Defending the Union: Andrew Jackson's Nullification Proclamation and American Federalism

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Defending the Union: Andrew Jackson's Nullification Proclamation and American Federalism

Matthew S. Brogdon

Abstract: This essay contends that we can better understand Andrew Jackson's distinctive account of federalism by looking outside the Jeffersonian and Jacksonian political traditions. More appropriate peers for Jackson, as a constitutional statesman, are John Marshall and Abraham Lincoln. Existing treatments of Jackson miss these connections because they focus primarily on his roles as party leader and reformer, to the neglect of his constitutional statesmanship. A major cause of this neglect is the apparent inconsistency between Jackson's "nationalist" account of the Union in the Nullification Proclamation and his advocacy of "states' rights" elsewhere, a tension that can be resolved by a closer reading of Jackson's rhetoric. Among other things, this redefinition of Jackson's legacy demonstrates that there is no necessary tension between a strong union and meaningful limits on federal power; nor is there a necessary affinity between narrow construction of federal power and state-compact theory.

While Andrew Jackson's roles as party leader and president receive extensive treatment in the existing literature, his contributions as a constitutional statesman—as an expositor and custodian of the constitutional order—receive little sustained attention.[1] But Jackson's constructive role in the development of the most fundamental features of the constitutional order, especially the federal system, deserves the same extensive treatment as his role in the development of Jacksonian democracy and the modern party system.[2] This essay therefore seeks to redefine Jackson's place in American

This article would not be in print without a great deal of encouragement and helpful criticism from David and Mary Nichols. Thanks are also due to Marty Medhurst, in whose graduate seminar the ideas contained herein were first conceived, and to the anonymous reviewers from the *Review of Politics* for their incisive criticism and fruitful suggestions.

[1]"Statesman," as used in this article, should be understood as a gender-neutral term.

[2]By focusing on the question of federalism, this discussion is the first step in a reassessment of Jackson's place in American constitutional development. His construction of separation of powers was also prescient and, like his account of the union, has

constitutional development and contends that we can better understand his distinctive arguments by looking outside the Jeffersonian and Jacksonian political traditions; more appropriate peers for Jackson as a constitutional statesman are John Marshall and Abraham Lincoln. These three hold in common a coherent account of the Union—its democratic foundation, its supremacy, and its perpetuity—that forms the cornerstone of American constitutionalism and finds its fullest articulation in Jackson's Nullification Proclamation. Among other things, this redefinition of Jackson's legacy demonstrates that there is no necessary tension between a strong union and meaningful limits on federal legislative power; a powerful government is not necessarily an extensive one.

We will proceed by first examining the existing literature on the nullification controversy, which has undersold Jackson as a constitutional statesman because it relies too heavily on the preconceived categories of antebellum federalism. These categories find their fullest explication in the Webster-Hayne debate of 1830 and the ensuing controversy that culminated two years later in South Carolina's attempt to nullify the federal tariff law. This debate provides the context necessary to appreciate the distinctive account of the Union that Jackson provides in his proclamation. We will see that Jackson defies the familiar categories and demands comparison with other great constitutional statesmen of the early republic. In particular, we will demonstrate the remarkable similarities between Jackson's construction of federal power in his veto messages and Marshall's treatment of federalism in *McCulloch v. Maryland*, as well as the pervasive influence of Jackson's proclamation on Lincoln's response to secession. Conventional wisdom would see little affinity among these three statesmen, but Jackson's construction of the Constitution has far more in common with Marshall's and with Lincoln's than conventional wisdom would have us believe. The existing literature overlooks similarities of this sort because it fails to draw a clear distinction between Jacksonian democracy and Jackson's democratic constitutionalism, conflating Jackson's own construction of the Constitution with that of the political movement he spawned.

The Misconstruction of Andrew Jackson

Taking their cue from Henry Clay, scholars find pervasive inconsistency in Jackson's exposition of the federal principle, citing especially the supposed

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continuing relevance for the American political order. Surprisingly, though, competent treatments of Jackson's contribution to separation of powers have been limited primarily to tangential discussions in broader analyses of the presidency. See, e.g., David K. Nichols, *The Myth of the Modern Presidency* (University Park, PA: Penn State University Press, 1994), chaps. 1 and 4.

disparity between his "nationalist" account of the Union in the Nullification Proclamation and his advocacy of "states' rights" elsewhere. Responding to South Carolina's attempt to nullify the tariff law, Jackson's proclamation identified the Constitution as a sovereign act of the people of the United States and denied to the states any constitutional role in passing upon the constitutionality of federal laws. Furthermore, Jackson insisted that the Constitution created a perpetual union. As an extraordinary, sovereign act of the whole people, only a similar act of the whole people was sufficient to dissolve it; to attempt to dissolve the Union by other means was either treason or revolution. The states therefore possessed no constitutional power to nullify federal laws or to withdraw from the Union.[3]

Among Jackson's unionist contemporaries, the proclamation produced both admiration and puzzlement. The president who had persistently vetoed internal improvements and who had "killed" the national bank now produced a comprehensive and uncompromising defense of federal supremacy. Perhaps more surprisingly, Jackson's proclamation espoused the view that federal courts were the last resort for states aggrieved by federal laws, a position that must have seemed anomalous to contemporaries who had witnessed the president's animus toward John Marshall's Supreme Court.[4] Jackson's proclamation addressed the most divisive institutional questions of antebellum American politics in a way that few of his contemporaries anticipated. The heir to Jefferson's states' rights mantle had turned to the old Federalist doctrines of popular ratification, perpetuity, and judicial finality to defend the Union. The proclamation evoked admiration from unlikely sources such as Daniel Webster, Joseph Story, and John Marshall, men with whom Jackson was continually at odds in the policy battles of the 1820s and '30s. "Since [Jackson's] last proclamation and message the Chief Justice and myself have become [the president's] warmest supporters," Justice Story wrote to his wife in January of 1833, "and will continue so just as long as he maintains the principles contained in them."[5] Meanwhile, other of Jackson's contemporary political opponents marveled at the contrast between the president's energetic defense of federal supremacy in the proclamation and his apparently weak vision of federal power elsewhere. Comparing the forceful rhetoric of the proclamation with the president's conciliatory posture toward the nullifiers in the annual message delivered six

[3]Andrew Jackson, "Proclamation," December 10, 1832, in *A Compilation of the Messages and Papers of the Presidents*, ed. James D. Richardson (New York: Bureau of National Literature, 1897), 3:1203–19.

[4]Of course, nothing that Jackson had said or done with respect to Georgia's defiance in the face of the *Worcester* decision or in opposition to the national bank denied either the validity or the finality of judicial review. See, e.g., Richard P. Longaker, "Andrew Jackson and the Judiciary," *Political Science Quarterly* 71, no. 3 (1956): 341–64.

[5]Joseph Story to Sarah Waldo Story, January 25, 1833, in *Life and Letters of Joseph Story*, ed. William Whetmore Story (Boston: Little and Brown, 1851), 2:119.

days earlier, Henry Clay wondered at the change in the president's tone. "One short week," he wrote, "produced the message and the proclamation—the former ultra on the side of state rights, and latter ultra on the side of consolidation." Clay was at a loss as to how the two might be reconciled.[6] As president, Jackson had used the veto to chip away at the Hamiltonian edifice—especially the national bank and federally funded internal improvements—while Clay sought to perpetuate and enlarge it with the American System. Jackson's contemporaries regarded the messages that accompanied Jackson's bank veto and the veto of the Maysville Road bill—along with the Virginia and Kentucky Resolutions of 1798–99—as paradigmatic specimens of the states' rights position. The annual message that preceded the proclamation appeared to be in line with this. Thus, Jackson's sudden and enthusiastic defense of national power in the proclamation seemed to Clay to be a clear repudiation of decentralization and states' rights.

Much of the existing literature on Jackson mirrors Clay's puzzlement. The most prominent modern accounts of the nullification controversy, while offering a more nuanced reading of Jackson's rhetoric, have nonetheless tended to perpetuate the assumption that there is a fundamental disparity between his advocacy of federal supremacy in the proclamation and his rhetoric of states' rights expressed elsewhere. According to Richard E. Ellis, Jackson's proclamation "offered a theory about the origins and nature of the Union that in many ways differed radically from the states' rights position he had taken less than a week earlier in his annual address." By arguing that the Union preceded the states, that the federal government is supreme within its sphere of action, and that the Constitution was formed by the people of the United States, Jackson "undercut the constitutional-ideological underpinnings of states' rights in general" and "downplayed the states' rights position he had taken throughout his first administration." Indeed, "Jackson seemed now to be endorsing a nationalist theory of the origins of the Union."[7] Similarly, Donald B. Cole concludes that Jackson, "intent on winning over the people and suppressing nullification," overstated his case. The proclamation was a manufactured divergence from the genuine states' rights view Jackson had earlier espoused.[8] Forrest McDonald, taking a somewhat different approach, contrasts Jackson's vehement response to South Carolina's nullification with his complacency in the face of Georgia's defiance of the Supreme Court earlier that same year and concludes that the vehemence of the proclamation flowed from "entirely personal reasons: South Carolina's nullification was closely identified with a man Jackson hated [John C. Calhoun], and the

[6]Clay to Francis Brooke, December 12, 1832, in *Private Correspondence of Henry Clay*, ed. Calvin Colton (New York: A. S. Barnes, 1855), 344–45.

[7]Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York: Oxford University Press, 1987), 84 and 179.

[8]Donald B. Cole, *The Presidency of Andrew Jackson* (Lawrence: University Press of Kansas, 1993), 161 and 179.

state had refused to vote for his reelection."[9] Jackson emerges from these accounts either an unprincipled pragmatist or a man at the mercy of his passions.

It is difficult to take Jackson seriously as a constitutional statesman if his vigorous assertion of federal supremacy was merely an anomaly produced by unexamined prejudice, personal animosity, or unprincipled pragmatism. It is no surprise, then, that the proclamation has garnered attention primarily for its practical effect and for what it tells us about Jackson's personality, not for the quality of its arguments. To cite one glaring example of this neglect, Arthur M. Schlesinger's seminal work, *The Age of Jackson*, deals with Jackson's role in the nullification crisis in fewer than three pages and declines altogether to deal with Jackson's constitutional arguments, focusing instead on the effect of the proclamation on Jacksonian democracy.[10] Even more surprising, though, is the neglect of the proclamation in constitutionally grounded analyses of American federalism. Michael Les Benedict's otherwise insightful essay on antebellum federalism, for example, scarcely notices the proclamation, quoting it only once and giving it no sustained discussion.[11]

Two recent Jackson biographers, Robert V. Remini and H. W. Brands, give Jackson a more sympathetic reading. They characterize the proclamation as a genuine product of Jackson's convictions and attribute to him greater agency in the development of its ideas.[12] Likewise, Kenneth M. Stampp, on whom Remini relies heavily, has argued that Jackson's proclamation comes closer "to being the definitive statement of the case for perpetuity [of the Union]" than any other extant specimen of constitutional interpretation.[13] Yet none of these scholars attempt to reconcile the (supposed) tension between Jackson's doctrine of federal supremacy and his decentralizing policy platform. Thus, Jackson's most able defenders ignore rather than confront the assumptions of inconsistency and impure motives that pervade the existing literature.

The Nullification Controversy

Without a coherent account of Jackson's views, it is impossible to determine accurately his place in American constitutional development. Therefore,

[9]Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776–1876* (Lawrence: University Press of Kansas, 2000), 107–9.

[10]Arthur M. Schlesinger Jr., *The Age of Jackson* (Boston: Little, Brown, 1950), 95–97.

[11]Michael Les Benedict, "Abraham Lincoln and Federalism," *Journal of the Abraham Lincoln Association* 10, no. 1 (1988): 11.

[12]Robert V. Remini, *Andrew Jackson and the Course of American Democracy, 1833–1845* (New York: Harper and Row, 1984), 16–23; H. W. Brands, *Andrew Jackson: His Life and Times* (New York: Doubleday, 2005), 475–82.

[13]Kenneth M. Stampp, "The Concept of a Perpetual Union," *Journal of American History* 65, no. 1 (1978): 5–33.

any treatment of Jackson as a constitutional statesman must address the place of the Nullification Proclamation both within Jackson's constitutional thought and within the historical context of the nullification controversy. The existing literature examines Jackson's account of the federal principle using categories it derives largely from partisan clashes in Congress, especially the Webster-Hayne debate of 1830. These categories are inadequate, though, because the elements from which Jackson constructed his account of the federal principle formed a peculiar combination that set him apart from his contemporaries. Both Daniel Webster's nationalism and Robert Hayne's compact theory differ significantly from Jackson's defense of federal supremacy in the proclamation. Those few scholars who have attempted to look beyond the familiar categories have traced the argument of the proclamation to Edward Livingston's speech in the long debate that followed Webster and Hayne's exchange, making much of the fact that Livingston would later serve as principal draftsman of Jackson's proclamation.[14] There are, however, important distinctions between Livingston's defense of the Union and Jackson's. Thus, none of the competing accounts of the Union in the Webster-Hayne debate adequately captures the sophistication of Jackson's argument in the proclamation. A brief discussion of the nullification controversy will demonstrate the distinctiveness of Jackson's position as well as the necessity of looking beyond the partisan divisions of antebellum political debate.

The nullification controversy emerged from a deteriorating economic situation in the South, which cotton men traced to the protective tariff. Amid rising tension, South Carolina's legislature sent a message of protest to the Senate in 1828 denouncing the protective tariff as an unconstitutional exercise of federal power and suggesting as a possible remedy the nullification of federal law by the state.[15] Then Vice President John C. Calhoun had mapped out the rationale behind the South Carolina doctrine in a lengthy "exposition" later published by the state legislature. Calhoun advocated a "rigid construction" of the Constitution that prohibited Congress from collecting protective tariffs. The limitations of the Constitution, however, are not self-enforcing, and Calhoun did not believe that the federal courts afforded adequate security against the expansion of national power. The

[14]See, e.g., Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 1999), chap. 3.

[15]The message is generally known as the South Carolina Protest, which the legislature adopted in December of 1828 to express the state's disapprobation of the new tariff law. Calhoun, then vice president to John Quincy Adams and Jackson's vice president-elect, secretly drafted the document. The Protest was prefigured by an anonymous report known as the South Carolina Exposition, one draft of which was written in Calhoun's own hand. For a brief discussion of Calhoun's connection to the Exposition and Protest, see Ross M. Lence, ed., *Union and Liberty: The Political Philosophy of John C. Calhoun* (Indianapolis: Liberty Fund, 1992), 311–12.

Southern minority could not rely upon a "technical system of construction," such as that employed by courts, to maintain balance in the federal system. Such security could be found only "in the reserved rights of the States themselves" to impede the enforcement of unconstitutional laws.[16]

According to Calhoun, this right of the state to interpose its power between its own citizens and unconstitutional exercises of federal power flowed from its reserved sovereignty. "The right of judging, in such cases, is an essential attribute of sovereignty—of which the States cannot be divested without losing their sovereignty itself—and being reduced to a subordinate corporate condition." To admit the right of the federal government to decide the extent of its own power "is to convert it, in fact, into a great consolidated government, with unlimited powers, and to divest the States, in reality, of all their rights."[17] Calhoun further argued that the power to determine when nullification and interposition were appropriate rested with the people of a state assembled in convention, a suggestion that would soon bear fruit.

Two years after publication of the South Carolina Exposition and Protest, Daniel Webster of Massachusetts and Robert Y. Hayne of South Carolina locked horns in the Senate over the nature and origin of the Union. Following Calhoun's rationale closely, Hayne argued that the Constitution is a compact to which the individual states are parties. "Before the formation of the constitution, each State was an independent sovereignty, possessing all the rights and powers appertaining to independent nations [and] after the Constitution was formed, they remained equally sovereign and independent, as to all powers, not expressly delegated to the Federal Government."[18] The compact among the states was among sovereign equals. Thus, the correct analogy for the federal system, according to Hayne, is a treaty-based league of sovereign states.[19] In the case of a dispute over the extent of the federal government's powers, the sovereign states must individually judge the merits of the dispute. For, in absence of a "common superior, it results, from the very nature of things, that the parties *must be their own judges*."[20] Hayne interprets the Constitution as though it were a treaty and therefore subject to construction by the individual parties to it. Hayne, following Calhoun's lead, treats the states as nations existing as a result of history and custom rather than as a result of agreement or contract. The states are therefore the locus of

[16]John C. Calhoun, "Rough Draft of What Is Called the South Carolina Exposition," in *Union and Liberty*, 313 and 348 (hereafter cited as "South Carolina Exposition").

[17]Calhoun, "South Carolina Exposition," 348.

[18]Speech of Robert Y. Hayne, January 27, 1830, in *The Webster-Hayne Debate on the Nature of the Union*, ed. Herman Belz (Indianapolis: Liberty Fund, 2000), 165.

[19]Hayne continued: "All sovereigns are of necessity equal, and any one State, however small in population or territory, has the same rights as the rest, just as the most insignificant nation in Europe is as much sovereign as France, or Russia, or England" (ibid., 166).

[20]Ibid.

sovereignty, while the federal government, being wholly artificial and contractual, is a mere creature or agent of the states.

Responding to Hayne and Calhoun's account of the Union, Webster argued that the whole people, in their sovereign capacity, ratified the Constitution and that it was therefore meant to serve their collective interests, not the interests of individual states.[21] The reserved powers of the states are subject to the determinations of the people of the United States. "We are all agents of the same supreme power, the People," Webster argued. "The General Government and the State Governments derive their authority from the same source."[22]

In reply to Hayne's argument that the federal government cannot judge the extent of its own powers, Webster appealed to the text of the Constitution. The Supremacy Clause of Article VI declares the Constitution of the United States and laws *made in pursuance thereof* to be the supreme law of the land, "any thing in the Constitution or laws of any State to the contrary notwithstanding." Article III extends the judicial power "to all cases arising under the Constitution and laws of the United States." According to Webster, the text had thereby settled on the Supreme Court the power to decide controversies over whether a law was "made in pursuance" of the Constitution. "These two provisions, sir, cover the whole ground. They are, in truth, the key-stone of the arch. With these, it is a Constitution; without them, it is a Confederation."[23] A reserved right in the states to resist federal law would constitute a substantive return to the Articles of Confederation.

Webster's doctrines of federal supremacy and of the origin of the Constitution in the people did not, of themselves, lead inevitably to support for expansive national powers. Webster's contemporaries, however, conflated his constitutional arguments for federal supremacy and perpetual union with a preference for the policies of the American System, whether they opposed or supported it. Hayne, for one, did not see how the federal government could be popular and supreme, yet limited in its powers. Webster's theory held that the sovereign people had delegated limited powers to the state and national governments alike. Hayne challenged the practicability of this kind of sovereignty that doles out power as it pleases. If the federal government is not a creature of the states, he argued, it must be the creator of the states. He would not entertain the possibility that the state and national governments alike are creatures of the sovereign people, both to some extent contractual and artificial.[24]

Nonetheless, Hayne was not without cause in associating Webster's argument with expansive national power. Webster's rhetoric had invited the

[21]Speech of Daniel Webster, January 26 and 27, 1830, in *Webster-Hayne Debate*, 126.
[22]Ibid.
[23]Ibid., 137.
[24]See the speech of Robert Y. Hayne, in *Webster-Hayne Debate*, 167.

association.[25] In particular, Webster's claim that the American nation preceded the Constitution suggested that it was the Union rather than the states that enjoyed legislative sovereignty as an incident of nationhood. The resulting conflation of a nationally democratic account of the Constitution's origin with the politics of the American System may explain Clay's characterization of Jackson's proclamation in 1832 as "ultra on the side of consolidation."[26]

The exchange between Hayne and Webster sparked a larger debate that would continue on the Senate floor for over a month. On March 9, Edward Livingston of Louisiana rose to speak. The young Southerner carefully positioned himself between Hayne and Webster by opposing nullification while eschewing the popular origin of the Constitution. As Livingston put it, "the danger of establishing on the one hand a constitutional veto in each of the States ... and, on the other, the dangers which result to the State Governments by considering that of the Union as entirely popular ... seem both of them to be so great, as to justify, and indeed demand, an expression of my dissent from both." Livingston instead argued that the federal government was of a mixed character.[27] Taking up the argument Madison had mapped out in *Federalist*, No. 39, Livingston relocated his emphasis from the origins of the Constitution to its institutional components, citing particularly equal representation in the Senate and the role of the state legislatures in ratifying and amending the Constitution.[28] These institutional elements all give to the Constitution the nature of a compact among states. "In short, the Government had its inception with [the states]; it depends on their political existence for its operation; and its duration cannot go beyond theirs."[29]

Nonetheless, Livingston ultimately finds that the balance is on the side of what he called a "popular government" as opposed to a compact among states. He defines the former, in contradistinction to a league of states, as one that is founded on consent and that, most importantly, "operates in all its departments directly upon the people." In this regard, the Constitution gives birth to a government that "acts in the exercise of its legitimate powers directly upon individuals, and not through the medium of State authorities. This is an essential character of a popular Government."[30] When

[25]See, for example, the closing passage of Webster's second reply to Hayne, in *Webster-Hayne Debate*, 143–44.

[26]See note 6 above and accompanying text.

[27]Speech of Edward Livingston, March 9, 1830, in *Webster-Hayne Debate*, 459.

[28]See Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 250–57.

[29]Speech of Edward Livingston, in *Webster-Hayne Debate*, 461.

[30]Ibid., 462. As Whittington writes of Livingston's speech to the Senate, "Instead of emphasizing the unity of the people in a single nation, Livingston thought it was sufficient to establish the strength of the Union to emphasize the general government's power of enforcement, including the constitutional recognition of treason as a

Webster had spoken of popular government, he meant a government that has its *origin* in the people rather than the states. Livingston, in contrast, means by popular government one that *acts* directly on the people rather than the states. He goes on to point out that Article VI of the Constitution requires every state legislator and every executive or judicial officer of a state to give an oath to support the Constitution. "To whatever power the citizen owes allegiance," Livingston argues, "that power is his sovereign. There cannot be a double, altho' there may be a subordinate fealty."[31] The Constitution itself made clear that obedience to federal law takes precedence over obedience to state law. Livingston therefore concludes that it matters not whether the Constitution received its authority from the states in their political capacity or from the citizens of the United States in their collective capacity; federal supremacy is clear from the terms and institutional character of the Constitution itself. Livingston thus avoids the debate over the origins of the Union altogether, just as Madison had ducked the issue in *Federalist*, No. 39.

Jackson's Democratic Constitutionalism

The Webster-Hayne debate provoked a great deal of controversy but settled nothing. Congress neither repealed nor reduced the tariff and dissatisfaction in Southern states continued to build. In 1831, Calhoun made his support of nullification public with the Fort Hill Address, in which he further elaborated the constitutional rationale for nullification that he had articulated in the South Carolina Exposition.[32] Congress did finally pass a new tariff law in 1832, but the reductions fell far short of the South's expectations. The growing tension in South Carolina politics finally erupted. In November, a state convention—of the sort envisioned by Calhoun—directed the state legislature to nullify the federal tariff law and to impede its enforcement in the state. Jackson issued a conspicuous yet calm warning to the nullifiers in his annual message on December 4, subtly threatening to put down nullification by force if necessary.[33]

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federal crime. The President was obliged to enforce the laws of the general government, and if any form of resistance to those laws was a reserved power of the state, then there should be a correlative federal duty to respect those rights laid out in the Constitution. Instead, the federal enforcement power was absolute" (Whittington, *Constitutional Construction*, 85–86).

[31]Speech of Edward Livingston, in *Webster-Hayne Debate*, 462.

[32]John C. Calhoun, "The Fort Hill Address," July 26, 1831, in *Union and Liberty*, 367–400.

[33]Jackson wrote to Congress, "Should the exigency arise rendering the execution of the existing laws impracticable from any cause whatever, prompt notice of it will be given to Congress, with a suggestion of such views and measures as may be

Jackson did, nonetheless, offer an olive branch in his annual message. He argued that the "policy of protection must be ultimately limited to those articles of domestic manufacture which are indispensible to our safety in time of war." Indeed, he urged that "the whole scheme of duties" be reduced "as soon as a just regard to the faith of the Government and to the preservation of the large capital invested in establishments of domestic industry will permit."[34] It was probably this suggestion—which had little to do with constitutional doctrine—that led Clay to characterize the annual message as "ultra on the side of state rights."[35] A week later, on December 11, 1832, Jackson issued his Nullification Proclamation to the people of South Carolina. The president left no room for doubt regarding his resolve to enforce the law. Citing his duty "to take care that the laws be faithfully executed," Jackson "warn[ed] the citizens of South Carolina who have been deluded into an opposition to the laws of the danger they incur[red] by obedience to the illegal and disorganizing ordinance of the [South Carolina] convention [that presumed to nullify the federal tariff law]."[36]

Of course, almost no one, not even Calhoun, denied constitutional supremacy in theory. The states were bound to permit the enforcement of all laws "made in pursuance" of the Constitution. The central question in the nullification controversy, at least on the face of things, was therefore one of constitutional interpretation. This is why Hayne and Calhoun had insisted that the proper analogy for the Union was a treaty among foreign nations; each party judges the terms of a treaty for itself, there being no common judge between sovereigns.[37]

Jackson decisively rejected Calhoun's argument that individual states—and, by extension, a sectional coalition of states—may judge the extent of federal power. He recognized only "two appeals from an unconstitutional act of Congress—one to the judiciary, the other to the people and the States" through the amendment process.[38] The Constitution was not a compact among states, but a sovereign act of the people of the United States. Unlike Livingston, Jackson had no qualms about asserting the nationally democratic origins of the Constitution to bolster his case for federal supremacy. The involvement of the states in its framing and ratification notwithstanding, the Constitution was, to Jackson's mind, a sovereign act of the

deemed necessary to meet it" (Andrew Jackson, "Fourth Annual Message," December 4, 1832, in *Messages and Papers of the Presidents* 3:1162).

[34]Ibid., 1161.

[35]See text accompanying notes 6 and 7 above.

[36]Jackson, "Proclamation," 1215. For an account of the resulting compromise that ended the crisis, see Merrill D. Peterson, *Olive Branch and Sword: The Compromise of 1833* (Baton Rouge, LA: Louisiana State University Press, 1982).

[37]See text accompanying notes 18–20 above.

[38]Jackson, "Proclamation," 1205.

American people collectively.[39] Two weeks after the issuance of the proclamation, Jackson reiterated this point in a letter to Vice President-elect Martin Van Buren.

> The true Republican doctrine is, that the people are the sovereign power, that they have the right to establish such form of Government they please, and we must look into the constitution which they have established, for the powers expressly granted, the ballance [sic] being retained to the people, and the States.[40]

Jackson pounded away at the South Carolina doctrine with what Remini calls his "fundamental creed: The people are sovereign. The Union is perpetual."[41] Jackson's core assumption is that no government possesses sovereignty proper, but that all legitimate governments are constitutional and thus limited. The only sovereign, the only source of constitutional authority, is the people. The people, through sovereign constitutional acts, set boundaries to the exercise of political power. The Constitution, as an extraordinary act of the sovereign people, delegates certain powers to the federal government and places explicit limits on the powers of the state and federal governments alike. In order to discern the proper boundaries between state and federal power, one must look to the terms of the Constitution.

At first glance, Jackson's argument is indistinguishable from Webster's nationalism, but a closer reading of the proclamation reveals key differences. When Jackson first gives an account of the Founding, he carefully avoids the assertion that the United States was a nation prior to the adoption of the Constitution. "In our colonial state, although dependent on another power, we very early considered ourselves as connected by common interest with each other." This language is significantly different from Webster's claim that Americans were a single people in 1774. It suggests instead that a people constitutes itself as a people—"we ... considered ourselves connected." Jackson goes on to note that even before 1776, the colonies had formed leagues for common defense and "were known in [their] aggregate character as *the United Colonies of America*." The Declaration of Independence was issued as a joint act, but "when the terms of our Confederation were reduced to form it was in that of a solemn league of several states," which would act as a nation "for the purpose of conducting some certain domestic concerns and all foreign relations."[42]

Jackson is here subscribing, not to the hard nationalist line that nationhood preceded the Constitution, but to the view that there had always been some

[39]Ibid., 1211.

[40]Jackson to Martin Van Buren, December 23, 1832, in *Correspondence of Andrew Jackson*, ed. John Spencer Bassett, vol. 4 (Washington, DC: Carnegie Institution, 1929), 504.

[41]Remini, *Andrew Jackson and the Course of American Democracy*, 21.

[42]Jackson, "Proclamation," 1206.

political tie among the States. It was, furthermore, a connection formed by "common interest," not nationhood, as Webster would have it. Jackson emphasizes the artificial or contractual character of the national government. The national government had an essentially mixed character prior to the adoption of the Constitution. It was not an expression of nationhood, but neither was it merely a league of sovereign states. Jackson's account of the Union's origins thus stands in contrast to those of Webster and Calhoun alike. Whereas Webster and Calhoun describe political origins in terms of a social process, Jackson describes political origins in terms of contract and artifice.

Later in the proclamation, however, when Jackson denies the right of states to secede from the Union, he goes further toward an account of the Founding in which nationhood precedes the Constitution. "Under the royal Government we had no separate character; our opposition to its oppressions began as *united colonies*. We were the *United States* under the Confederation, and the name was perpetuated and the Union rendered more perfect by the Federal Constitution. In none of these stages did we consider ourselves in any other light than as forming one nation."[43] This account of the Union is in some sense consistent with Webster's, but it is tempered by his earlier qualification that these national ties were formed by artificial constitutive acts: the Articles of Association produced by the First Continental Congress in 1774, the Declaration of Independence, the Articles of Confederation, and the Constitution. Jackson is depreciating nationhood in favor of perpetual union. The Constitution does not simply create a political order for an existing people; the Constitution itself constitutes—or reconstitutes—that people as a nation.

Even if Jackson did not fully embrace Webster's nationalism, his claim that the Constitution was "made in the name and by the authority of the people of the United States, whose delegates framed and whose conventions approved it" threatened to alienate many within the Democratic Party.[44] If any position was associated with the expansion of national power in the 1830s, it was the contention that the Constitution was ratified by the people as citizens of the United States rather than as citizens of the several states. Weeks after the president had committed himself to this position, Van Buren continued to urge him to abandon it, warning, "the present is not a season for the settlement or discussion of abstract propositions," especially when such "doctrinal points of the proclamation ... might perhaps have been omitted without weakening the force or probable effect of that document." Van Buren feared especially that challenging the state-compact theory of the Union's origins might alienate Virginia and ally her with South Carolina.[45] He was

[43]Ibid., 1213.

[44]Ibid., 1206.

[45]Martin Van Buren to Jackson, December 27, 1832, in *Correspondence of Andrew Jackson* 4:507.

not far off the mark. John Marshall described the reception of the proclamation in the Virginia legislature.

> That paper astonished, and for a moment silenced them. In a short time however the power of speech was recovered; and was employed in bestowing on its author the only epithet which could possibly weigh in the scales against the name of "Andrew Jackson," and countervail its popularity. ... They said Andrew Jackson had become a Federalist,—even an ultra federalist. To have said he was ready to break down and trample on every other department in the government would not have injured him but to say that he was a Federalist—a convert to the opinions of Washington was a mortal blow under which he is yet staggering.[46]

Jackson's insistence on the nationally democratic foundation of constitutional authority in the face of such opposition and against the repeated advice of Van Buren only confirms that Jackson's position in the proclamation was not a mere whim of passion. By tracing the Constitution to an act of the people as a whole, Jackson went beyond the approach we have seen Livingston use to find a middle way between Webster's nationalism and Hayne's compact theory. Livingston's argument that the Constitution establishes a compact among states in some respects and a popular government in others was a safe route that effectively answered the nullifiers without upsetting Southern moderates, who embraced state-compact theory but rejected nullification. For Jackson, in contrast, the popular origin of the Constitution presented no difficulty. In order to avoid the conflict between states' rights and the Constitution's origin that Livingston and Van Buren feared, Jackson makes a distinction between the origin of the Constitution's authority, which is popular and national, and the institutional character of the Constitution, which is a mixture of national and federal elements. Livingston and Van Buren had failed to see how the mixed character of the government could be distinguished from its unmixed origin in an act of the people.

Admittedly, there is nothing especially original about this view of American constitutionalism. Publius in *The Federalist* as well as Marshall in *McCulloch v. Maryland*, among others, articulated something very close if not identical to it.[47] However, Jackson, unlike most other purveyors of this doctrine, did not articulate it in pursuit of a more extensive federal government. Thus, he presents the rare case of one who affirmed both the nationally popular origin of constitutional authority and federal supremacy, but simultaneously placed real limits on the expansion of federal power. As Michael Les Benedict observes, committed nationalists in the antebellum

[46]Marshall to Joseph Story, December 25, 1832, in *The Papers of John Marshall*, ed. Charles F. Hobson, vol. 12 (Chapel Hill: University of North Carolina Press, 2006), 248.

[47]See, for example, Hamilton, *Federalist*, No. 78, in *The Federalist*, 524–26; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402–6 (1819).

period—Webster and Story, for instance—accepted "that the Constitution must impose some limit to the use of delegated power," but they rarely seemed to encounter a federal policy that exceeded that limit.[48] Jackson stands out as the one vigorous defender of federal supremacy and the nationally democratic origin of the Constitution in this period who set real limits to federal power and took action to maintain them. This is precisely why "democratic constitutionalism" is an appropriate label for Jackson's theory of politics. He preserves both the democratic and constitutional elements of the American political order, refusing to discount one in favor of the other.

For all his emphasis on the origin of the Union, Jackson's argument against nullification and secession did not ultimately require that the Constitution originate with the people. Jackson answered the nullifiers by arguing as well that the Constitution formed a government, not merely a league. Even if one admitted the Constitution to be a compact among the states, he claimed, still no state would be constitutionally entitled to nullify federal law. The states, rather than the people, had been the parties to the Articles of Confederation, Jackson admitted, and "under its operation we could scarcely be called a nation." But even then, "no State could legally annul a decision of the Congress or refuse to submit to its execution."[49] It was so proclaimed by the express terms of the Articles, under which the states had bound themselves to "abide by the determinations of Congress on all questions which by that Confederation should be submitted to them."[50] The Articles had bound states to permit the execution of federal laws, but contained no provision for enforcement. "Congress made requisitions, but they were not complied with. The Government could not operate on individuals."[51]

As a remedy for this deficiency of power, the Constitution of 1787 supplied the government of the Union with adequate executive and judicial powers. The evident motive behind framing the Constitution was to allow the federal government power to execute its laws directly on individuals rather than indirectly through the state governments.

> The allegiance of [the states'] citizens was transferred [by the Constitution], in the first instance, to the Government of the United States; they became American citizens and owed obedience to the Constitution of the United States and to laws made in conformity with the powers it vested in Congress. ... How, then, can that State be said to be sovereign and independent whose citizens owe obedience to laws not made by it and whose magistrates are sworn to disregard those laws when they come in conflict with those passed by another?[52]

[48]Benedict, "Abraham Lincoln and Federalism," 19.
[49]Jackson, "Proclamation," 1206.
[50]Articles of Confederation, art. XIII.
[51]Jackson, "Proclamation," 1206.
[52]Ibid., 1213.

As Whittington points out, Jackson follows Livingston in emphasizing the executive power of the federal government as a decisive institutional factor in establishing its supremacy over and independence from the states.[53] It is important to keep in mind, though, that while this institutional argument for federal supremacy owes much to Livingston, Jackson undergirds it with the claim that the Constitution originates in an act of the whole people, a claim Livingston carefully avoided in his own arguments.[54]

Sensing the specter of secession behind South Carolina's claims, Jackson argued that secession was likewise indefensible even given the assumptions of the state-compact theory. Prefiguring Lincoln's defense of the Union three decades later, Jackson made the perpetuity of the Union the cornerstone of his argument. The Articles of Confederation, he argued, had declared the union of the states under it to be perpetual. "Can it be conceived that an instrument made for the purpose of *forming a more perfect union* than that of the Confederation could be so constructed by the assembled wisdom of our country as to substitute for that Confederation a form of government dependent for its existence on the local interest . . . of a State?"[55] The Union could not be made "more perfect" by becoming more soluble. Even had this language been absent, perpetuity was supported by the right of self-defense that inhered in nations. No government could countenance, much less support, the right of a member state to dissolve it. Moreover, Jackson argued that the Constitution is not a mere treaty and thus cannot be dissolved by one of the parties to it. It may only be legally dissolved as it was created: by a sovereign act of the states or of the people collectively, depending upon which theory of the Union's origins one accepted. All other attempts to dissolve the Union or nullify its laws are either revolutionary (if just) or treasonous (if unwarranted). "Secession, like any other revolutionary act, may be morally justified by the extremity of oppression; but to call it a constitutional right is confounding the meaning of terms." In essence, the nullifiers and secessionists were staging a revolution while denying that the government had any power to resist them. But Jackson refused to let them have it both ways. Calling secession a constitutional right, he averred, is merely a means "to deceive those who are willing to assert a right, but would pause before they made a revolution or incur the penalties consequent on a failure."[56]

[53]Whittington, *Constitutional Construction*, 85–86.

[54]The distinction between Livingston and Jackson on the matter of popular sovereignty is also critically important because it helps to demonstrate Jackson's control over the argument of the proclamation. For a detailed account of the drafting of the proclamation and Jackson's agency in crafting its argument, see Remini, *Andrew Jackson and the Course of American Democracy*, 16–23.

[55]Jackson, "Proclamation," 1206.

[56]Ibid., 1212.

Since Jackson's refutation of nullification and secession did not require his theory of the origin of the Constitution in the people, why did he devote so much of the proclamation to a discussion of it? In the first place, Calhoun's theory began from the premise that the states had entered the Union as independent sovereignties and must therefore be treated as sovereign nations entering into a league. Demonstrating that the individual states had never really acted as independent sovereignties but had, since the inception of their resistance to British rule, acted as a unified whole with respect to their common concerns cut Calhoun's argument off at the knees. More important, the popular basis of constitutional authority had implications beyond the case at hand. To Jackson's mind, political power detached from the sovereign people was at best a benign tyranny. Legitimate power flows from the people. Thus, to admit that the Constitution derived its authority from some source other than the people would diminish its greatness. Extending this rationale, Jackson had defended independent executive action on the premise that the institutional powers of the presidency flowed from its connection to the people through the Constitution.[57] Even if one could admit the compact theory of the Constitution and still refute the claims of nullification and secession—as Jackson would proceed to do—the admission would severely degrade both the Union and the presidency.[58]

Furthermore, Jackson's recourse to state-compact theory was merely provisional and prudential. It does not qualify the strong nationalist and popular bent of his argument against nullification. It was evident that no matter what Jackson said, many partisans would never surrender the assumptions of the compact theory. Jefferson and Madison's Virginia and Kentucky Resolutions of 1798–99 had attained the status of gospel truth in much of the South, leading even John Marshall to despair of the future of the Union. "In the South, we are so far gone in political Metaphysics that I fear no demonstration can restore us to common sense." Marshall wrote to Joseph Story, "The word 'State Rights,' as expounded by the resolutions of 98 and the report of 99, construed by our legislature, has a charm against which all reasoning is vain."[59] Jackson himself, speaking of state-compact theory in the

[57]See, for example, Jackson's defense of the independence and unity of the executive in his protest message to the Senate following the removal of government deposits from the national bank (Andrew Jackson, "Protest," in *Messages and Papers* 3:1288–1312).

[58]Prompted by similar concerns, Madison included "want of ratification by the people" in his list of the defects of the Articles of Confederation. Without a foundation in popular consent, Madison warned, the Union was susceptible to the twin evils of nullification and secession. Popular ratification would be the primary remedy. See James Madison, "Vices of the Political System of the United States," April 1787, in *James Madison: Writings*, ed. Jack N. Rackove (New York: Library of America, 1999), 73–74.

[59]Marshall to Joseph Story, July 31, 1833, in *Papers of John Marshall* 12:291.

proclamation, echoed Marshall's observation. "Fallacious as this course of reasoning is, it enlists State pride and finds advocates in the honest prejudices of those who have not studied the nature of our Government sufficiently to see the radical error on which it rests."[60] Thus, it was quite sensible for Jackson to offer an account of federalism palatable to moderate adherents of state-compact theory. It strengthened his position and lent an air of compromise to the proclamation while forcing him to concede nothing. It could only help his cause.

Jackson and the American Political Tradition

Jackson's advocacy of federal supremacy was so emphatic and went so far toward the nationalist account of the Union that many Democrats felt betrayed and alienated. It seemed that Jackson had abandoned Jeffersonian orthodoxy for the old Federalist heresies. But Jacksonians failed to see the extent to which Jackson's reading of the Constitution shaped both his response to the nullification crisis and his advocacy of decentralized government. Jackson replaced the compact-theory basis for states' rights with a constitutional foundation for decentralization, an account that was not destructive of federal supremacy or the perpetuity of the Union. In spite of Jackson's careful explication, Jacksonian Democrats continued to exaggerate the tension between the popular foundation of the Constitution and states' rights. Even though the Democratic Party ultimately retained its Jacksonian label, Jackson's successors in the White House would eschew his understanding of federalism. The constitutional arguments of James K. Polk and Franklin Pierce owed more to Calhoun—and to Jefferson—than to Jackson. Thus, Jacksonian democracy became something quite distinct from Jackson's democratic constitutionalism.

Indeed, one might say that this is precisely the ground of confusion in the literature on Jackson as a constitutional thinker. Most scholarship on Jackson's political career is more concerned with Jacksonianism, Jacksonian democracy, the Age of Jackson, or the Jacksonian persuasion than with Jackson himself. Focusing on Jackson instead of these other concepts allows us to see a deep but subtle resonance among Jackson's, Marshall's, and Lincoln's accounts of the Union. Following the nullification crisis, Democrats attempted to maintain the continuity between the Jeffersonian and Jacksonian elements of its heritage. But Jacksonians failed to see the important, principled differences not only between Calhoun and Jackson but also between Jefferson and Jackson. It is a recognition of those differences that establishes a certain kinship between Jackson the Democrat and both Marshall the Federalist and Lincoln the Republican, thus creating a more complex and interesting view of American constitutional development and of the importance of

[60]Jackson, "Proclamation," 1211.

certain shared constitutional assumptions among the three greatest defenders of the Union in the nineteenth century.

Jackson and Marshall on Construction of Federal Power

Not only does Jackson's account of the Union—its source of authority, its perpetuity, its supremacy—echo John Marshall's, his approach to constitutional construction in his veto messages bears a striking resemblance to Marshall's construction of federal power in *McCulloch v. Maryland*. Both Calhoun's doctrine of state sovereignty and Jefferson's strict construction of Congress's Article I powers will serve as points of contrast that highlight the affinity between Jackson's understanding of federal power and Marshall's.

When Calhoun erected the barrier of state sovereignty against the exercise of federal power to mitigate the effects of the Supremacy Clause and the doctrine of implied powers, he was facing down the problem that the Constitution clearly delegated powers that in their exercise conflicted periodically with the interests of individual states. Both the Necessary and Proper Clause and the Tenth Amendment clearly recognized implied powers in Congress. Particularly problematic was the precise language of the Tenth Amendment, which reaffirmed that the federal government was one of delegated powers. Its language was largely taken from the second article of the Articles of Confederation, which read, "Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation *expressly* delegated to the United States, in Congress assembled."[61] The Tenth Amendment, while it made explicit the doctrine of delegated powers, omitted the term "expressly" from the formulation and it was clear that those who framed its language had quite consciously done so. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[62] Omission of the term "expressly" was an implicit acknowledgment of the possession of implied powers by the federal government.[63]

The Supremacy Clause of Article VI aggravated the problem by binding the state governments to permit the enforcement of all federal laws "made in pursuance" of the Constitution. As we have seen, Calhoun attempted to mitigate the force of the Constitution's language by his doctrine of state

[61]Articles of Confederation, art. II.

[62]US Constitution, amend. X.

[63]The most commonly cited source for this interpretation of the Tenth Amendment is Marshall's opinion in McCulloch v. Maryland, 17 U.S. at 406–7. For a critique of Marshall's argument, see Kurt T. Lash, "The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and 'Expressly' Delegated Powers," *Notre Dame Law Review* 83, no. 5 (2008): 1889–1956.

sovereignty and his argument that the Constitution aims to secure the self-governance of state majorities in the management of their own affairs. Calhoun concluded that the Constitution should not be presumed to contain any power inconsistent with the autonomy of the states in the management of their internal affairs. Such reasoning read federal supremacy and implied powers out of the Constitution and thereby rendered the document closer in effect to the Articles of Confederation.

Jefferson resolved the problem of implied powers in much simpler fashion. He simply denied that there was any significant difference in the way powers ought to be construed under the Articles of Confederation and under the Constitution. The difference lay primarily in the addition of enumerated powers, not in the addition of implied powers. In Jefferson's classic opinion on the constitutionality of the national bank, drafted while he was secretary of state to Washington in 1789, he thus held that Congress could exercise only those powers that were expressly enumerated in the Constitution.[64] Instead of reading the Necessary and Proper Clause as an expansion of implied powers, he read it as a limitation of them. "Necessary and proper," he averred, means that Congress may employ only those means that are necessary to the achievement of the end, means without which the end could not be accomplished. Thus he formally recognized Congress's implied powers but set such narrow bounds to them that they dwindle to insignificance. Jefferson warned that a more lenient construction would swell the powers of the federal government beyond control.[65] While Jefferson's solution to the problem of implied powers did not go as far as Calhoun's state-sovereignty argument—at least, not in 1791—the bedrock principle he proposed was the same. The guiding principle of constitutional construction must be the preservation of self-rule by the states.[66]

Looking to Jackson's veto messages, we find an interpretation of the Necessary and Proper Clause and a construction of federal power substantially different from both Calhoun's and Jefferson's. In the Maysville Road veto, Jackson wrote, "such grants have always been professedly under the control of the general principle that the works which might be thus aided should be 'of a general, not local, national, not state,' character. A disregard of this distinction would of necessity lead to the subversion of the federal system."[67] The relevant question for Jackson is whether the system of

[64]Thomas Jefferson, "Opinion on the Constitutionality of the Bill for Establishing a National Bank," in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al., vol. 19 (Princeton: Princeton University Press, 1974), 275–80.

[65]Ibid., 277–78.

[66]Ibid., 279.

[67]Andrew Jackson, "Veto Message," May 27, 1830, in *Messages and Papers* 3:1050. One problem with this interpretation of Jackson is his occasional use of the term "expressly" when speaking of the delegated powers of the federal government. See, for example, the quotation accompanying note 40 above. Jackson's use of the term

improvements serves a legitimate national legislative purpose, one falling within the ends prescribed by the Constitution. This is fundamentally similar to Marshall's analysis in *McCulloch*: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited ... are Constitutional."[68] If the end is prescribed by the Constitution, and the means is both tailored to achieve that end and does not violate the prohibitions contained in the Constitution, the exercise of power is constitutionally permissible. The purposes of funding internal improvements included the facilitation of interstate commerce and the more efficient provision of the common defense. Jackson was willing to accept this argument as long as there was a discernible connection between the particular expenditure and its ostensible purposes. He acknowledged the difficulty of distinguishing between improvements that actually serve a legitimate purpose and those that do not. "What is properly *national* in its character or otherwise is an inquiry which is often extremely difficult of solution." This standard was, "however, sufficiently definite and imperative to [Jackson's] mind to forbid [his] approbation" of the Maysville Road bill.[69] While there could be no bright line, there was nonetheless a boundary.

The similarity with Marshall is amplified when one views the contrast with James K. Polk's internal improvements veto in 1846.[70] "The Constitution has not, in my judgment," wrote Polk, "conferred upon the Federal Government the power to construct works of internal improvement within the States, or to appropriate money from the Treasury for that purpose."[71] Polk declares the improvements unconstitutional because the power to erect them is not explicitly enumerated in the Constitution, a position that is closer to Jefferson's opinion on the bank than to Jackson's argument in the Maysville Road

ignores, on its face, the substantive change between the Articles of Confederation and the Tenth Amendment. There are at least two plausible explanations for this. Perhaps Jackson considered the Necessary and Proper Clause to be an express delegation of authority to Congress, albeit an express delegation of implied powers. Or, more plausibly in my view, Jackson's use of the word was merely a shorthand—and inaccurate—way of articulating the fact that he took the delegated character of federal power seriously, unlike Clay and Webster who seemed to equate implied powers with a general police power.

[68]*McCulloch*, 17 U.S. at 421.

[69]Jackson, "Veto Message," 1050–51.

[70]See Alfred H. Kelly, Winfred Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 7th ed. (New York: Norton, 1999), 202.

[71]James K. Polk, "Veto Message," August 3, 1846, in *Messages and Papers* 6:2310; see also Polk, "Veto Message," December 15, 1847, in *Messages and Papers* 6:2460, and "Fourth Annual Message," December 5, 1848, in *Messages and Papers* 6:2506.

veto. There is no balancing or weighing to determine whether the proposed improvement furthers a legitimate constitutional purpose. Diverging further from Jackson's position, Polk even suggested that Congress lacked the power to improve navigable waterways in furtherance of interstate commerce or the common defense. Polk defends this construction of federal power by drawing a dichotomy between improvements of a local character that "can benefit only the particular neighborhood in which they are situated" and those "immediately connected with our foreign commerce." Only the latter are proper objects of appropriations.[72] Polk thereby sweeps under the rug the whole complicated business of *interstate* commerce. He leaves no mystery as to his reasons for drawing this artificial dichotomy between local and foreign commerce. Echoing Jefferson, Polk warns that any admission of an intermediate category of improvements pertaining solely to interstate but not foreign commerce would "concede the *principle* that the Federal Government possesses the power to expend the public money in a general system of internal improvements, limited in its extent only by the ever-varying discretion of successive Congresses and successive Executives." Polk further cautions Congress that the funding of improvements that in any way benefit one section or locale will "produce combinations of local and sectional interests" locked in a "disreputable scramble for the public money."[73] Limiting expenditures to objects within the stream of foreign commerce would avoid such sectional and local inequities.

Polk's formulaic construction of federal power is symptomatic of a general disparity between Jackson and his Jacksonian successors. As David Currie argues, "Succeeding Democratic Presidents—and John Tyler, who had turned Whig because he thought Jackson too *generous* in his interpretation of federal power—took increasingly narrow views of congressional authority over internal improvements."[74] The fact that Polk and the other Jacksonians accepted the legitimacy of some improvements does not discredit Currie's generalization. As Currie notes, Polk acquiesced in the construction of lighthouses, piers, and buoys to facilitate safe navigation of the coast only because such improvements dated from the first Congress. Picking up where Polk left off, Franklin Pierce approved an 1854 appropriation to remove obstructions from the Cape Fear River only because the obstructions were the result of earlier actions of the federal government. Barring this exceptional instance, Pierce insisted that Congress's power to regulate commerce permitted it to improve navigation only by use of lighthouses, beacons, buoys, and other such devices to point out hazards and obstructions; Congress could not go further and simply remove the obstructions or construct a canal. Pierce

[72]Polk, "Veto Message," in *Messages and Papers* 6:2312, 2314.

[73]Ibid., 2314.

[74]David Currie, *The Constitution in Congress: Democrats and Whigs, 1829–1861* (Chicago: University of Chicago Press, 2005), 16.

warned that if Congress were allowed to go this extra step and construct a canal or a harbor, there would be no principled means of distinguishing such improvements from the construction of highways and railroads, leading inevitably to a "general system" of improvements.[75] Here we find another of Jackson's successors drawing a bright line, not because the text of the Constitution demands it, but because subsequent Congresses and presidents might fail to distinguish reasonable applications of the interstate commerce power from unreasonable ones. James Buchanan's veto messages merely continued the pattern.[76] Whereas Jackson had accepted the hazy boundary that the Framers had drawn between federal and state authority, the Jacksonians repeatedly insisted on demarcating the extent of federal authority with bright lines.

Even on the matter of the national bank, where Jackson bore the Jeffersonian mantle most explicitly, his argument hinges on a premise not inconsistent with Marshall's in *McCulloch*. His central argument is that the court's determination that the bank is constitutionally legitimate does not preclude him from vetoing the recharter on grounds of policy as well as constitutionality. Jackson argues that the Constitution provides guidance for policymakers beyond what the court may enforce. To put it another way, the president and Congress may, in the use of their legislative discretion, read constitutional limits more strictly (though not more broadly) than the court in the use of its judgment. After quoting from Marshall's opinion, Jackson notes that the "principle here affirmed is that the 'degree of its necessity' ... is a question exclusively for legislative consideration. ... Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* ... or *unnecessary* and *improper*, and therefore unconstitutional."[77]

Thus, Jackson argues that he is following Marshall in holding that the political branches may subject policies to more rigorous scrutiny than the Court does. Jackson's argument does appear accurate when compared with Marshall's opinion.[78] "Where the law is not prohibited," Marshall writes,

[75]Franklin Pierce, "Veto Message," December 30, 1854, in *Messages and Papers* 7:2798.

[76]Currie, *The Constitution in Congress*, 19–24, 33–36.

[77]Jackson, "Veto Message," 1146. As Longaker explains at greater length, Jackson did not take a position in the bank veto on the finality of the Court in *striking down* a federal law; he merely denies its finality in *upholding* one. Thus, he does not take a position on whether the executive may nonetheless enforce a law after the judiciary declares it unconstitutional. See Longaker, "Andrew Jackson and the Judiciary."

[78]There is a possible tension between Jackson's argument and Marshall's opinion. Jackson claims that, by finding the bank to be an unnecessary and improper means of pursuing the objects entrusted to the government, he is declaring it unconstitutional. He assumes that the Necessary and Proper Clause is not merely a grant of discretion to the political branches, as Marshall suggests, but an enforceable

"and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground."[79] Marshall finds that the incorporation of a national bank is a means tailored to achieve objectives delegated to the care of the federal government and is therefore a constitutionally legitimate policy. Having vindicated the bank, Marshall qualifies his decision by noting that the Court is not competent to decide whether a given policy is necessary or proper within the meaning of the last clause of Article I, section 8 of the Constitution. This, he says, is a determination to be made by the political branches. And that is exactly what Jackson does in vetoing the recharter of the bank.

Jackson's federalism, therefore, flows from an effort to limit the powers of the federal government by use of terms internal to the Constitution and consistently with federal supremacy. He declined to follow Jefferson's and Calhoun's efforts to erect the autonomy of the states as the touchstone of constitutional construction. A charitable reading of Jackson would describe his arguments in the proclamation and veto messages alike as an effort to narrow the range of potential federal policies to fit within constitutionally prescribed ends and constitutionally legitimate means. In other words, Jackson appreciated the fact that the Constitution sets broad outer bounds to politics within which a range of policies can be legitimately pursued. This stands in contrast to the use of doctrinal arguments by Calhoun and his progeny to foreclose a political settlement. The distance between Jackson and nationalists such as Marshall is exaggerated by the tendency to conflate Jackson's policy platform and his construction of the Constitution. What differences there are stem primarily from policy considerations rather than constitutional doctrine.[80]

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constitutional standard. The clause is not *judicially* enforceable because its language is too ambiguous to admit of a legal construction. The practical consequence of these two positions, at least in the case of the Necessary and Proper Clause, is the same.

[79]*McCulloch*, 17 U.S. at 423.

[80]I am indebted to one of the anonymous reviewers for observing that my thesis may explain Jackson's appointment of Supreme Court Justices John McLean and James M. Wayne. Scholars often assume that these two appointments were mistakes given their divergence from later Jacksonian presidents and from Chief Justice Roger B. Taney on the issues of slavery and federal economic power. See, e.g., Remini, *Andrew Jackson and the Course of American Democracy*, 266–69. Calling them mistakes assumes, of course, that Taney and the Jacksonian presidents were the true heirs to Jackson's constitutional views, a premise this article challenges. Exploration of their jurisprudence and its connection with Jackson's constitutional arguments would form a fruitful object of analysis, but must be left for another essay.

Jackson and Lincoln on the Character of the Union

Lincoln's first inaugural emulates the rhetoric of the Nullification Proclamation to a remarkable degree. Citing the Articles of Association, the Declaration of Independence, and the Articles of Confederation, as had Jackson in the proclamation, Lincoln begins from the premise that the "Union is much older than the Constitution."[81] Here a subtle similarity between Lincoln and Jackson emerges. Like Jackson, Lincoln avoids Webster's claim of American nationhood and emphasizes the legal and contractual bases for union, discounting nationhood in favor of union.

Lincoln then asserts the perpetuity of the Union, which, following Jackson, he derives from the Constitution's striving "to form a more perfect union." The Articles of Confederation had declared the Union to be perpetual and "one of the declared objects for ordaining and establishing the Constitution was '*to form a more perfect Union.*'... But if destruction of the Union by one or by a part only of the States be lawfully possible, the Union is *less* perfect than before the Constitution, having lost the vital element of perpetuity."[82]

Furthermore, Lincoln argued, again following Jackson, that even if the compact theory of the Constitution's origin were accurate, the terms of the Constitution itself would bind the federal government to disallow nullification by a state. "If the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade by less than all the parties who made it?" Regardless who the parties to the compact are, they must either amend the Constitution by the procedures prescribed in the compact itself or do so by unanimous consent of the parties to the compact.

> One party to a contract may violate it—break it, so to speak—but does it not require all to lawfully rescind it?... It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that *resolves* and *ordinances* to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances.[83]

Like Jackson, Lincoln concludes that any attempt to secede from the Union or to nullify its laws may be revolution in furtherance of a just cause, but it cannot be a constitutional right.

Lincoln likewise identifies executive power as the characteristic feature of a government as distinct from a league:

[81]Abraham Lincoln, first inaugural address, March 4, 1861, in *Messages and Papers* 7:3208.
[82]Ibid.
[83]Ibid.

> I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part, and I shall perform it so far as practicable unless my rightful masters, the American people, shall withhold the requisite means or in some authoritative manner direct the contrary. I trust this will not be regarded as a menace, but only as the declared purpose of the Union that it *will* constitutionally defend and maintain itself.[84]

The federal government's power to enforce its own laws directly on individuals comes quickly into the foreground in Lincoln's response to secession, just as it had in Jackson's response to nullification. [85] The president's oath to "faithfully execute the laws" seems a "simple duty" indeed when first encountered in the text of Article II, but its application in the nullification and secession crises proved this feature of the constitutional order indispensible. That Jackson and Lincoln could cite a constitutional duty rather than mere necessity as a warrant for independent action lent an air of legality and legitimacy to their actions that might otherwise have been lacking.

Lincoln's rhetorical debt to Jackson was not coincidental. There is considerable evidence that Lincoln intentionally modeled the first inaugural on the proclamation. It is certainly clear that he consulted the proclamation extensively while drafting his address. A week after his election, Lincoln borrowed Edwin Williams's *Presidents' Messages, Inaugural, Annual, and Special, from 1789 to 1846* from the Illinois State Library, which contained Jackson's proclamation. This, in itself, means little, but two contemporary accounts of Lincoln's preparation of the inaugural speech give it particular significance. A *New York Evening Post* journalist who observed Lincoln studying Williams's volumes noted that the president-elect studied "with particular interest Andrew Jackson's 1832 proclamation against South Carolina Nullification."[86] Even more significant is William Herndon's account of the drafting of the speech, which bears out the accuracy of the journalist's observation. After returning Williams's collection to the library, Herndon records

[84]Ibid.

[85]It was on this point that Albert J. Beveridge grudgingly noted the resemblance between Lincoln's first inaugural and the rhetoric of the Nullification Proclamation. "Gently, but firmly, and with tremendous force," Beveridge writes, "in the style and spirit of Abraham Lincoln rather than of Andrew Jackson, the Proclamation makes clear that the national laws will be executed and that resistance to them will be put down by force of arms" (Beveridge, *The Life of John Marshall* [Boston: Houghton Mifflin, 1919], 4:563). Beveridge did not intend his remark as a compliment to Jackson; he saw the proclamation as an anomalous exercise of sound reasoning and sober judgment by a man otherwise at the mercy of his own passions. But such skepticism of Jackson's motives and abilities is misguided.

[86]Harold Holzer, *Lincoln President-Elect: Abraham Lincoln and the Great Secession Winter 1860–1861* (New York: Simon and Schuster, 2008), 255–56.

that Lincoln requested from him the documents he intended to use in drafting the speech.

> Late in January Mr. Lincoln informed me that he was ready to begin the preparation of his inaugural address. ... He asked me to furnish him with Henry Clay's great speech delivered in 1850; Andrew Jackson's proclamation against Nullification; and a copy of the Constitution.[87]

The possible motives for Lincoln's reliance on Jackson are numerous. It may simply have been prudence. Jackson had spoken with a level of authority unrivaled since Jefferson. Although Jackson alienated a substantial portion of the Democratic Party, he at least made federal supremacy and the popular origin of the Constitution legitimate, if not palatable, doctrines among Democrats.[88] That Lincoln could anoint his vindication of the Union with the blessing of the most popular Democratic president of the nineteenth century may have made the frank rhetoric of his first inaugural possible.

Prudential motives aside, it is quite possible, even likely, that Lincoln genuinely admired Jackson's handling of the nullifiers. After all, it is Jackson's portrait—not Clay's or Webster's—that still adorns Lincoln's old office.[89] As early as 1856, the ascendant Republican paid tribute to Old Hickory's leadership in the nullification crisis when he reminded a crowd in Princeton, Illinois, that "the Calhoun Nullifying doctrine sprang up, but Gen. Jackson, with that decision of character that ever characterized him, put an end to it."[90] Four years later, the proclamation would serve as Lincoln's model in constructing his own answer to Calhoun's doctrine in the first inaugural. Later, when Southern moderates in Maryland urged Lincoln to forestall the use of force after the fall of Fort Sumter, Lincoln answered with an appeal to the great exemplars of presidential leadership. "There is no Washington in that—no

[87]Only later, Herndon writes, did Lincoln call for Webster's reply to Hayne. See William H. Herndon and Jesse W. Weik, *Herndon's Lincoln: The True Story of a Great Life* (Chicago: Belford-Clarke, 1890), 3:478. As the foregoing discussion of the content of Lincoln's speech shows, the argument and style of the speech owed more to Jackson than it did to Webster.

[88]Commenting on the reaction of Virginia Democrats to the proclamation, John Marshall noted that many of them "pass[ed] by [Jackson's] denunciation of all their former theories; and, though they will not approve the sound opinions avowed in his proclamation, are ready to denounce nullification, and to support him in maintaining the union" (Marshall to Joseph Story, December 25, 1832, in *Papers of John Marshall* 12:248).

[89]Neither this fact nor the quotations that follow are meant to suggest that Lincoln favored Jackson over Clay, with whom he quite explicitly identified himself throughout his career.

[90]Abraham Lincoln, speech at Princeton, Illinois, July 4, 1856, in *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler (Springfield, IL: Abraham Lincoln Association, 1953), 2:346.

Jackson in that—no manhood nor honor in that."[91] It is certainly clear that "Lincoln did not feel the repulsion toward Jackson that was official Whig dogma."[92]

The claim that Lincoln admired Jackson as a model of presidential leadership might be questioned in light of Lincoln's address to the Young Men's Lyceum of Springfield in 1838, which appears on its face to be a demonization of the plebiscitary leadership favored by Jacksonians. Scarcely a year after Jackson left office, Lincoln warned the Young Men's Lyceum that mob law was a symptom of the demagogic character of American politics in the 1830s. Demagoguery had created the mobocratic spirit. In the anarchy that attends the mob, "men of sufficient talent and ambition will not be wanting to seize the opportunity, strike the blow, and overturn that fair fabric [the Constitution]." The remedy, Lincoln suggested, was a "political religion" characterized by "reverence for the laws." Reverence for the law would moderate the "wild and furious passions" of the mob and stave off the attendant evil of dictatorship.[93]

The Lyceum address leaves the reader with the impression that plebiscitary leadership in general is inimical to the rule of law and that Jacksonian democracy in particular is destructive of the constitutional order. Reasoning along these lines, one might conclude that the Lyceum address is a sharp critique of Jackson. The purpose of the speech, however, was to inspire "reverence for the laws" through rhetorical leadership. The political religion of adherence to the law must be "taught in schools, in seminaries, and in colleges . . . let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice."[94] Rhetorical leadership is itself the antidote to demagoguery and mob law. The threat and the remedy thus issue from the same source. Lincoln's first inaugural illustrates his understanding of the high purpose of political rhetoric and his deep appreciation of plebiscitary presidential leadership—something he might well have learned from Jackson. Let us not overlook the fact that the Nullification Proclamation was an overt—and largely successful—attempt at plebiscitary leadership by the president. Its manifest purpose was to create a "moral force" in favor of union; "it was meant to reach out to all Americans . . . and rally them to the defense of the Union and the Constitution."[95] Jackson's proclamation and Lincoln's first

[91]Abraham Lincoln, reply to Baltimore Committee, April 22, 1861, in *Collected Works of Abraham Lincoln* 4:341.

[92]Harry V. Jaffa, *Crisis of the House Divided: An Interpretation of the Lincoln-Douglas Debates* (Seattle: University of Washington Press, 1959), 223.

[93]Abraham Lincoln, address before the Young Men's Lyceum of Springfield, Illinois, January 27, 1838, in *Collected Works of Abraham Lincoln* 1:109–12.

[94]Ibid., 112.

[95]Remini, *Andrew Jackson and the Course of American Democracy,* 17. Though it is not within the scope of this article to address the accuracy of Jeffrey Tulis's rhetorical-presidency thesis, Jackson's leadership in the nullification crisis—and on a number

inaugural remain two of the most powerful political sermons on behalf of reverence for the law in American history.

Nonetheless, in Lincoln's ambivalence toward plebiscitary rhetorical leadership we find an incisive critique of Jackson. Whereas Jackson sees only the promise of rhetorical leadership and seems unaware of the danger that demagoguery poses to the constitutional order, Lincoln recognizes popular rhetoric for the two-edged sword that it is. Thus Lincoln surpassed Jackson in his understanding of democratic leadership even while he emulated Jackson's rhetorical assault on the nullifiers and his appeal to the Union and the rule of law.

Conclusion

Andrew Jackson deserves more attention as a constitutional statesman and not merely as a party leader and politician. Jackson's sophisticated, consistent, and coherent account of the federal principle transcends the party divisions of his time. It simply cannot be defined adequately using the familiar categories of Jeffersonian, Federalist, Whig, nationalist, or states' rights. His exposition of the character of the Union and his construction of federal power finds no peer among either his Jeffersonian predecessors or his Jacksonian successors. But looking beyond these familiar categories we do find a surprising and unexamined affinity among Jackson the Democrat, Marshall the Federalist, and Lincoln the Republican.

These three great constitutional statesmen of the early republic thus represent a recurrent and coherent account of the Union—its democratic foundation, its supremacy, and its perpetuity—that forms the cornerstone of American constitutionalism. It is a resilient species of democratic constitutionalism that transcends party competition in the United States and forms a common set of foundational principles. These principles in turn provide a stable foundation over which the ideological and party disputes of the political process can be layered. That Jackson, Marshall, and Lincoln could share a common view of the Constitution while differing so dramatically in their policy goals demonstrates that setting meaningful limits to federal power undermines neither the perpetuity of the Union nor the supremacy of the federal government.

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of other occasions—does demand further examination as an early specimen of plebiscitary leadership by the president. See Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987).