

Introduction

The First World War contributed to the transformation of American constitutional law by expanding the economic regulatory powers of the federal government and by providing a catalyst for the expansion of personal liberties, including freedom of speech and the rights of women, racial minorities, and unionized workers. The war also profoundly affected federalism and separation of powers by aggrandizing the federal government at the expense of the states and transferring power from Congress to the president. This book will explore the political, economic, and social forces that generated such rapid changes in traditional understandings of the constitutional relationships between the federal and state governments and their citizens.

Before the war, even modest federal and state economic regulations frequently generated intense political opposition that provoked litigation subjecting such measures to searching and sometimes fatal judicial scrutiny. During the war, however, military exigencies overwhelmed political and constitutional objections to far-reaching legislation and regulations that enabled the federal government to take control of most major aspects of the economy. Although these unprecedented actions stirred considerable controversy and generated significant legal challenges, there was a general consensus that the necessities of war provided constitutional justifications for expedients that would have seemed almost revolutionary during peacetime.

As Charles Evans Hughes explained in addressing the American Bar Association's annual meeting in 1918, "Self preservation is the first law of national life and the Constitution itself provides the necessary powers in order to defend and preserve the United States." Declaring that "the

Constitution marches,” and that “we have a *fighting* Constitution,” Hughes believed that the Constitution’s language was broad enough to provide the federal government with authority to respond to the “novel and complex” problems generated by the war.¹

This “fighting Constitution” enabled the federal government to establish priorities for industrial production; regulate the manufacturing, distribution, and pricing of food and fuel; and operate the railroads, telephones, and telegraphs. The federal government also enacted the nation’s first comprehensive conscription law, which drafted more than 2 million men into military service. Efforts to conserve grain and to promote sobriety among the troops resulted in federal prohibition of the manufacture and sale of alcohol, which was constitutionalized in 1919 in the Eighteenth Amendment.

Wartime regulations permanently altered the relationship between government and private industry. Although direct government control of most major economic activities ended shortly after the war, many federal regulations remained in place in at least modified form. Moreover, many of the wartime programs provided models for federal regulatory legislation that laid the foundation for the modern administrative state during the Great Depression and facilitated judicial willingness to uphold the constitutionality of such legislation after the so-called “judicial revolution” of 1937.

The war also improved the status of women and workers insofar as they made significant contributions to the war. The war provided a major impetus for the enactment of the woman suffrage amendment to the Constitution, and it encouraged the federal government to empower trade unions and improve labor conditions. Although African Americans and other racial minorities likewise made critical contributions to the war effort both at home and abroad, the war did little to erode racial barriers and in some ways reinforced them. The wartime experiences of racial minorities, however, helped to generate self-confidence that later proved useful in various civil rights movements.

The constitutional aspect of the war that is most widely remembered is the development of modern civil liberties law. The widespread suppression of freedom of speech and press and the oppression of German Americans generated several postwar Supreme Court decisions which

¹ Charles E. Hughes, “War Powers Under the Constitution,” *Report of the Fortieth Annual Meeting of the American Bar Association* (The Lord Baltimore Press, 1917), 232, 233, 248 (emphasis in original).

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were the predicate for the nationalization of the Bill of Rights and the Court's modern role as the guardian of personal liberties.

The widespread acquiescence to President Wilson's call for war in April 1917 and the subsequent scope of unprecedented mobilization under a "fighting Constitution" were not inevitable, for the tradition of nonintervention in foreign conflicts that had been a fundamental policy since the days of Washington had kept the United States aloof from the European conflagration for more than two and a half years after war began in August 1914. Despite clamor for war among many elite Americans who had strong economic and cultural ties with Britain, most Americans supported the neutrality advocated by Wilson, who won re-election in 1916 on the slogan, "He kept us out of war." Some opponents of war claimed that members of Congress who had campaigned on an antiwar platform were breaking faith with voters.² During the debate on the declaration of war, one congressman claimed that anyone six months earlier who had wanted to send a large army "to the shambles of Europe" would have been derided "as a madman and would-be murderer" and a person who advocated military alliances with foreign nations "would have been charged with little short of crime."³ Another recalled that during the debate about the armed neutrality bill only six weeks earlier, members of Congress had agreed "that war was inconceivable, impossible, unimaginable."⁴ Pointing out that the war already had killed more than 4 million persons, the progressive lawyer and social activist Amos Pinchot asked why any American would want to embroil his nation in "the most gigantic, unparalleled catastrophe to humanity that the world has ever known" merely because "someone beats a drum."⁵ Wilson himself had agonized over his decision until hours before he appeared before Congress on April 2, 1917 to seek a declaration of war, and he acknowledged in his address that "[i]t is a fearful thing to lead this great peaceful people into war, into the most terrible and disastrous of all wars, civilization itself seeming to be in the balance."⁶

² Representative John L. Burnett of Alabama claimed that members of the House would not have won re-election if they had told voters that they were going to send young men to be "butchered 3,000 miles away from their homes." 55 Cong. Rec. 373 (April 5, 1917).

³ 55 Cong. Rec. 352 (April 5, 1917) (statement of Rep. Sloan).

⁴ *Ibid.*, 329 (statement of Rep. London).

⁵ Amos Pinchot, "Keep Out of War," *The Public*, March 16, 1917, 251.

⁶ Arthur S. Link, ed., "An Address to a Joint Session of Congress," in *The Papers of Woodrow Wilson*, Vol. 41 (Princeton University Press, 1983), 526.

In asking Congress to declare war, Wilson explained that the United States could not remain passive in the wake of Germany's new policy of unrestricted submarine warfare, which threatened American ships. Wilson also claimed that German spies were attempting to sabotage the American economy, and he mentioned Germany's offer to assist Mexico in reclaiming American territory if the United States went to war with Germany. Reiterating the theme of "peace without victory" that he had sounded ten weeks earlier in an address to Congress, Wilson vowed that Americans would fight not for territory or indemnities, but rather to "vindicate the principles of peace and justice" against "selfish and autocratic power." In his most emblematic phrase, he declared that "The world must be made safe for democracy."⁷

The word "democracy," of course, is ambiguous. Wilson presumably equated it with the American form of government, as expressed in his vision of a "New Freedom" in which white male voters would select representatives who would use the regulatory power of the state and federal governments to foster individual economic initiative and transcend parochial interests to promote their own vision of the welfare of the entire nation. Wilson's critics pointed out that most American allies, including Great Britain, Belgium, Serbia, Greece, Montenegro, Italy, Japan, and Siam, were monarchies,⁸ that Britain held far more people under colonial domination than did Germany, and that Germany had made major strides toward democracy, at least until the war began.⁹ The abdication of the Russian czar in March 1917 and his replacement by an ostensibly less autocratic government encouraged American intervention on behalf of the Allies, as Wilson emphasized in his war address,¹⁰ even though the future of Russian democracy remained highly uncertain.

The manner in which the nation might conduct Wilson's crusade for democracy also was at first uncertain, as Wilson acknowledged in his address,¹¹ particularly in the absence of any invasion and because the United States never had intervened in a war between or among great world

⁷ *Ibid.*, 519–25.

⁸ "Have We a Message to the World?" *Issues and Events*, August 4, 1917, 70; 55 Cong. Rec. 228 (April 4, 1917) (statement of Sen. LaFollette).

⁹ Pointing out that vast numbers of Germans opposed militarism and favored democracy, the only Socialist member of Congress warned that "we cannot hurt the Kaiser without striking at the German people, without killing men whose ideals are like ours." 55 Cong. Rec. 330 (April 5, 1917) (statement of Rep. London).

¹⁰ "An Address to a Joint Session of Congress," 524.

¹¹ *Ibid.*, 521 ("What this will involve is unclear.")

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powers. Although the war could have been limited to naval battles with German submarines or confined to increases in financial assistance to the Allied nations, Wilson informed Congress that he sought an ambitious role for the United States that would require the “organization and mobilization of all the material resources of the country,” and at least an additional half million men for the military forces. Congressional assent to such sweeping measures was not inevitable. Wilson’s declaration that the nation was fighting for democracy did not make it so. Many members of Congress who voted for war envisioned a much more limited enterprise. At least some believed that a declaration of war did not compel the United States to send any troops overseas, a question reserved for independent determination at a later time.¹² It was not until the autumn of 1917 that the Wilson Administration decided to send a massive army overseas.

Many Americans, even some who favored full-scale efforts to defeat Germany, did not share Wilson’s belief that the United States had a mission to spread democracy, an enterprise that they regarded as hopelessly amorphous and fraught with military and political peril. As the journalist Max Eastman observed, “This is not a war for democracy. It did not originate in a dispute about democracy, and it is unlikely to terminate in a democratic settlement . . . We will Prussianize ourselves, and we will probably not democratize Prussia. That will remain, as before, the task of libertarians within the Prussian Empire.”¹³ During the Civil War, President Lincoln’s belief that the Union was fighting to preserve democracy at home and abroad, a vision he most memorably proclaimed in his Gettysburg address, had failed to convince many Northerners that the war was justified. Wilson faced an even more difficult task in framing the war as a struggle for democracy, for the distant and ill-defined “autocracy” of Germany was a less obvious threat to democracy than was the sunder of the United States by a patrician and slave-based Confederacy.

Opponents of the war contended that Germany had a right under international law to attack vessels that were providing munitions and war materials for its foes¹⁴ and that Britain had violated international law by mining the North Sea and blockading the ports of neutral countries.¹⁵ Many opponents of war also alleged that war was a pretext

¹² 55 Cong. Rec. 219 (April 4, 1917) (statement of Sen. Kenyon).

¹³ Max Eastman, “Advertising Democracy,” *The Masses*, June 1917, 5.

¹⁴ 55 Cong. Rec. 326 (April 5, 1917) (statement of Rep. Mason).

¹⁵ E.g., *ibid.*, 230, 232 (April 4, 1917) (statement of Sen. LaFollette).

to ensure repayment of enormous American loans to the Allies, to enrich munitions manufacturers, to protect trade with the Allies, and to safeguard American markets throughout the world. American trade with Germany and Austria-Hungary declined by 99 percent between 1914 and 1916, while trade with the Allies quadrupled. By 1916, trade with the Central Powers was barely \$1 million, while trade with the Allies exceeded \$3 billion.¹⁶ Meanwhile, Americans loaned increasingly large sums to the British and French, who owed nearly \$3 billion to American investors by the end of 1916.¹⁷ “We are going into war upon the command of gold,” declared Senator George W. Norris of Nebraska two days before Congress declared war. “I feel that we are about to put the dollar sign upon the American flag.”¹⁸ Norris and other opponents of war warned that it would impoverish workers, stimulate inflation, inflict needless carnage, and violate the American tradition against meddling in the affairs of other nations.¹⁹ Although many members of Congress shared these worries, most voted for the war resolution, which carried by a vote of 88 to 6 in the Senate and 373 to 50 in the House.

The debates about the justification for the war provided a predicate for nearly all subsequent controversies concerning the constitutionality of wartime measures. The scope of the federal war powers and state police powers largely depended upon whether the threat and consequences of German victory were sufficient to warrant the enactment of measures that presumably would have been unconstitutional during peacetime. The Supreme Court often has recognized that military or economic emergencies may temper the manner in which the Constitution is construed, or else there may be no Constitution left to interpret. If German troops had sailed into any American harbor, the federal government naturally would have brushed aside any constitutional scruples that impeded efforts to repel the invasion, but the lack of any immediate threat compelled some kind of balancing test. Although this equation usually was tacit or inchoate, it was critical to the constitutional validity of conscription, most regulations of economic activity, and repression of civil liberties. To a large extent, therefore, geographical boundaries defined

¹⁶ Marc A. Eisner, *From Warfare State to Welfare State: World War I, Compensatory State Building, and the Limits of the Modern Order* (Pennsylvania State University Press, 2000), 52.

¹⁷ Paul A. C. Koistinen, *Mobilizing for Modern War: The Political Economy of American Warfare, 1865–1919* (University Press of Kansas, 1997), 129, 132–34.

¹⁸ 55 Cong. Rec. 213 (April 4, 1917).

¹⁹ E.g., *ibid.*, and *ibid.*, 359 (April 5, 1917) (statement of Rep. Browne).

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constitutional boundaries. Similarly, constitutional formulations were dependent upon arithmetical calculations about the extent to which regulations involving food, fuel, munitions, manufacturing, transportation, labor, conscription, and suppression of personal liberties were needed to protect the nation's security. Faced with questions about whether extreme measures were needed in the absence of any military emergency, the Wilson Administration and many members of Congress became increasingly apocalyptic in their insistence that Germany posed an existential threat to the United States. By August 1917, Wilson was describing the war as "the real and final battle for the independence of the United States."²⁰

Opponents of the war and critics of intrusive wartime legislation insisted that Germany had no ability or desire to invade, conquer, occupy, or govern the United States. As Representative Claude Kitchin of North Carolina pointed out in opposing the declaration of war, "no invasion is threatened. Not a foot of our soil is demanded or coveted. No essential honor is to be sacrificed . . . No part of our sovereignty is questioned."²¹ During the debate about censorship of the press a month later, Senator Oscar W. Underwood of Alabama explained that he might have favored censorship if the United States bordered the English Channel, but not "when 3000 miles of sea separate us from the enemy's country" and "when we know with absolute positiveness that no [enemy] troops can leave the Continent of Europe."²² Even if Germany somehow invaded and defeated the United States, opponents of war denied that Germany could hold or subjugate a prosperous and sprawling nation of highly educated, fiercely independent, and well-armed people, even in the unlikely event that it could enlist the support of significant numbers of German Americans. "You don't think they would eat us, do you?," asked an antiwar physician who mocked the far-fetched prospect of German conquest. "They wouldn't make slaves of us, would they?"²³ Secretary of State Robert Lansing warned, however, that Americans who regarded German invasion as improbable should

²⁰ "President Would Like to Be in the Trenches, He Says, in Message to National Draft Army," *New York Times*, September 5, 1917, 1 (reprinting letter from Wilson to Thomas L. Chadbourne, Jr., of Mayor's Committee on National Defense, New York City, August 30, 1917).

²¹ 55 Cong. Rec. 333 (April 5, 1917). ²² *Ibid.*, 2114 (May 11, 1917).

²³ Ben L. Reitman, "Why You Shouldn't Go to War – Refuse to Kill or Be Killed," *Mother Earth*, April 1917, 41.

remember that the improbable, yes, the impossible, has been happening in this war since the beginning . . . The day has gone by when we can measure possibilities by past experiences or when we believe that any physical obstacle is so great or any moral influence is so potent as to cause the German autocracy to abandon its mad purpose of world conquest.²⁴

With the hindsight of German ambitions and atrocities during World War II, Lansing's caveat may have more resonance today than it did in 1917.

Wilson's address to Congress also foreshadowed tensions about separation of powers that would generate intense controversy throughout the war even though Congress nearly always would acquiesce to the president. As a political scientist at Princeton, Wilson had advocated a "congressional government" similar to the British parliamentary system, in which a strong executive who commanded a legislative majority would have a free hand in crafting domestic and foreign policy. As president, Wilson tended to model himself as a prime minister, taking the initiative to propose legislation to Congress. This worked well for him during his first term, when Democratic majorities in both houses enacted many of the domestic reforms embodied in his New Freedom program. In foreign policy, however, Wilson tended to forget that a prime minister works closely with his cabinet and must remain sensitive to the opinions of the legislators who sustain his government. Members of his own party balked at many of the measures that he proposed for war preparedness during 1916, and 11 senators in February 1917 successfully blocked his request to arm merchant ships, which he subsequently undertook to do pursuant to his power as commander in chief.

Wilson failed to share his war address with any of his Cabinet members, even refusing to speak with two who asked to see it.²⁵ He explained to Colonel Edward M. House that Cabinet members would have picked it to pieces with criticisms. House confided in his diary that Wilson should not have humiliated his Cabinet in this manner, and that Wilson seemed increasingly "impatient of any initiative on their part."²⁶

In his address to Congress, Wilson did not specifically request a declaration of war but rather requested Congress to "formally accept

²⁴ Louis F. Post, "War Patriotism," *The Public*, October 19, 1917, 1010 n.8, citing "War Information Series," No. 5, pp. 3–9, published by the Committee on Public Information.

²⁵ Daniel D. Stid, *The President as Statesman: Woodrow Wilson and the Constitution* (University Press of Kansas, 1998), 126.

²⁶ "From the Diary of Colonel House," April 2, 1917, in Arthur S. Link, ed., *The Papers of Woodrow Wilson*, Vol. 41 (Princeton University Press, 1983), 529.

the status of belligerent which has thus been thrust upon it.”²⁷ This subtle distinction shifted the role of Congress from deciding whether there would be a war to determining whether it would endorse the war that Wilson had declared to exist.²⁸ Wilson framed the issue cleverly, for recognition of a war that Germans had thrust upon peace-loving Americans could ameliorate allegations that Congress was unduly bellicose, while rejecting the German challenge could make Congress vulnerable to charges of cowardice. Wilson further underscored his imperious wartime role by announcing that his administration would take the initiative to draft legislation on all aspects of the war for congressional consideration.²⁹

Many members of Congress resented what they regarded as Wilson’s intrusion on their power. “Congress is vested by the Constitution with the power to declare war,” declared Representative Mayer London of New York. “Is it a mere clerical duty that we are to perform?”³⁰ In response to widespread calls to “stand by the President,” Charles Henry Sloan of Nebraska urged his colleagues to “stand by the Constitution and Congress in this great deliberation,”³¹ and Harry E. Hull of Iowa vowed to “stand by the people,” deploring “the unseemly way” in which the war resolution was “railroaded through Congress.”³² Ernest Lundeen of Minnesota refused “to crown the President with kingly powers.”³³ At least one member of Congress complained that Wilson exceeded his constitutional prerogative by drafting the war resolution,³⁴ and another chided his colleagues for “washing their hands” and placing “the responsibility upon the one man who under the Constitution does not have that responsibility.”³⁵ Some members who voted for war vowed that they would scrupulously exercise their constitutional duty of independent judgment in determining whether to follow Wilson’s later recommendations involving sensitive issues such as conscription and taxation.³⁶ Members who opposed the war, however, warned that members of Congress were deluding themselves if they believed that they could defer to Wilson’s request for war and yet reserve independent judgment on the president’s proposals for the conduct of the war.³⁷

²⁷ “An Address to a Joint Session of Congress,” 521.

²⁸ See Stid, *The President as Statesman*, 127.

²⁹ “An Address to a Joint Session of Congress,” 522. ³⁰ 55 Cong. 329 (April 5, 1917).

³¹ *Ibid.*, 351. ³² *Ibid.*, 347. ³³ *Ibid.*, 363. ³⁴ *Ibid.*, 351 (statement of Rep. Sloan).

³⁵ *Ibid.*, 327 (April 4, 1917) (statement of Rep. Mason).

³⁶ *Ibid.*, 354 (April 5, 1917) (statement of Sen. Lenroot).

³⁷ E.g., *ibid.*, 356–57 (statement of Rep. Reavis).

Many opponents of the war insisted that entanglement in the European conflagration was so momentous that Congress should conduct a national referendum and abide by the verdict of the voters. This suggestion complemented proposals for a constitutional amendment to require a national plebiscite for a declaration of war that peace activists had advocated for many years before 1917.³⁸ Senator Asle Gronna of North Dakota argued that the American people should make the decision because they were “the ultimate sovereign power of this country” and would bear the enormous consequences of war. Gronna also alleged that pro-war congressmen had failed to respect the constitutional right of the people to petition the government insofar as they had dismissed as “noisy clamor” the many letters, telegrams, and petitions with which so many citizens had pleaded with Congress to avoid conflict.³⁹ Members of Congress who favored a referendum claimed that communications that they had received from constituents overwhelmingly opposed war.⁴⁰ Senator Robert M. LaFollette, Sr. of Wisconsin alleged that advocates of war did not dare submit the question to the people because they knew that the people would oppose it “by a vote of more than ten to one.” LaFollette argued that preparations for espionage legislation and conscription provided “complete proof” that the war lacked popular support.⁴¹

Opponents of a referendum complained that it would trifle with the constitutional powers of Congress.⁴² *The New Republic* warned that it would be useless because government decisions “must be composed of an intricate series of problems which cannot be isolated. On most points the answer is not yes or no but a course of action with many ramifications of detail.”⁴³ Challenging this opinion, *The Public* declared that “[w]hatever ramifications of detail be involved, the question of war can be properly answered with yes or no. A negative answer means that no matter how the alleged cause of dispute may be settled, there must be no war concerning it.”⁴⁴

Despite initial uncertainty about the scope of the war and ongoing questions about its purpose, the Wilson Administration quickly

³⁸ See David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution 1777–1995* (University Press of Kansas, 1996), 317.

³⁹ 55 Cong. Rec. 220 (April 4, 1917).

⁴⁰ *Ibid.*, 224 (April 4, 1917) (statement of Sen. LaFollette); *Ibid.*, 327 (April 5, 1917) (statement of Rep. Mason); *Ibid.*, 362 (statement of Rep. Lundeen).

⁴¹ *Ibid.*, 228 (April 4, 1917). ⁴² Post, “War Patriotism,” November 2, 1917, 1055–56.

⁴³ *The New Republic*, February 24, 1917, 92.

⁴⁴ *The Public* (unsigned editorial), March 2, 1917, 196.