subsequent adoption of responsibility for administering and policing the

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128. See Antonio Cassese, *Ex iniuria ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT'L L. 23 (1999); see also Ved P. Naada et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law*, 26 DENV. J. INT'L L. & POL'Y 827, 865-66 (1998) (arguing that the UN should have primary jurisdiction over intervention in humanitarian crises).

situation in Kosovo by the Security Council.<sup>129</sup> That the corrective may have had some lasting effect became clear in the Council's relatively rapid reaction to the situation in East Timor, following the vote for independence.<sup>130</sup> While the Council was arguably negligent in failing to anticipate the possibility of a violent reaction to the referendum, it was able to respond forcefully to the situation as it developed. This is undoubtedly a legacy of Kosovo.

The Security Council structure represents an antiquated distribution of power. Nevertheless, it is not likely to change any time soon: the Charter amendment procedure poses too many obstacles.<sup>131</sup> Thus, we find ourselves with a mismatch between a global order of international human rights that has developed in the last generation, and an institution designed to deal with an international legal order in which state sovereignty was central. That this mismatch did not wholly stymie the development of a law of human rights was itself remarkable: more a matter of luck than design.<sup>132</sup> Nevertheless, we should expect more occasions in which the institution and the law simply do not match.

The best the law can do in such situations is nothing at all. There is no reason to defend a partially antiquated institution at a

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129. See S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., U.N. Doc. S/RES/1244 (1999).

130. See S.C. Res. 1262, U.N. SCOR, 54th Sess., 4038th mtg., U.N. Doc. S/RES/1262 (1999); S.C. Res. 1264, U.N. SCOR, 54th Sess., 4045th mtg., U.N. Doc. S/RES/1264 (1999); S.C. Res. 1272, U.N. SCOR, 54th Sess., 4057th mtg., U.N. Doc. S/RES/1272 (1999).

131. Despite a working group and long debates on the issue, any prospects for reform are stymied by the lack of consensus among states as to what type of reform should occur and the requirement that any Charter amendment receive approval by "two-thirds of the members of the General Assembly . . . including all the permanent members of the Security Council." U.N. CHARTER art. 108. See generally BARDO FASSBENDER, U.N. SECURITY COUNCIL REFORM AND THE RIGHT TO VETO: A CONSTITUTIONAL PERSPECTIVE (1998) (describing obstacles posed by the veto); David D. Caron, *Strengthening the Collective Authority of the Security Council*, in THE AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 87TH ANNUAL MEETING, MARCH 31-APRIL 3, 1993, at 303, 306-08 (1993) (describing the obstacles created by the differences in capabilities between delegations, the veto, and the size of the Security Council).

132. See *supra* notes 84-91 and accompanying text.

substantial cost to individuals and groups. The institution of the Security Council is not a good in itself; neither, for that matter, is Congress. Each must be measured in terms of the ends of a legal order, which now include both human rights and democratic legitimacy. By these measures, neither the Security Council nor Congress always comes out well.

Just as we should not fetishize our institutions, we should not freely encourage independent enforcement action by states when there is still a danger of pretextual claims. The global order of human rights has hardly displaced traditional state interests across the board. We are only at the beginning of such a world of rights. There is no rule to be formulated because every situation will call forth different kinds of reactions. Just as Congress has frequently authorized presidential deployments of force after the fact, the same may be true of the Security Council. Post-hoc authorization may be the best measure we have of the legality of a humanitarian intervention.

In the end, we must decide for ourselves whether a use of force is really dedicated to the pursuit of a global order of human rights or is only a military intervention of the old style in pursuit of national interests. If it is the latter, it deserves to be condemned. But it should be condemned for what it is substantively, not for a failure to follow an antiquated arrangement or to subordinate normative ends

to an international institutional arrangement that is itself of questionable legitimacy.

The real problem today is not a surfeit of questionable humanitarian interventions, but the failure to take up this task in many places in the world. This has been the story, most evidently, in much of Africa. In the face of gross violations of human rights around the world, I can think of no reason to set law against any effort that promises substantial amelioration. While the law alone cannot stop states from the military pursuit of their vital national interests—as they understand them—it can have some effect on a state's willingness to pursue genuine humanitarian interventions. States reluctantly intervene on such grounds; to be told it is illegal would only increase the burden.

## VI. CONCLUSION

The great project at the beginning of the new millennium is the dissolution of the state system and the emergence of a global order of law founded on the idea of human rights. This is a most uncertain project normatively and institutionally. The age of states was only in part a disaster: along with endless wars, it brought us a system of ultimate meanings by which generations defined a life project. Whether a vision of human rights can provide ultimate meanings is an open question. For the United States, in particular, transition to a new age of a global regime of rights will be the hardest of all.

Americans understand the rule of law as the political order established by the Constitution and maintained by domestic courts. The Constitution expresses the will of the popular sovereign, and the courts speak in the voice of the people even when they declare popularly supported legislation to be unconstitutional.<sup>133</sup> But the rest of the world increasingly understands the rule of law as a global order of human rights. The existence of these legal rights is quite independent of the idea of popular sovereignty. For us, sovereignty is the source of law; for others, law precedes and limits sovereignty. Because we locate law within a functional account of popular sovereignty, we are by instinct extremely reluctant to recognize any “legal” space for a nondomestic court. For us, law is not a matter for “neutral” experts; rather, it is deeply political. Political not in the sense of factional, but in the sense that it is constitutive of a national identity. International law, perhaps for us alone in the Western world, threatens our deepest sense of political identity.

The American conception of law’s rule fit well within the international law of the Cold War. The international law of state sovereignty protected every national political community from forceful intervention by others. State sovereignty and self-determination under international law were understood primarily in a territorial fashion: within its borders, each state was substantially free to work out its own political identity. Our identity has been linked to *our* conception of law, but it is a fundamental mistake to think that our domestic deification of law’s rule should make us receptive to an international

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133. See KAHN, *supra* note 6.

rule of human rights law.

The United States was the first modern state, forming itself under a constitutional ideal of democracy and law. It is the country most deeply committed to an idea of itself as a sovereign entity under law. And it is the most spectacularly successful state in all of modern history. Only in the United States is the view deeply held that we have no need of the new global order of law: we have no such need because our nationalism has been a nationalism of rights under law for 200 years. This view puts American lawyers, judges, politicians, and academics outside of the most important global project of law. Americans are increasingly bystanders in an emerging discourse of international human rights. Only in the United States is this discourse of international human rights marginalized in our political institutions. Only in our domestic courts are there so few places at which the international law of human rights can even get a foothold from which to make cognizable arguments.<sup>134</sup>

We confront two different legal orders today, one constitutional and one international. Both are actually in great flux as they try to adjust to each other. Every political instinct that we have will work against participation in a new global order of law. Ironically, our substantive understanding of law—of the rights a liberal legal regime must protect—is not significantly out of step with the emerging global order. There is no reason why it should be, since the United States has often served as the model of a successful regime under law. But our understanding of the sources of law is deeply inconsistent with this emerging order. It is not likely that we will soon substitute the international Covenant for Civil and Political Rights for the Bill of Rights. That the American adjudication of rights would care deeply about the views of the Framers, who have been gone for 200 years, and not at all about international covenants to which the United States is a party, is not just a deeply puzzling position to

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134. See *Fujii v. State*, 38 Cal. 2d 718, 722, 242 P.2d 617, 620 (1952) (concluding that human rights provisions of the United Nations Charter are non-self-executing); Alfred T. Goodwin, *International Law in the Federal Courts*, 20 CAL. W. INT'L L.J. 157, 162 (1990) (arguing that “while the courts almost daily confront issues . . . involving human rights . . . [they] have been slow to incorporate international human rights law into domestic jurisprudence”).

judges and academics elsewhere—to them it is simply irrational.

To attempt to reinvigorate Congress's war declaring role would only exacerbate this problem of incongruity. It would be an act of international irresponsibility framed as a matter of constitutional responsibility. Here, the courts have paved the way for a quiet abandonment. Congress's war powers have not been judicially enforceable; it would be a disaster were they to become so. We do not need eighteenth century solutions to twenty-first century problems.