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Veto! The Jacksonian Revolution in Constitutional Law

Gerard N. Magliocca

Indiana University School of Law–Indianapolis, gmaglioc@iupui.edu

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Veto! The Jacksonian Revolution in Constitutional Law

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[T]he majority of the committee believe that the case has occurred . . . contemplated by the founders of the Constitution by the grant to the House of Representatives of the power to impeach the President . . .

. . . In the mean time, the abusive exercise of the constitutional power of the President to arrest the action of Congress upon measures vital to the welfare of the people, has wrought conviction upon the minds of a majority of the committee, that the veto power itself must be restrained and modified by an amendment of the Constitution . . .

House Select Committee on the Veto of the Provisional Tariff¹

[The committee] has assailed my whole official conduct without the shadow of a pretext for such assault . . .

. . . .
 . . . I represent the executive authority of the people of the United States, and it is in their name . . . that I protest against every attempt to break down the undoubted constitutional power of this department . . .

Protest Message of President John Tyler²

I. INTRODUCTION

Constitutional lawyers are paid to masquerade as historians. Even for non-originalists, a debate about our fundamental principles would be inconceivable without some references to the musings of Thomas Jefferson, the essays in *The Federalist*, or the deliberations of the Constitutional Convention. On certain occasions, the legal canon expands to include Reconstruction and the events surrounding the adoption of the Fourteenth Amendment. But these narrow slices of the past comprise virtually all of the history judges and scholars ordinarily consult for constitutional guidance.³

Parsimony is not without its virtues. Lawyers are specialists in reading texts, not in interpreting historical events. Since most of our Constitution's text was produced during the Founding and Reconstruction, the inclination to grant these two historical periods a monopoly over constitutional interpretation is understandable. Like all monopolies, this generates stability at the expense of knowledge. Text and the history surrounding the authorship of text, however, are not the *sine qua non* of momentous constitutional change. Recent scholarship has shown how the New Deal ushered in a doctrinal revolution—following the Supreme Court's "switch in time" in the face of Franklin D. Roosevelt's Court-packing plan—without a formal constitutional amendment.⁴ To understand the New Deal transformation, as well as

1. CONG. GLOBE, 27th Cong., 2nd Sess. 896 (1842) (report of the Select Committee).

2. John Tyler, Protest (Aug. 30, 1842), in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 190, 191-93 (James D. Richardson ed., 1897) [hereinafter MESSAGES].

3. See Stephen M. Griffin, *Constitutional Theory Transformed*, 108 YALE L.J. 2115, 2149 (1999).

4. For more on the constitutional significance of the New Deal, see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255-382 (1998). See also West Coast

the evolution of other constitutional principles, we must often go beyond the privileged history of the Founding and Reconstruction.

The poverty of the historical canon in constitutional law was manifestly clear in the recent national discussion over President Clinton's actions during the Monica Lewinsky affair. In contrast to the rich discourse that accompanied the House debate and Senate trial on the articles of impeachment, the much-heralded alternative of censure generated more constitutional heat than light. Most Republicans—particularly in the House of Representatives—asserted that a congressional censure of the president would violate the principle of separation of powers and was therefore not an option. Democrats, on the other hand, generally responded that censure was a legitimate remedy for presidential malfeasance that did not rise to the level of a high crime and misdemeanor. Although the refusal of the House leadership to allow a floor vote on censure was probably critical in persuading wavering members to support impeachment, neither the President's supporters nor his detractors provided much authority to support their constitutional conclusions about censure. In particular, both sides failed to grapple with the only relevant precedent—the censure of President Andrew Jackson by the Senate in 1834.⁵

The omission of any significant discussion about the Jacksonian censure during the Clinton impeachment saga stems from one simple fact: Lawyers have never considered Jacksonian Democracy part of the authoritative historical canon, and hence they are unfamiliar with the constitutional arguments that framed the nineteenth-century censure debate. Moreover, Andrew Jackson was censured for political actions, unlike Bill Clinton's alleged criminal conduct, and Jackson's censure comprised just one aspect in a wider institutional struggle far removed from modern legal discourse.

This article challenges the exclusion of Jacksonism from the constitutional pantheon and begins a critical reexamination of the profound structural and doctrinal changes wrought by that movement between

Hotel Co. v. Parrish, 300 U.S. 379 (1937) (marking the switch by Justice Roberts). But see Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994) (claiming that the switch was driven by doctrine and not by political pressure).

5. Although some House members mentioned the Jackson censure during the Clinton impeachment debate, only Representative Bob Barr of Georgia discussed the matter at length. Barr relied on Jackson's protest against the 1834 Senate censure as authority for the proposition that any congressional censure of a president is unconstitutional. See 144 CONG. REC. H12037 (daily ed. Dec. 19, 1998) (statement of Rep. Barr); *id.* at H11815 (daily ed. Dec. 18, 1998); see also 10 CONG. DEB. 1317-36 (1834) (protest of President Jackson). For more on the protest and the constitutional debate on censure, see *infra* Parts IV.C, IV.E.

1828 and 1842.⁶ Although many facets of the Jacksonian experience merit careful reflection, this analysis focuses primarily on Jackson's revolutionary use of the veto power to transform the presidency into an organ capable of bringing about major constitutional change without an Article V amendment.

In the course of reinterpreting the legal landmarks thrown up by Jacksonian Democracy—including the veto of the Second Bank of the United States and the Censure Resolution—this article advances four claims. First, Jackson's vetoes were crucial to reinvigorating the presidency after a long period of congressional dominance. Second, Jackson's veto practice broke sharply with precedent by repudiating the notion that presidents could not legitimately challenge established constitutional principles. Third, the hostile congressional reaction to the vetoes raining down upon them was, in fact, a stalking horse for a broader dialogue about the legitimacy of presidential efforts to alter the Constitution without a formal Article V amendment. In this respect, Jacksonian Democracy was a precedent for FDR's more expansive use of the presidency during the New Deal. Finally, the evidence suggests that but for the accident of President William Henry Harrison's death, Jackson's transformation would have culminated in the reversal of *McCulloch v. Maryland*⁷ by the Supreme Court.⁸

6. For an overview of the political developments in this era, see WILFRED E. BINKLEY, *PRESIDENT AND CONGRESS* 66-98 (1947); NORMA LOIS PETERSON, *THE PRESIDENCIES OF WILLIAM HENRY HARRISON & JOHN TYLER* 70-107 (1989); ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 88-102 (1953); and STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH* 129-55 (1993).

7. 17 U.S. (4 Wheat.) 316 (1819).

8. See *infra* text accompanying notes 253-60, 288-90. The jurisprudential impact of Jacksonian Democracy will be explored further in a future work.

Two consequences of viewing Jacksonianism as an independent source of constitutional authority are worth noting here. First, the Supreme Court's much-criticized opinion in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), turns out to be a faithful, if broad, exposition of Jacksonian principles that were repeatedly ratified by the American people in elections during the 1830s and 1840s. Despite *Dred Scott's* profound immorality, characterizing the decision as the act of a willful cabal of pro-slavery Justices is simply inaccurate. But see *Planned Parenthood v. Casey*, 505 U.S. 833, 998-1002 (1992) (Scalia, J., dissenting); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 28-34 (1990).

Second, the Jackson Court contributed many significant, if unheralded, concepts to our jurisprudence. One example was *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), an early slavery case argued by Senators Henry Clay and Daniel Webster. *Groves* supported the Jacksonian innovation of *electing* state judges by rejecting an invitation to give no deference to their state law interpretations, see *id.* at 485-86 (argument of Sen. Clay), and the opinion also gave birth to substantive due process in the Supreme Court, see *id.* at 510-17 (Baldwin, J., concurring).

Hardly anyone bothers to ask what kind of presidential veto is legitimate today since the answer is obvious—any kind.⁹ In the 1830s and 1840s, however, the constitutional legitimacy of the veto power stirred fiery debate. Since there is no evidence that the veto was a source of concern before Jackson came along,¹⁰ commentators seeking to explain the passionate response against the vetoes of Andrew Jackson and John Tyler have resorted to a brusque dismissal of the participants' sincerity.¹¹ Edward S. Corwin, the dean of constitutional scholars on the presidency, sarcastically categorized the veto controversy as an example of "the early talent of Americans for conjuring up constitutional limitations out of thin air."¹²

While bad faith provides a plausible answer to the veto debate, it unfairly condemns an entire generation of statesmen, including Henry Clay, Daniel Webster, and John Quincy Adams, who saw Jackson's innovations as a grave threat to constitutional liberty. Charles L. Black, Jr. believed "[w]e act at our great peril when we consider 'absurd' something which seemed not at all absurd to John Quincy Adams,"¹³ and Black was right. The veto contest between Congress and the executive was crucial in shaping President Jackson's vision to overhaul the Constitution without an Article V amendment.¹⁴

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9. See, e.g., Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 265 (1994) ("The veto and pardon powers are generally agreed to be plenary. The President may exercise them on any grounds he sees fit.").
 10. The text describing the veto power states only that: "If [the President] approve [a bill] he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. CONST. art. I, § 7, cl. 2.
 11. See, e.g., ROBERT J. SPITZER, *THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY* 26 (1988) ("[T]he constitutional and historical arguments by congressional and other critics who dissented from presidential vetoes were founded, in large part, on partisan differences.").
 12. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1784-1984*, at 319 (5th rev. ed. 1984).
 13. Charles L. Black, Jr., *Some Thoughts on the Veto*, LAW & CONTEMP. PROBS., Spring 1976, at 87, 92.
 14. An overhaul of the Constitution refers to major legal shifts normally associated with Article V amendments, Supreme Court cases, or changes in practice produced by the political branches. Most of the time, this final category of constitutional reform is subsequently codified in Supreme Court opinions, but not always. See generally BRUCE ACKERMAN & DAVID GOLOVE, *IS NAFTA CONSTITUTIONAL?* (1995) (detailing the political legitimization of the congressional-executive agreement in lieu of formal Senate treaty ratification). Of course, the claim that these kinds of political actions should be understood as constitutional in nature has been challenged. Compare Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (criticizing this interpretive approach as too malleable), with David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791 (1998) (responding that a textual and structural method is also quite pliable).

The relationship between the presidential veto and constitutional transformation led from the White House can be stated this way: A president seeking to advance his constitutional agenda without congressional support quickly discovers that the veto is the only formal mechanism available to formulate and mobilize popular support for that agenda.¹⁵ To the extent that the legitimacy of constitutional change initiated by the president is resisted, it follows that the veto power itself will become a focal point for the opposition, notwithstanding its innocuous prior history.

Applying this hypothesis to Jackson assumes that he actually sought to transform the Constitution with his vetoes. Much of this article is devoted to proving that assumption through the historical record, but then another perplexing question remains. If the veto struggle was really all about constitutional change, then what explains the escalation of the war under President Tyler, who was known for his devotion to the constitutional status-quo?¹⁶ Although Theodore Roosevelt described Tyler as "a politician of monumental littleness,"¹⁷ he played a key role in reinforcing the transformative veto precedents Jackson established by stubbornly opposing congressional efforts to overturn them.¹⁸

The story of how Jacksonian Democrats creatively used the veto to renew the Constitution begins in Part II with some historical background. Originally conceived as a relatively broad grant of authority, the veto power was conspicuous only by the lack of controversy surrounding its creation and use for a variety of purposes. James Madison's 1815 veto of the Second Bank of the United States, however, strongly implied that consistent legislative practice should bar the use of a veto based solely on *constitutional* grounds.¹⁹

Part III places Madison's understanding of the veto within the wider consensus of the early Republic about the limited role of the

15. Jackson also arguably resorted to extra-legal devices, most notably in his refusal to enforce the Supreme Court's fascinating opinion in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which struck down anti-Cherokee measures in Georgia. See SKOWRONEK, *supra* note 6, at 141.

16. See, e.g., SKOWRONEK, *supra* note 6, at 155.

17. Gertrude Block, *Punctuated Lawyer*, FED. LAW., Feb. 1996, at 7, 7 (emphasis omitted). Another reason for Tyler's dim reputation was his membership in the provisional Congress of the Confederacy as a representative from Virginia. See 4 ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY 1522 (Leonard W. Levy & Louis Fisher eds., 1994).

18. See, e.g., John Tyler, Veto Message (Aug. 16, 1841), in 4 MESSAGES, *supra* note 2, at 63 (vetoing the creation of a new Bank of the United States); *infra* Part V.B-C.

19. See James Madison, Veto Message (Jan. 30, 1815), in 1 MESSAGES, *supra* note 2, at 555. "Legislative practice" refers to the precedents established by statutes that are enacted. See *infra* text accompanying notes 68-69.

presidency.²⁰ This view was articulated by the Marshall Court and by political observers such as Justice Joseph Story, who believed that the House of Representatives had "absorbed all the popular feeling and all the effective power of the country" by 1818.²¹ Doctrinally, Story's observation was expressed through (1) precedential interpretation, which endowed legislative practice with greater authority than original intent in constitutional reasoning, and (2) a strong presumption of congressional supremacy.²² These doctrines stood as the bulwarks of an institutional matrix designed to prevent presidents from claiming a popular mandate for radical change.

Part IV tells the tale of Jackson's repudiation of this inherited understanding of the presidency and canvasses his unconventional struggle to rebuild the Constitution through the veto. Unfolding in six sections, this narrative includes: (1) a textual exegesis of Jackson's veto messages; (2) an analysis of the legislative furor they engendered; (3) a review of the elections that steadily shifted the balance of power towards "Old Hickory" during the 1830s; (4) a discussion of the debate surrounding the President's censure; and (5) an examination of the constitutional intent of Jacksonianism with respect to the decision in *McCulloch*.²³ Jackson's peers recognized that a new *presidential* model of constitutional change was developing before their eyes, and

20. See, e.g., JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 268 (1996) ("[T]he ideal of executive leadership that the framers favored remained, in a sense, apolitical. They saw the president not as a leader who would mobilize governing coalitions but as an executive who would rise like a patriot king above party . . ."); Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267 (1997).

21. Letter from Joseph Story to Hon. Ezekiel Bacon (Mar. 12, 1818), in 1 *LIFE AND LETTERS OF JOSEPH STORY* 310, 311 (William W. Story ed., Boston, Charles C. Little & James Brown 1851).

22. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 621 (1842) (stating that the Marshall Court repeatedly endorsed the principle that established practice strongly constrained constitutional actors); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308 (1803) ("[P]ractice, and acquiescence . . . [afford] an irresistible answer, and [have] indeed fixed the construction."); SKOWRONEK, *supra* note 6, at 92.

23. Not all of Jackson's vetoes had transformative aspirations, but only those exercised after the Democrats won control of Congress in 1834 relied on other rationales. See Andrew Jackson, Veto Message (June 9, 1836), in 3 *MESSAGES, supra* note 2, at 231 (rejecting a bill that sought to fix the date of congressional adjournment as violative of Article I, Section 5); Andrew Jackson, Veto Message (Mar. 3, 1835), in 3 *MESSAGES, supra* note 2, at 146 (voiding an act adjusting the negotiation authority of foreign claims as an interference with the executive function).

When this analysis uses the term "veto," it refers only to measures that were subject to an override vote. Another category of so-called "pocket vetoes" describes bills the president refuses to sign within ten days of passage but after Congress has adjourned. See SPITZER, *supra* note 11, at 16. Presidents often offered formal explanations for their pocket vetoes, see, e.g., Andrew Jackson, Veto Message (Dec. 4, 1833), in 3 *MESSAGES, supra* note 2, at 56 [hereinafter Jackson, Veto Message (Dec. 4, 1833)], but those vetoes were not subject to congressional review. Therefore, they did not contribute much to the dialogue that is the focus

swam against the revolutionary tide until they were overwhelmed at the polls. Their self-awareness on this fundamental issue predates the New Deal and modern academic debate by over a century.²⁴

Part V describes the unsuccessful effort of the Whig Party to reverse Jackson's transformation, and explains how John Tyler's vetoes served as the functional equivalent of judicial opinions in consolidating the substance of Jacksonian Democracy.²⁵ When President Harrison denounced Jackson's veto innovations in his 1841 Inaugural Address,²⁶ the new model of presidential transformation appeared headed for an early death. Instead, it was Harrison who died. By vetoing a new bank and other measures passed by the Whig Congress, Tyler—Harrison's successor—provoked the first attempted presidential impeachment²⁷ and the first government shutdown crisis.²⁸ Tyler's vetoes prevented the dismantling of Jacksonian Democracy's major political achievements. Those same vetoes, however, blocked a case challenging the bank's constitutionality from reaching a Supreme Court packed with Jackson's anti-bank partisans. Thus, Tyler may have inadvertently saved *McCulloch* from the dustbin of history and denied Jackson's movement what would have been its greatest victory.²⁹

Through a close textual analysis of the contemporary sources, Justice Levi Woodbury's observation that "[t]he veto power is the people's tribunative prerogative speaking again through their executive"³⁰ will be confirmed. By recounting the events that form the Jacksonian leg-

here. While pocket vetoes will not be totally ignored, their presence will generally be noted only in footnotes.

24. See, e.g., CONG. GLOBE, 27th Cong., 2nd Sess. app. at 152-53 (1842) (statement of Sen. Archer); 10 CONG. DEB. 84-85 (1834) (statement of Sen. Clay).

25. See PETERSON, *supra* note 6, at 29-30. Martin Van Buren, Jackson's Vice-President during his second term, succeeded to the presidency in 1837. The Democrats' control of Congress during Van Buren's administration, however, minimized interbranch conflict. Accordingly, he is only a minor player in this discussion.

26. See William Henry Harrison, Inaugural Address (Mar. 4, 1841), in 4 MESSAGES, *supra* note 2, at 5, 9-11.

27. See CONG. GLOBE, 27th Cong., 3rd Sess. 144-46 (1843) (debate on the impeachment resolution).

28. The shutdown was caused by President Tyler's veto of the tariff reauthorization, due to riders distributing revenues from the sale of public lands. See PETERSON, *supra* note 6, at 101 ("The Treasury was empty; governmental workers went unpaid; obligations were not met."); see also John Tyler, Veto Message (Aug. 9, 1842), in 4 MESSAGES, *supra* note 2, at 183, 186 ("The bill unites two subjects which, so far from having any affinity to one another, are wholly incongruous in their character."). Following this veto, a House Select Committee was convened to consider a response. See CONG. GLOBE, 27th Cong., 2nd Sess. 877 (1842); *supra* text accompanying note 1.

29. See John Tyler, Veto Message (Sept. 9, 1841), in 4 MESSAGES, *supra* note 2, at 68.

30. HENRY JONES FORD, THE RISE AND GROWTH OF AMERICAN POLITICS 187 (DaCapo Press 1967) (1898).

acy, this article offers new support for the legitimacy of informal constitutional change driven from 1600 Pennsylvania Avenue.

II. VETOES IN THE EARLY REPUBLIC

Until Jackson's arrival on the political stage, the veto power was a backwater of constitutional discourse. The limited evidence from the Founding and the first few decades of the Republic's history support a somewhat broad reading of the power. Madison's 1815 Veto of the Second Bank of the United States, however, crafted a constitutional caveat based on settled legislative practice. This veto principle was the tripwire that Jackson would trigger in the 1830s.

A. The Founding Vision

Fear of legislative excess was behind the Framers' decision to give the president a qualified veto.³¹ State legislatures of the late 1770s and early 1780s were notorious for their *ex post facto* measures and arbitrary confiscatory statutes that eroded public confidence in self-governance.³² Although constitutional abuses by legislatures were a serious concern, Madison explained in 1785 that the general lack of "wisdom and steadiness [in lawmaking was] the grievance complained of in all our republics."³³ In response to this poor legislative performance, reformers focused on strengthening the independence of state governors, but only Massachusetts went so far as to provide its governor with a veto.³⁴ The Massachusetts convention explained that the veto power was designed "not only to preserve the laws from being unsystematical and inaccurate, but that a due balance may be preserved in the three capital powers of government."³⁵

Expectations that the veto would improve public policy and defend against constitutional violations by the legislature also drove the delegates at the 1787 Philadelphia Convention. Elbridge Gerry argued that the purpose of "the Revisionary power was merely to secure the Executive department [against] legislative encroachment,"³⁶ while Madison added that vetoes would prevent laws "unwise in their prin-

31. See THE FEDERALIST NO. 73, at 494 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); SPITZER, *supra* note 11, at 15-16; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 435 (1969).

32. See WOOD, *supra* note 31, at 403-09.

33. Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in THE WRITINGS OF JAMES MADISON 166, 167 (Gaillard Hunt ed., 1901) (emphasis omitted).

34. See WOOD, *supra* note 31, at 434-35. New York's governor also possessed a veto power, but only as part of a Council of Revision that included the chancellor and judges of the state supreme court. See *id.* at 433.

35. JOSIAH HENRY BENTON, THE VETO POWER IN THE UNITED STATES: WHAT IS IT? 41 (Boston, A.C. Getchell 1888); see also SPITZER, *supra* note 11, at 10.

36. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 75 (Max Farrand ed., rev. ed. 1966).

ciple [and] incorrect in their form."³⁷ Hamilton expanded upon the position of the Convention in *The Federalist No. 73*.³⁸ After describing the veto's value for enforcing separation of powers, he went on to say:

It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.³⁹

Hamilton's statement and the context against which it was made establish that the veto was originally understood as a power whose only clear limit was presidential discretion.⁴⁰ This conclusion is reinforced by Hamilton's use of the catch-all justification "any impulse unfriendly to the public good" to round out his discussion of the veto power. For the Framers, the presidential veto could be used for constitutional or policy reasons when appropriate.

One would think that providing such a power to the executive inspired heated debate, but even most Anti-Federalists accepted the veto with hardly a whimper.⁴¹ In the Constitutional Convention, the only divisive question was whether the veto ought to be absolute or qualified.⁴² During the subsequent ratification battle, some criticism was leveled at the power for being an unnecessary monarchical inheritance, but even that assertion was disputed by other Anti-Federalists.⁴³ For the most part, only silence accompanied the adoption of the veto, and that would continue until Jackson used his vetoes as the trumpet for presidential transformation.

B. Practice of Presidents Before Jackson

With the exception of President Madison's 1815 bank veto, early presidential vetoes followed the Framers' design and were used for different purposes with unquestioned constitutional acceptance. George Washington employed the veto for the first time on an apportionment bill that he thought would violate the constitutional requirement that there be at least one representative for every thirty thousand peo-

37. 1 *id.* at 139.

38. See THE FEDERALIST NO. 73, *supra* note 31, at 494-99.

39. *Id.* at 495.

40. See SPITZER, *supra* note 11, at 18.

41. See *id.* at 21; see also RAKOVE, *supra* note 20, at 274-75 (explaining that the Anti-Federalists were not concerned about the presidency's powers under the proposed Constitution).

42. See SPITZER, *supra* note 11, at 11-13. There was discussion in the Convention about whether the veto ought to be provided to a Council of Revision composed of the president and Supreme Court justices, but this was defeated in spite of Madison's support. See EDWARD CAMPBELL MASON, THE VETO POWER 20-22 (Boston, Ginn & Co. 1890).

43. See SPITZER, *supra* note 11, at 20-22.

ple.⁴⁴ At the end of his second term, President Washington used his veto again to block a military appropriation bill that would have eliminated two units of cavalry.⁴⁵ Only policy arguments were advanced as a rationale this time, focusing on the utility of the troops in question and the unfairness of denying them the equivalent of back pay.⁴⁶ Neither Washington's constitutional veto nor his policy veto drew any comment from Congress as to their legitimacy, although naturally many voted to override these decisions.⁴⁷

Presidents refrained from vetoing legislation for the next fourteen years, but when Madison resumed the practice, the pattern of executive discretion and universal acceptance continued.⁴⁸ The First Amendment's Establishment Clause formed the backbone of Madison's first two vetoes.⁴⁹ Then in 1812, Madison vetoed a bill authorizing the President to appoint Supreme Court justices to temporarily fill district court vacancies.⁵⁰ He thought this provision would create additional conflicts in appellate review, and introduced "an unsuitable relation of members of the judicial department to a discretionary authority of the executive department."⁵¹ With his final veto, President Madison waded into the morass spawned by the issue of federal spending on national roads and canals by declaring that such "internal improvements" exceeded Congress's Article I, Section 8 powers.⁵² Five years later, President Monroe employed similar rea-

44. See George Washington, Veto Message (Apr. 5, 1792), in 1 MESSAGES, *supra* note 2, at 124; CARLTON JACKSON, PRESIDENTIAL VETOES 1792-1945, at 1-2 (1967).

45. See George Washington, Veto Message (Feb. 28, 1797), in 1 MESSAGES, *supra* note 2, at 211; JACKSON, *supra* note 44, at 3-4.

46. See Washington, *supra* note 45, at 212; JACKSON, *supra* note 44, at 3; SPITZER, *supra* note 11, at 28-29.

47. See JACKSON, *supra* note 44, at 2-4; see also SPITZER, *supra* note 11, at 29 (stating that Washington's practice had established "[t]he legitimacy of the president's mature judgment in deciding whether to veto").

48. For an explanation of Jefferson's veto abstention, see *infra* text accompanying notes 102-03.

49. See James Madison, Veto Message (Feb. 21, 1811), in 1 MESSAGES, *supra* note 2, at 489 (voiding an act to incorporate an Episcopal church in the District of Columbia); James Madison, Veto Message (Feb. 28, 1811), in 1 MESSAGES, *supra* note 2, at 490 (blocking a bill that reserved land for the use of a Baptist Church); JACKSON, *supra* note 44, at 5-7.

50. See James Madison, Veto Message (Apr. 3, 1812), in 1 MESSAGES, *supra* note 2, at 511 [hereinafter Madison, Veto Message (Apr. 3, 1812)]; JACKSON, *supra* note 44, at 7-8. Later that year, Madison used a policy rationale to pocket veto an immigration bill that he felt was "liable to abuse by aliens having no real purpose of effectuating a naturalization." James Madison, Veto Message (Nov. 5, 1812), in 1 MESSAGES, *supra* note 2, at 523.

51. Madison, Veto Message (Apr. 3, 1812), *supra* note 50, at 511; see JACKSON, *supra* note 44, at 8; cf. Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792) (questioning the constitutionality of executive supervision of Article III judges).

52. See James Madison, Veto Message (Mar. 3, 1817), in 1 MESSAGES, *supra* note 2, at 584.

soning in his only veto, rejecting another internal improvements bill, although he conceded that monies appropriated for such projects were constitutional if the states had final authority over construction.⁵³ While Madison and Monroe continued to veto bills for a variety of reasons, Congress remained quiet.⁵⁴

C. Madison's Veto of the Second Bank of the United States

In the forty years between the Founding and Jackson's presidency, the only substantive constraint on the president's veto discretion was erected by Madison's message rejecting the charter of the Second Bank of the United States.⁵⁵ Before explaining what that constraint was and where it came from, it is worth recalling the importance of the bank issue in the constitutional consciousness of early Americans. When the question of whether Congress had the power to charter a national bank first reared its head in 1791, the debate badly split Washington's cabinet between its Jeffersonian and Hamiltonian wings.⁵⁶ *Representative* Madison sided with Jefferson, arguing (1) that an interpretation of the Necessary and Proper Clause authorizing Congress to create a bank would leave few restraints on national legislative power, and (2) that the Constitutional Convention had specifically rejected a motion to give Congress the power to charter corporations.⁵⁷

Nevertheless, when a similar proposal came before *President* Madison, he relied exclusively on policy grounds to veto the bill since, in his mind, the constitutional question had been conclusively resolved in favor of the bank.⁵⁸ Madison's decision came four years before the Marshall Court put its stamp of approval on the bank in *McCulloch*.⁵⁹ Why did Madison believe that the bank was no longer

53. See James Monroe, Veto Message (May 4, 1822), in 2 MESSAGES, *supra* note 2, at 142. For a fascinating account of the political dynamics behind Monroe's thinking, see SKOWRONEK, *supra* note 6, at 98-107.

54. The only suggestion of congressional concern about the legitimacy of the veto rests with a constitutional amendment introduced in 1818 to eliminate the veto entirely and lodge most executive and judicial appointments with Congress. This proposal was immediately tabled without any debate. See 32 ANNALS OF CONG. 1744-45 (1818).

55. See Madison, *supra* note 19, at 555. The next year, Madison signed a revised bank bill whose proposed renewal was vetoed by Jackson in 1832. See JACKSON, *supra* note 44, at 29-36; Andrew Jackson, Veto Message (July 10, 1832), in 2 MESSAGES, *supra* note 2, at 576 [hereinafter Jackson, Veto Message (July 10, 1832)].

56. See Arnold, *supra* note 20, at 275.

57. See *id.* at 274.

58. See Madison, *supra* note 19, at 555-57. The First Bank's charter lapsed in 1811. See BINKLEY, *supra* note 6, at 59.

59. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

open to constitutional challenge when the Supreme Court had not even ruled on the issue?

Let us begin by examining the preface of the bank veto message:

Waiving the question of the constitutional authority of the Legislature to establish an incorporated bank as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation⁶⁰

Madison's message thus identified a new limit upon vetoes exercised on a constitutional basis: consistent practice. This Burkean approach to constitutional interpretation is the antithesis of originalism. Years later, in letters to C.E. Haynes and General LaFayette, Madison expanded on his interpretive view by stating that no "abstract opinion of the text"⁶¹ could defeat "a construction put on the Constitution by the nation, which, having made it, had the supreme right to declare its meaning."⁶² Theories of interpretation that prefer experience to logic are nothing new,⁶³ but Madison's system argued for the equivalence of legislative, executive, and judicial precedent in discerning constitutional meaning.⁶⁴ This formulation had a profound impact on legal debate throughout the ante-bellum era.⁶⁵

Although Madison mentioned legislative, executive, and judicial actions in his veto message, we will soon see that statutory precedent was the critical component of authoritative practice in the pre-Jackson Republic.⁶⁶ Statutory precedent is invariably created by the concurrence of Congress and the executive branch, and therefore does represent both legislative and executive practice for any particular constitutional construction.⁶⁷ Moreover, the "repeated recognitions"

60. Madison, *supra* note 19, at 555.

61. Letter from James Madison to C.E. Haynes (Feb. 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 164, 165 (Philadelphia, J.B. Lippincott & Co. 1867); see Arnold, *supra* note 20, at 288-89.

62. Letter from James Madison to General LaFayette (Nov. 1826), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 61, at 538, 542; see Arnold, *supra* note 20, at 288-89.

63. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881) ("The life of the law has not been logic: it has been experience.").

64. See Arnold, *supra* note 20, at 285-86.

65. See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 546 (1857) (McLean, J., dissenting) (quoting Madison's bank veto as support for the constitutionality of the Missouri Compromise); Harrison, *supra* note 26, at 11 (quoting Madison's bank veto and denouncing Jackson).

66. See *infra* text accompanying notes 85-93, 139-41, 160-66, 176-77.

67. Of course, a statute can be enacted without presidential support if Congress overrides a veto. No veto was overridden, however, until 1845. See SPITZER, *supra* note 11, at 51. As a result, the laws of the early Republic were always the product of legislative and executive consensus.

of the bank's constitutionality that Madison faced at the time of his veto message were basically statutes authorizing the bank and bank-related matters.⁶⁸ During this analysis, the term "legislative precedent" will often be used to stand in for "practice," so as to emphasize the importance of statutes for constitutional interpretation in the early Republic.

The sources of Madison's interpretive system are explored further in Part III, but for now the important point is that his theory had significant implications for the presidential veto. In a letter to Charles Ingersoll, Madison explained that—since prior practice fixed a given constitutional construction—a presidential veto on constitutional grounds would be inappropriate in the face "of all the obligations derived from a course of precedents amounting to the requisite evidence of the national judgment and intention."⁶⁹ From a power limited only by the president's discretion, Madison turned the veto into a device constrained by layers of legislative precedent. Not surprisingly, Madison opposed Jackson's 1832 bank veto precisely because Jackson ignored the extensive practice supporting the bank's constitutionality.⁷⁰

Madison's disagreement with Jackson's veto approach offers the first clue in the search for answers about the Jacksonian-era veto dispute. Two questions need answers, however, before we can proceed. First, it is not clear why Madison's understanding of the veto's constitutional limits made any practical difference. After all, Madison ended up vetoing the bank anyway, and the legitimacy of presidential vetoes on purely policy grounds would appear to swallow up any limitation placed on constitutional vetoes. This argument fails for two reasons. First, the early policy vetoes tended to be quite technical in nature. Once their specific objections were met by Congress, new versions of the vetoed bills almost always passed.⁷¹ In Madison's case, Congress amended the bank bill and the President signed its charter into law the following year.⁷² The limited application of the policy veto, therefore, undercuts the notion that it could accomplish everything that a principled constitutional veto could.

More important, once a statute was enacted, the legislative precedent it created exerted significant influence over subsequent constitutional interpretation under the Burkean method advocated by Madison. In an interpretive regime that relied mainly upon evolution-

68. See, e.g., Act of Feb. 25, 1791, ch. 10, 1 Stat. 191.

69. Letter from James Madison to Ingersoll (June 25, 1831), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 61, at 183, 186.

70. See Arnold, *supra* note 20, at 287-88.

71. Washington's military appropriations veto was resolved this way, see JACKSON, *supra* note 44, at 4, as was Madison's policy-based pocket veto of the 1812 immigration bill, see *id.* at 9.

72. See *id.* at 11.

ary practice based on statutes, only a veto that stated its objections in constitutional terms allowed presidents to shape the development of the law by expressing a constitutional argument distinct from the congressional construction. Madison's notion that these particular vetoes were barred by established legislative practice, therefore, implied that presidents could not legitimately challenge the constitutional order as articulated by Congress and the Supreme Court. President Jackson turned this proposition on its head during the 1830s.

A second issue raised by the Madison/Jackson schism on the bank veto is whether Madison was honoring the intent of the Framers when he asserted that a constitutionally-based veto could not be used if practice all went in the other direction. Putting aside the fact that Madison was a Framers, his veto limitation does seem at odds with the original vision of a veto power constrained only by the President's discretion. This view of Madison's position, however, ignores the Framers' broader understanding that the veto would "certainly not [be used] as a means of systematic policy control over the legislative branch."⁷³ Their assumption was that the President would act only as an aristocratic guardian of the status-quo, devoid of any independent authority to rally popular opinion on behalf of significant political or constitutional change.⁷⁴ Madison's concern about using the veto in the face of settled practice, therefore, does cohere with the original understanding of the limited nature of the presidential office.⁷⁵ The next section explores this issue in greater depth, and argues that Jefferson's activist presidency was the event between the Founding and 1815 that drove the development of the principles underlying Madison's bank veto.⁷⁶

73. Black, *supra* note 13, at 90.

74. See, e.g., CONG. GLOBE, 27th Cong., 2nd Sess. app. at 934 (1842) (statement of Rep. Rayner); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 67-69 (1991); RAKOVE, *supra* note 20, at 261-62 (describing the "deeper difficulty the framers faced in imagining how a single official, however independent, could set his opinion against the collective weight and influence of a representative assembly"); cf. U.S. CONST. art. V. (denying the presidency any role in the amendment process).

75. Even if Article V is not read *expressio unius*, see 2 ACKERMAN, *supra* note 4, at 71-81; Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988), it is hard to argue that the Framers saw the presidency as an institution that could legitimately express the popular will of the nation, given their careful construction of the Electoral College to prevent the direct popular election of the president, see U.S. CONST. art. II, § 1, amended by U.S. CONST. amend. XII.

76. See RAKOVE, *supra* note 20, at 283 ("In later years, Madison came to doubt whether *Federalist* 48 had been right to argue that 'executive power being restrained within a narrower compass [than the legislature's], and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.'" (alteration in original) (quoting *THE FEDERALIST* No. 48)).

III. CONSTRAINTS ON JACKSON'S VETO ADAPTATION

This part scrutinizes the twin principles of precedential interpretation and legislative supremacy that supported Madison's understanding of the veto and framed the contemporary view of the presidency.⁷⁷ It then explains how these two doctrines were linked to the legitimacy of presidential efforts to transform constitutional law. Precedential interpretation and legislative supremacy developed as a response to Jefferson's unorthodox use of the presidency to reconstitute the political system, during the "Revolution of 1800," so that any new attempt at presidential transformation would be smothered at its inception.⁷⁸ As long as these twin principles remained in force, constitutional change led by the president outside of Article V would be impossible.

A. Precedential Interpretation in the Regime of Marshall and Madison

Madison's elevation of legislative practice over other sources of authority—a doctrine I call precedential interpretation—in his bank veto message was not the quirky musing of one theorist, but expressed a consensus developed, in part, by the jurisprudence of the Marshall Court. In *Stuart v. Laird*,⁷⁹ a case decided during the same term as *Marbury v. Madison*,⁸⁰ the Court upheld the controversial repeal of the Federalist Judiciary Act of 1801.⁸¹ The Act had created the infamous "midnight judges" that threatened to block Jefferson's program.⁸² One contested aspect of the repeal was the restoration of circuit riding, a practice by which Supreme Court Justices were forced to sit as judges on intermediate courts of appeal.⁸³

Although many of the Justices were privately convinced that the elimination of existing Article III judges and the restoration of circuit-riding were unconstitutional,⁸⁴ their opinion ignored the Article III

77. See, e.g., CONG. GLOBE, 27th Cong., 1st Sess. app. at viii (1841) (statement of Rep. Jones); 8 CONG. DEB. 1229-31 (1833) (statement of Sen. Webster).

78. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803); cf. BRUCE ACKERMAN, *THE ROOTS OF PRESIDENTIALISM* (forthcoming 2001) (describing the significance of *Stuart* in the Jeffersonian period); SKOWRONEK, *supra* note 6, at 72-77 (noting that *Stuart* upheld a major component of the Jeffersonian transformation, but was also part of an institutional effort to contain the presidency).

79. 5 U.S. (1 Cranch) 299 (1803).

80. 5 U.S. (1 Cranch) 137 (1803).

81. See Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (repealing Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, and Act of Mar. 3, 1801, ch. 32, 2 Stat. 123).

82. See *Stuart*, 5 U.S. (1 Cranch) at 308; ACKERMAN, *supra* note 78. The critical importance of this repeal for the Jeffersonian agenda was demonstrated by the Republicans' elimination of the Court's 1802 term to prevent interference with the repeal's implementation. See ACKERMAN, *supra* note 78; PAUL W. KAHN, *THE REIGN OF LAW* 14 (1995); SKOWRONEK, *supra* note 6, at 75.

83. See *Stuart*, 5 U.S. (1 Cranch) at 309; ACKERMAN, *supra* note 78.

84. See ACKERMAN, *supra* note 78.

issue and dismissed the argument challenging the return of circuit-riding with the following:

To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.⁸⁵

Putting the divergence between the Court's private and public opinions to one side for the moment, their official argument strongly supports Madison's idea that practice was a most important form of legal authority. Indeed, the Court used a term not often heard in interpretive discourse—irresistible—to describe the status of practice. Lest one think that *Stuart* was of only contemporary significance, nearly forty years later this passage from the opinion was cited on the floor of the House to support the bank's constitutionality against President Tyler's potential veto,⁸⁶ and over fifty years later was relied upon by the primary dissent in *Dred Scott v. Sandford*.⁸⁷

When the Court addressed the constitutionality of the bank in *McCulloch*, it affirmed Madison's precedential approach to interpretation.⁸⁸ The Chief Justice's opinion stated that "[a]n exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded."⁸⁹ This was certainly not as strong as the comparable claim in *Stuart*, but nevertheless joined other Marshall Court opinions in stressing the significance of legislative decisions and practice in constraining the range of plausible constitutional interpretations.⁹⁰

Even Marshall's critics accepted that practice ought to be controlling if it all pointed one way.⁹¹ In an essay attacking *McCulloch*, Marshall's judicial arch-rival Spencer Roane lambasted the Chief Justice's reasoning, but on the issue of the dispositive force of practice he carefully limited his argument to the Court's use of "equivocal and inter-

85. *Stuart*, 5 U.S. (1 Cranch) at 309.

86. See CONG. GLOBE, 27th Cong., 1st Sess. app. at xv (1841) (statement of Rep. Gamble).

87. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 616 (1857) (Curtis, J., dissenting).

88. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

89. *Id.*

90. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 621 (1842) (citing *Stuart*, *Martin v. Hunter's Lessee*, and *Cohens v. Virginia* as Marshall Court precedents in support of the robust authority of practice in constitutional interpretation).

91. See Letter from Hampden to the Editor of the *Richmond Enquirer*, RICHMOND ENQUIRER, June 18, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland* 125, 137-38 (Gerald Gunther ed., 1969).

rupted acquiescence . . . to settle the question."⁹² The issue for Roane was not whether practice was dispositive, but whether the bank had actually been ratified by consistent practice as Madison and Marshall claimed. This was a far different argument from the one Jackson would make in his veto messages, as the President would not just dispute how the precedents ought to be read, but would deny the authority of legislative precedent altogether.⁹³

B. Legislative Supremacy

The second leg supporting Madison's belief in the authority of past legislative acts to bind presidential judgments on constitutionality was the ideology and reality of congressional supremacy. Deference to the people's representatives was the premier article of faith for Jeffersonian Republicans such as Madison.⁹⁴ In Jefferson's first annual message, he summarized his formal view of executive-legislative relations this way: "Nothing shall be wanting on my part to inform as far as in my power the legislative judgment, nor to carry that judgment into faithful execution."⁹⁵ Jefferson's actual practice left something to be desired (as the next section explains), but nevertheless his mantra gave greater credence to the idea of legislative precedent as binding authority.

After Jefferson left office, Congress moved vigorously to assert its independent policy making power, thus further reinforcing Madison's and Marshall's need to defer to legislative precedent. Beginning in 1811, Henry Clay used his position as Speaker of the House to reinvigorate the congressional caucus and committee system in order to secure party discipline accountable only to legislative leaders.⁹⁶ Much of Congress' clout came from the role the caucus played in selecting the presidential nominee of the dominant Republican party, and Madison and Monroe did little to oppose this obvious subordination of

92. *Id.* Roane was a powerful advocate for states' rights from his position on the Virginia Court of Appeals, and wrote his essay on *McCulloch* under the pseudonym Hampden. See JOHN MARSHALL'S DEFENSE OF *McCulloch v. Maryland*, *supra* note 91, at 1.

93. See *infra* text accompanying notes 164-66, 176-77.

94. See, e.g., 1 ACKERMAN, *supra* note 74, at 69-70; BINKLEY, *supra* note 6, at 49 ("Republican doctrine made Congress the fundamental organ, the mainspring of government and peculiarly the agent of the people."); SKOWRONEK, *supra* note 6, at 92 ("Presidential deference to Congress [was] the leading principle of governmental organization under the Jeffersonians . . .").

95. Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 1 MESSAGES, *supra* note 2, at 326, 331-32.

96. See BINKLEY, *supra* note 6, at 58-59; PETERSON, *supra* note 6, at 52; SKOWRONEK, *supra* note 6, at 92-93. Henry Clay will be referred to repeatedly in this article, and for good reason. The foremost statesman of his age, Clay was also the undisputed leader of the Jacksonian opposition as a senator and as an unsuccessful presidential candidate in 1824, 1832, and 1844.

the executive branch to the legislature.⁹⁷ One scholar noted that an observer of America's unwritten constitution in 1825 might well have concluded "that under the circumstances of congressional influence on presidential elections these events did not constitute popular referenda on presidential policies."⁹⁸ In this environment, Madison's decision to frame the veto as another expression of presidential deference to legislative will made sense both as a matter of prudence and constitutional duty.

C. The Possibility of Presidential Transformation

Precedential interpretation and legislative supremacy had the effect of impeding the President's ability to generate constitutional change. But how did the doctrines supporting Madison's bank veto become so potent after Jefferson spent eight years giving them the back of his presidential hand? The use of the term "Revolution of 1800" to describe Jefferson's election evokes images of radical reform and executive power at odds with the constitutional consensus against presidential transformation described so far.⁹⁹ This inconsistency is reinforced when we recall Jefferson's view that his election "was as real a revolution in the principles of our government as that of 1776 was in its form,"¹⁰⁰ and the hushed awe of his contemporaries who believed that "[t]he President has only to act and the Majority will approve."¹⁰¹

At a practical level, presidential transformation and legislative supremacy could coexist in Jefferson's administration because his supporters dominated Congress.¹⁰² John Marshall predicted that Jefferson would "embody himself with the house of representatives," and "[b]y weakening the office President[,] increase his personal power,"¹⁰³ which is exactly what happened. Jefferson's legislative control was so great that he never needed to wield his veto pen. While this strategy of formal deference to Congress was politically effective, the critical point is that Jefferson did nothing during his tenure to

97. See BINKLEY, *supra* note 6, at 63.

98. *Id.* at 65. Jackson broke with precedent on this issue as well, becoming the first President since Jefferson not to be either nominated by the caucus or elected by the House of Representatives. See *id.* at 67.

99. See generally SKOWRONEK, *supra* note 6, at 62-85 (describing Jefferson's reconstruction of the political order).

100. *Id.* at 62.

101. NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON 249 (1987).

102. See BINKLEY, *supra* note 6, at 52-53; SKOWRONEK, *supra* note 6, at 73-75.

103. Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), in 6 THE PAPERS OF JOHN MARSHALL 46, 46 (Charles F. Hobson ed., 1990).

make the presidency a *legitimate* fulcrum for constitutional change.¹⁰⁴ Instead, Jefferson's insistence on legislative supremacy had the perverse effect of boxing in future presidents by enhancing the formal authority of legislative precedent.¹⁰⁵

Of course, Jefferson's legislative legerdemain cannot entirely explain the revolutionary activism in his presidency, nor can it explain the failure of Madison and Monroe to exert equivalent control over their Republican Congresses. Two additional nuances must be considered. First, Jefferson's charismatic leadership and unique status as the author of the Declaration of Independence might have enabled him to transcend constitutional taboos in a way that his successors could not. While there is considerable merit to this contention,¹⁰⁶ the argument runs into trouble because the doctrine of precedential interpretation got its start in *Stuart* while Jefferson was still in office.¹⁰⁷

A second—and more persuasive—explanation is that the coexistence of the "Revolution of 1800" with the doctrines underlying Madison's veto constraint can be explained if those doctrines developed *in response* to Jefferson's transformative presidency in order to deter a repetition of that precedent.¹⁰⁸ Consider the effect that precedential interpretation and legislative supremacy had on presidential power. If applied in good faith, they would lead inexorably to the conclusion that presidents could play no role in amending the Constitution. The informal devices of threatening the Court with impeachment (as Jefferson did), or appointing like-minded justices (as FDR did), depend upon a president's ability to mobilize public support for his constitutional agenda and the Court's freedom to break radically with established doctrine.¹⁰⁹ By contrast, under the consensus that reigned between Jefferson and Jackson, any presidential criticism of established constitutional law as defined by legislative precedent was presumptively improper, and judges were bound by past practice in a relatively strong fashion that inhibited major doctrinal shifts.¹¹⁰ Put this together with a general assumption that Congress was the dominant organ of public policy, and the bell tolls for the possibility of informal constitutional change initiated by a president.

104. See BINKLEY, *supra* note 6, at 68 ("The Jeffersonian method of achieving mastery through secret influence with Congress had proved transient.").

105. See *supra* text accompanying notes 79-85.

106. See SKOWRONEK, *supra* note 6, at 70-71.

107. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

108. While these doctrines developed to discredit Jefferson's example, they could not obliterate his presidency from historical memory. Indeed, Jackson's partisans and opponents both harkened back to Jefferson's administration when they sought to evaluate the legitimacy of Jackson's transformative actions. See *infra* text accompanying notes 226-32.

109. See ACKERMAN, *supra* note 78.

110. See *Stuart*, 5 U.S. (1 Cranch) at 309; Madison, *supra* note 19, at 555.

The principles behind Madison's understanding of the veto not only limited the potential for presidential transformation, but they were the stepchildren of Jefferson's successful revolution. The crucial link between Jefferson's presidency and Madison's bank veto is *Stuart*, which upheld a major plank of Jefferson's constitutional agenda—the repeal of the Judiciary Act of 1801.¹¹¹ Recall that the Court used this case to articulate a rule of precedential interpretation, even though the Justices privately believed that the repeal unconstitutionally eliminated Article III judges by replacing them with justices riding circuit.¹¹² Such an interpretive somersault can only be understood as the Supreme Court knuckling under to political pressure.¹¹³ Yet, at the very point when the Court legitimated Jefferson's "Revolution of 1800" by upholding its legislative cornerstone, the Justices also planted the seeds of a doctrine that would grow to block any future presidential transformation of the Constitution.

Viewing this move as intuitive rather than purely coincidental is reasonable because we know that the issue of controlling presidential power was very much on the minds of the Justices that same term in *Marbury*.¹¹⁴ *Marbury* developed judicial review as a mechanism to restrain the other branches, but Chief Justice Marshall also poured much of his rhetorical fire on the President's abuse of power in failing to deliver *Marbury's* commission.¹¹⁵ Although it would be overstating the matter to argue that the Court self-consciously employed a practice rationale in *Stuart* as a weapon against presidential authority, legislative tradition did provide a convenient harbor for a Court seeking to ride out the political storm.

Stephen Skowronek has observed that "[t]he common thread running through *Stuart v. Laird* [and] *Marbury v. Madison* . . . is not a potent judicial challenge to Jefferson's political reconstruction but a Court working to establish its own authority on the fringes of a political field thoroughly dominated by a hostile executive."¹¹⁶ Only in the years following Jefferson's departure could his hollow, formal ideology of legislative supremacy and the Court's toothless dicta in *Stuart* coalesce to contain the presidency. This account also explains why Madison's concept of a veto constrained by legislative precedent devel-

111. See *Stuart*, 5 U.S. (1 Cranch) at 299.

112. See U.S. CONST. art. III, § 1; ACKERMAN, *supra* note 78; *supra* text accompanying notes 82-85.

113. See ACKERMAN, *supra* note 78; SKOWRONEK, *supra* note 6, at 75-77.

114. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); KAHN, *supra* note 82, at 13 ("Nowhere in the *Marbury* opinion does the election of 1800 come clearly into view. Yet that election largely framed the problem of judicial authority to which the Marshall Court had to respond").

115. See *Marbury*, 5 U.S. (1 Cranch) at 158, 166, 170; 1 ACKERMAN, *supra* note 74, at 71-72; SKOWRONEK, *supra* note 6, at 76.

116. SKOWRONEK, *supra* note 6, at 76-77.

oped well after the Founding. Although Jefferson did not use the veto for transformative purposes, his presidential example may very well have been on Madison's mind when he was evaluating a veto of the bank. Jefferson's radical use of executive power, however, could not have been on the Framers' minds when they envisioned vetoes as being constrained only by a president's discretion.

The previous discussion demonstrates that a link between the veto controversy and presidential transformation of the Constitution rests on more than an assumption that a president seeking to undertake such an effort without congressional support would turn to the veto.¹¹⁷ Concerns about presidential transformation were woven into the very principles underlying the only substantive veto constraint developed before Jackson's time.

IV. TRANSFORMATION AND DYNAMIC INSTITUTIONAL INTERACTION: ANDREW JACKSON

On Jackson's Inauguration Day, Daniel Webster commented that the President's "friends have no common principle—they are held together by no common tie."¹¹⁸ This part shows how Andrew Jackson forged a constitutional movement around an egalitarian political and economic agenda—although only for white men—by pounding his veto shield into a sword. As Congress escalated its resistance to the President's agenda and his unorthodox institutional initiatives, a dispute over the veto power began to change into a self-conscious reflection on the legitimacy of constitutional transformation led from the White House.¹¹⁹ Both Democrats and their opponents expected the crown jewel of Jackson's presidency to be the reversal of *McCulloch* in the Supreme Court, and by 1837 some spoke of that result as a foregone conclusion.¹²⁰

A. Changing Lanes Along the Maysville Road

The passage of the Maysville Road internal improvements bill early in Jackson's administration demonstrated that his 1828 election had not been accompanied by effective control over the legislative branch.¹²¹ In enacting the statute, Congress reaffirmed that internal

117. See *supra* text accompanying note 15.

118. Letter from Daniel Webster to Ezekiel Webster (Feb. 23, 1829), in *THE LETTERS OF DANIEL WEBSTER* 141, 142 (C.H. Van Tyne ed., Scholarly Press 1970) (1902).

119. See, e.g., BINKLEY, *supra* note 6, at 68 ("The place of the President in the American constitutional system may be said to have been the outstanding constitutional question raised by Jackson's eight years in the presidential office.").

120. See 13 CONG. DEB. 387 (1837) (statement of Sen. Benton); *id.* at 469 (statement of Sen. Bayard).

121. See SKOWRONEK, *supra* note 6, at 138-39. Although the Democratic Party did have a majority in Congress, enough Democrats refused to follow Jackson's lead

improvements were integral to the "American System" of protective tariffs and a national bank that had been designed by Hamilton and expounded by Clay as the reigning policy ethos.¹²² The goals of the American System were to spur the development of domestic manufacturing and create an alliance between the commercial classes and the national government.¹²³ Such an agenda tended to exacerbate class tensions, and its sweeping objectives necessitated the broad construction of the federal government's powers that Madison and Monroe had decried in their vetoes.¹²⁴ Both of these results were antithetical to Jackson's instinctive belief in Jeffersonian notions of equality and limited government.¹²⁵ By 1830, Clay already suspected that the President's plan was "to cry down old constructions of the Constitution; to cry up State rights, [and] to make all Mr. Jefferson's opinions the articles of faith of the new church."¹²⁶

Clay's fears were confirmed later that year when Jackson used his first veto to strike a blow against the American System through the Maysville Road project.¹²⁷ The bill in question authorized \$150,000 of government stock purchases in a private corporation chartered to extend the National Road through Kentucky between Maysville and Lexington, and—as a project in Clay's home state—the bill had more than its share of symbolic power.¹²⁸ Describing the project as an "irregular, improvident, and unequal appropriation[] of the public funds"¹²⁹ at a time when the administration was trying to pay down the national debt, Jackson also expressed strong constitutional objec-

on major issues to deny him a reliable base of support. See MICHAEL F. HOLZ, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY* 15 (1999).

122. See MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 68-84 (1987); SCHLESINGER, *supra* note 6, at 10-11.

123. See PETERSON, *supra* note 122, at 68-84; SCHLESINGER, *supra* note 6, at 11-13; see also *id.* at 62 (quoting James Polk on the American System).

124. See *supra* text accompanying notes 52-53.

125. See PETERSON, *supra* note 122, at 165; 2 ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN FREEDOM, 1822-1832*, at 231 (1981); SCHLESINGER, *supra* note 6, at 57-59; SKOWRONEK, *supra* note 6, at 131.

126. PETERSON, *supra* note 122, at 194; see SKOWRONEK, *supra* note 6, at 131.

127. See Andrew Jackson, Veto Message (May 27, 1830), in 2 MESSAGES, *supra* note 2, at 483 [hereinafter Jackson, Veto Message (May 27, 1830)]. Subsequent vetoes on internal improvements and public land sales also relied on the Maysville Road veto. See Andrew Jackson, Veto Message (May 31, 1830), in 2 MESSAGES, *supra* note 2, at 493; Andrew Jackson, Veto Message (Dec. 6, 1832), in 2 MESSAGES, *supra* note 2, at 637; Jackson, Veto Message (Dec. 4, 1833), *supra* note 23, at 65. Jackson did not oppose all internal improvement bills, just the use of those projects as part of a broader commercial and political system linking the states. See Jackson, Veto Message (May 27, 1830), *supra*, at 487-88; PETERSON, *supra* note 122, at 196.

128. See JACKSON, *supra* note 44, at 16; SCHLESINGER, *supra* note 6, at 58; SKOWRONEK, *supra* note 6, at 139.

129. Jackson, Veto Message (May 27, 1830), *supra* note 127, at 489; see JACKSON, *supra* note 44, at 17-18.

tions in the absence of an explicit amendment authorizing spending on internal improvements.¹³⁰

In his argument against the Maysville Road, Jackson's veto message relied on the orthodox notions of precedential interpretation elaborated by previous internal improvement vetoes.¹³¹ Madison implied and Monroe explicitly stated that Congress had the power to appropriate funds for national internal improvements as long as the states were at liberty not to carry the projects forward.¹³² Jackson claimed that the Maysville Road was purely a local project because it ran within the confines of Kentucky, and therefore it could not be sustained under the existing construction of congressional power.¹³³ Of course, since the bill was designed to extend a national network of roads, classifying it as a local project was somewhat questionable, but Jackson's reading of the precedents was at least plausible.

Although the "holding" of the Maysville Road veto was rather bland, Jackson's "dicta" proceeded to undermine the whole enterprise of precedential interpretation. The President described Jefferson's much narrower position on the legitimate scope of internal improvements, noting its "deservedly high authority"¹³⁴ and explaining that "[t]he symmetry and purity of the Government would doubtless have been better preserved if this restriction of the power of appropriation could have been maintained."¹³⁵ Jackson then catalogued how Jeffer-

130. See Jackson, Veto Message (May 27, 1830), *supra* note 127, at 490-93. Jackson used both policy and constitutional arguments in his message, which raises one important interpretive consideration that needs to be resolved: Why should we take Jackson's constitutional arguments seriously? A bad faith explanation for the constitutional struggle over the veto has already been dismissed as inadequate. See *supra* text accompanying notes 11-12. Nevertheless, it could still be said that Jackson's constitutional claims were merely window-dressing for the President's policy objections.

There are two reasons to think that Jackson's constitutional ideas were sincere. First, at the end of 1830 Jackson pocket-vetoed two similar internal improvement bills while explicitly disavowing any constitutional objections. See Andrew Jackson, Second Annual Message (Dec. 6, 1830), in 2 MESSAGES, *supra* note 2, at 500, 508-11. If Jackson did not use constitutional arguments to simply dress up those vetoes, there is no reason to believe that he would have done so in the Maysville Road veto. Second, the constitutional logic expressed in the Maysville message mirrored Jackson's reasoning in his bank veto, and in this latter case the constitutional arguments were advanced in spite of Madison's precedent of vetoing the bank solely on policy grounds. See Jackson, Veto Message (July 10, 1832), *supra* note 55, at 581-91; Madison, *supra* note 19, at 555.

131. See Jackson, Veto Message (May 27, 1830), *supra* note 127, at 485-87; JACKSON, *supra* note 44, at 17.

132. See Jackson, Veto Message (May 27, 1830), *supra* note 127, at 486; JACKSON, *supra* note 44, at 17-18; SKOWRONEK, *supra* note 6, at 105; *supra* text accompanying notes 52-53.

133. See Jackson, Veto Message (May 27, 1830), *supra* note 127, at 487.

134. *Id.* at 485.

135. *Id.*

son's view had been totally ignored in practice,¹³⁶ and pointed out "the difficulty, if not impracticability, of bringing back the operations of the Government to the construction of the [original] Constitution."¹³⁷ Then came the veto's kicker, which argued that this experience gave:

an admonitory proof of the force of implication and the necessity of guarding the Constitution with sleepless vigilance against the authority of precedents which have not the sanction of its most plainly defined powers; for although it is the duty of all to look to that sacred instrument instead of the statute book, to repudiate at all times encroachments upon its spirit, . . . it is not less true that the public good and the nature of our political institutions require that individual differences should yield to a well-settled acquiescence of the people and confederated authorities in particular constructions of the Constitution on doubtful points.¹³⁸

This passage contained the seeds of a revolution.

Before parsing Jackson's text, the first noteworthy point is that the President's specific attacks on the interpretive value of past practice were qualified by a general endorsement of Madison's concept of precedent. After all, Jackson had relied on his predecessors' vetoes, and hence he could not afford to ignore prior authority altogether.¹³⁹ Nevertheless, the rest of Jackson's statement takes the standing assumptions of the constitutional regime to task. Practice was not the irresistible rule of constitutional construction proclaimed in *Stuart*,¹⁴⁰ but a suspicious source of authority that must be watched with "sleepless vigilance." Moreover, legislative precedent found in "the statute book" was unreliable in comparison with the Constitution itself, thus inverting Madison's notion that no abstract opinion of the constitutional text could defeat consistent legislative practice.¹⁴¹ Finally, Jackson opined that presidents had a duty to prevent all encroachments of the Constitution, yet conceded that practice had the ability to legitimate some encroachments. This final point was a contradiction that would remain unresolved until the bank veto, since Jackson believed that precedent was on his side in the case of the Maysville Road.

Although the foregoing analysis demonstrates that Jackson took considerable care to base his veto on accepted interpretive principles, the sharp reaction against his message in Congress indicated that

136. See *id.* at 485-86.

137. *Id.* at 487.

138. *Id.*

139. See *supra* text accompanying notes 131-32.

140. See *supra* text accompanying notes 82-85.

141. See *supra* text accompanying notes 61-62. It could be argued that Jackson was only referring to the creation of new statutory precedents, not the legitimacy of relying on old ones. If this was the case, however, Jackson's bank veto would have to be read as a total repudiation of his Maysville veto, as the bank message rejected the authority of statutory precedent. See *infra* text accompanying notes 161-66. The two veto messages cohere better if the first is understood as stage-setting for the second.

some already saw that a constitutional game was afoot. During debate on the override motion, Representative Stanbery stated his belief that "[o]n the whole, I consider this document artfully contrived to bring the whole system of internal improvements into disrepute."¹⁴² In response, Phillip Barbour—whom Jackson later elevated to the Supreme Court¹⁴³—defended the veto in a lengthy speech that characterized Jackson's action as the first step in a movement akin to Jefferson's successful presidential transformation.¹⁴⁴ Outside the Capitol, the Whig *National Intelligencer* reported that the Maysville Road veto was the herald for a challenge to the keystone of the American System: the Second Bank of the United States.¹⁴⁵

B. Throwing Down the Gauntlet: The Bank Veto

Andrew Jackson's rejection of the bank recharter was probably the most consequential veto in the history of the Republic, and its contemporary political impact was profound.¹⁴⁶ Although the bank's charter was not due to expire until 1836, a recharter was passed in 1832

142. 6 CONG. DEB. 1141 (1830) (statement of Rep. Stanbery). The attempt to override the president's veto failed in the House by a vote of 96-90. See JACKSON, *supra* note 44, at 23.

143. See Calvin R. Massey, *Getting There: A Brief History of the Politics of Supreme Court Appointments*, 19 HASTINGS CONST. L.Q. 1, 8-9 (1991).

144. Sir, I hail this act of the President as ominous of the most auspicious results. Amongst the many excellent doctrines which have grown out of our republican system, is this, that the blessings of freedom cannot be employed without a frequent recurrence to fundamental principles. In this instance, we are making that recurrence. . . . Thirty years ago, at the opening of the present century, our Government was drawn back to its original principles; the vessel of State, like one at sea, had gotten upon a wrong tack, and the new pilot who was then placed at the helm brought it again into the right course In the progress of a long voyage, it has again declined from its proper course; and I congratulate the whole crew that we have found another pilot

6 CONG. DEB. 1144 (1830) (statement of Rep. Barbour).

145. See JACKSON, *supra* note 44, at 23.

146. See BINKLEY, *supra* note 6, at 69; JACKSON, *supra* note 44, at 29; SCHLESINGER, *supra* note 6, at 90-92; SKOWRONEK, *supra* note 6, at 141-43; see also *United States v. Shive*, 27 F. Cas. 1065, 1067 (C.C.E.D. Pa. 1832) (No. 16,278) (rejecting defense counsel's attempt to use Jackson's veto message as part of a jury argument against the Bank's constitutionality). For more on the role of juries in constitutional movements, see Gerard N. Magliocca, *The Philosopher's Stone: Dualist Democracy and the Jury*, 69 U. COLO. L. REV. 175 (1998).

Before proceeding with this discussion, a broader claim against this reading of the veto struggle must be evaluated. Since the veto is only a negative power, is characterizing it as part of an affirmative program of constitutional transformation reasonable? Carlton Jackson reflects a commonly-held belief when he says that "[t]he bank veto cannot be regarded as a positive example of executive action." JACKSON, *supra* note 44, at 44.

This argument misses the dynamic aspects of the institutional contest. It is true that at any given point in time the veto is only a negative power, but Jackson's rhetoric in his veto messages was crucial in galvanizing popular and electo-

under the leadership of Jackson's opponent in the upcoming presidential election: Senator Clay.¹⁴⁷ The American System's architect hoped to expose fault lines in the Democratic Party by forcing the President to take a stand on the bank prior to the election.¹⁴⁸ Instead, Jackson turned the tables by firing the opening salvo of a bank war that would preoccupy American politics for much of the next decade.¹⁴⁹ Though his veto message was as much a skilled political manifesto as a serious exposition of constitutional law, this latter aspect is the focus here.¹⁵⁰

Repudiating the institution that Hamilton had deemed vital to "link[] the interest of the State in an intimate connection with those of the rich individuals belonging to it"¹⁵¹ would require the bulldozing of every type of constitutional precedent imaginable. Madison's bank veto had asserted that the constitutional question was settled,¹⁵² *McCulloch* had added the Court's imprimatur,¹⁵³ and Congress had repeatedly passed bank bills since Washington's administration.¹⁵⁴ Jackson could exercise his veto on policy grounds alone, but that would not change the fundamental principles that legitimated the bank and stood ready to be revived by any future president.¹⁵⁵ Putting a stake through the bank's heart and maintaining the momentum created by the Maysville Road veto demanded a sustained presidential campaign for constitutional change. Confronting a hostile Congress under the thumb of his presidential opponent, Jackson launched his crusade against a political system where "the rich and powerful too often bend the acts of government to their selfish purposes" and the national government "bind[s] the States more closely to the center"¹⁵⁶ through yet another veto message.

ral support for forthcoming elections that changed the political balance and paved the way for affirmative reform. See *infra* Part IV.E.

147. See BINKLEY, *supra* note 6, at 69; JACKSON, *supra* note 44, at 29-30; SCHLESINGER, *supra* note 6, at 86-87; SKOWRONEK, *supra* note 6, at 141-42.

148. See, e.g., PETERSON, *supra* note 122, at 207.

149. See *infra* Parts IV.C-E, V.B.

150. For a discussion of the political ramifications of the veto message, see SCHLESINGER, *supra* note 6, at 90-94.

151. Letter from Alexander Hamilton to Robert Morris (1780), in 3 THE WORKS OF ALEXANDER HAMILTON 319, 338 (Henry Cabot Lodge ed., 1904).

152. See Madison, *supra* note 19, at 555.

153. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

154. See BINKLEY, *supra* note 6, at 68-69; *supra* text accompanying note 68.

155. See SKOWRONEK, *supra* note 6, at 142 ("[I]n taking up that challenge he would be repudiating the whole framework of government in which the Bank was embedded."). There is a question about what kind of constitutional precedent Jackson was establishing here, because—although the bank war destroyed a national bank for the rest of the nineteenth century—Jackson's actions were not binding on his successors. This question expresses a methodological flaw that is contested throughout this analysis; namely, that only Article V amendments and Supreme Court cases can create substantial constitutional change.

156. Jackson, Veto Message (July 10, 1832), *supra* note 55, at 590.

After examining Jackson's argument that the bank was "unauthorized by the Constitution, subversive of the rights of the States, and dangerous to the liberties of the people,"¹⁵⁷ many commentators are drawn like moths to a flame to the President's claim that Supreme Court precedent did not control his judgment.¹⁵⁸ From a modern perspective, this reaction is understandable because the paramount authority of the Court in constitutional matters is taken for granted.¹⁵⁹ For Jackson's peers, however, the question of whether judicial precedents were binding on the constitutional judgments of others was not necessarily the primary issue. It paled in comparison to the President's rejection of the authority of *legislative* precedent and practice.¹⁶⁰

Following a lengthy discussion of his policy objections, Jackson began his constitutional offensive by equating precedent with legislative precedent and then rejecting its authority.¹⁶¹ In the President's own words: "It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. *To this conclusion I can not assent.*"¹⁶² Jackson defined "precedent" as comprising something other than court decisions and felt obliged to deal with the authority of this non-judicial authority first. The paragraph goes on to describe existing precedent by listing congressional decisions and state opinion concerning the bank.¹⁶³ So for Jackson, as for everyone else at this time, legislative acts were at the heart of any analysis of precedent.

In contrast to his Maysville Road dicta, Jackson's bank veto explicitly denied the authority of past practice. The President claimed that

157. *Id.* at 576.

158. *See id.* at 582 ("If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."). On the reaction to this, see 8 CONG. DEB. 1231, 1239-40 (1833) (statement of Sen. Webster); BINKLEY, *supra* note 6, at 70-74; JACKSON, *supra* note 44, at 33; SKOWRONEK, *supra* note 6, at 142.

159. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . .").

160. *See* 8 CONG. DEB. 1231 (1833) (statement of Sen. Webster); *id.* at 1266 (statement of Sen. Clay); JACKSON, *supra* note 44, at 41.

161. *See* Jackson, Veto Message (July 10, 1832), *supra* note 55, at 581-82.

162. *Id.* at 581 (emphasis added).

163. "One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal." *Id.* at 582. Webster correctly noted that the President mischaracterized the legislative history when he claimed that Congress had rejected a bank bill in 1815. *See* 8 CONG. DEB. 1230 (1833) (statement of Sen. Webster). Actually, it was Madison who rejected the bank, not Congress. *See* Madison, *supra* note 19, at 555.

"[m]ere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled."¹⁶⁴ This echoed Madison, but there were critical differences that exposed Jackson's profession of allegiance to precedent as an empty pledge. For instance, the President totally ignored Madison's prior veto declaring that practice had settled the bank constitutionality question.¹⁶⁵ The most relevant precedent of all—Madison's acquiescence on the question of constitutionality—does not appear anywhere in Jackson's veto message, and this "see no evil, hear no evil" methodology belies the President's assertion that he considered himself bound by well-settled understandings. Jackson's message concluded its legislative discussion by stating: "There is nothing in precedent, therefore, which, *if its authority were admitted*, ought to weigh in favor of the act before me."¹⁶⁶ An unavoidable implication of this statement was that the President did not admit the authority of past practice at all, and was instead asserting a new constitutional vision.

Beyond simply rejecting the authority of legislative precedent, Jackson's bank veto message began to expound a new proactive vision of the veto and the presidency. When the Supreme Court had faced the bank issue in *McCulloch*, the role of the presidency in shaping constitutional law was minimal. Yet, the bank veto stated that "[u]nder the decision of the Supreme Court, . . . it is the exclusive province of Congress *and the President* to decide whether the particular features of this act are necessary and proper."¹⁶⁷ In Jackson's view, the President was no longer subordinate to congressional power, but instead a true coequal partner in the exercise of constitutional discretion.¹⁶⁸

Having already ignored Madison's caution against using a constitutional veto to nullify the weight of past practice and legislative supremacy, Jackson took the next logical step for the legitimacy of presidential transformation by including a direct constitutional appeal to the electorate in his message.¹⁶⁹ Near the close of the veto, Jackson stated:

A general discussion will now take place, eliciting new light and settling important principles; and a new Congress, elected in the midst of such discussion, and furnishing an equal representation of the people according to the

164. Jackson, Veto Message (July 10, 1832), *supra* note 55, at 581-82.

165. See Madison, *supra* note 19, at 555.

166. Jackson, Veto Message (July 10, 1832), *supra* note 55, at 582 (emphasis added).

167. *Id.* at 583 (first emphasis added).

168. See 2 REMINI, *supra* note 125, at 370.

169. See CORWIN, *supra* note 12, at 21 ("Jackson became the first president in our history to appeal to the people over the heads of their legislative representatives.").

last census, will bear to the Capitol the verdict of public opinion, and, I doubt not, bring this important question to a satisfactory result.¹⁷⁰

While Jackson held out with one hand a temporary concession to legislative supremacy by describing Congress as the vessel of popular will, he took back power with the other hand by asserting that an election—not another adjudication—would be decisive in settling the constitutional contest.

Thus, Jackson recast the veto as an instrument to aid popular sovereignty. As we will see in the next section, Jackson upped the ante during the 1833-34 Deposit Crisis by claiming that a president could pursue his constitutional mandate, notwithstanding congressional opinion to the contrary.¹⁷¹ What were the constitutional principles at stake? Time now for the veto's ringing peroration:

Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union. It is time to pause in our career to review our principles, and if possible revive that devoted patriotism and spirit of compromise which distinguished the sages of the Revolution and the fathers of our Union.¹⁷²

The die was cast.

The response of the President's critics further demonstrates that Jackson had altered the veto from a tool of policy refinement into a weapon employed for constitutional transformation. Daniel Webster, the premier Supreme Court advocate of his day,¹⁷³ answered Jackson's challenge in a lengthy speech on the Senate floor denouncing Jackson's ambitious veto.¹⁷⁴ Unlike many of his colleagues, Webster conceded that the President's veto of the bank was constitutional, but he tore into its rationale.¹⁷⁵ In a parallel to Jackson, the Senator began his constitutional argument by emphasizing the legislative precedent sanctioning the bank's legitimacy.¹⁷⁶ Before he ever reached the question of *McCulloch's* relevance, Webster framed the crucial issue:

The legislative precedents all assert and maintain the power; and these legislative precedents have been the law of the land for almost forty years. They

170. Jackson, Veto Message (July 10, 1832), *supra* note 55, at 589.

171. See *infra* text accompanying notes 192-96.

172. Jackson, Veto Message (July 10, 1832), *supra* note 55, at 590-91.

173. See PETERSON, *supra* note 6, at 98.

174. See 8 CONG. DEB. 1221-40 (1833) (statement of Sen. Webster).

175. See *id.* at 1222 (statement of Sen. Webster) ("It is not to be doubted that the constitution gives the President the power which he has now exercised . . ."). In one respect Webster's constitutional analysis was flawed. He read the bank veto as setting forth the idea that the President could refuse to enforce validly enacted laws. See *id.* at 1232-33; JACKSON, *supra* note 44, at 40. Although Jackson arguably did just that during the Deposit Crisis, see *infra* Part IV.C-E, the veto message does not go that far, see JACKSON, *supra* note 44, at 40.

176. See 8 CONG. DEB. 1229-31 (1833) (statement of Sen. Webster).

settle the construction of the constitution, and sanction the exercise of the power in question so far as these ends can ever be accomplished by any legislative precedents whatever. *But the President does not admit the authority of precedent.*¹⁷⁷

Although the Massachusetts senator provided a cogent summary of traditional constitutional arguments in defense of the bank, his last sentence demonstrated an awareness that the old ground rules had been tossed aside by the President's veto.

As Webster struggled to understand the implications of this new constitutional paradigm, he engaged in some interesting speculation that foreshadowed the Deposit Crisis, and then—in another parallel to Jackson—closed his statement with a direct appeal to the people. If Congress could not determine whether its exercise of authority was constitutional, and the Court's judgment on that question was not binding, then Webster concluded that "the message proceeds to claim for the President, not the power of approval, but the primary power, the power of originating laws."¹⁷⁸ This statement seems odd if taken at face value. Webster probably did not mean that presidents would soon be ruling by decree. The constitutional predicates to the statement, however, suggest that he recognized a threat from a presidential attempt to revise constitutional understandings and legitimate laws that would otherwise be unauthorized.¹⁷⁹ Evidence supporting this reading will be provided shortly, but, whatever Webster thought, it was clear that he did not like the implications of Jackson's assertions. In closing his address to the Senate, Webster established the parameters of the 1832 election by saying: "It remains, now, for the people of the United States to choose between the principles here avowed and their Government. These cannot subsist together. The one or the other must be rejected."¹⁸⁰

While Webster focused on the jurisprudential implications of the bank veto, his counterpart Senator Clay condemned the means Jackson used to do his dirty work. In Clay's view, "[t]he veto [was] hardly reconcilable with the genius of representative Government" due to its English heritage, and should not be used in "ordinary cases."¹⁸¹ Clay's history lesson for the Senate was filled with inaccuracies. He claimed that the veto had been designed to stop precipitate legislation only, and that Madison had only used the power two or three times.¹⁸² The latter point is simply false, and the former one is questionable in

177. *Id.* at 1231 (statement of Sen. Webster) (emphasis added). Webster repeated his practice argument several times. *See id.* at 1233-34.

178. *Id.* at 1239-40.

179. Webster himself moved toward this conclusion during the Deposit Crisis. *See infra* text accompanying notes 244-45.

180. 8 CONG. DEB. 1240 (1833) (statement of Sen. Webster).

181. *Id.* at 1265 (statement of Sen. Clay).

182. *See id.* (statement of Sen. Clay).

the light of early practice that shows vetoes were used on many different types of legislation.¹⁸³ Moreover, even if Clay's argument that the veto could not be used in ordinary cases was valid, the recharter of the bank was hardly an ordinary bill.

Perhaps the Senator was just engaged in political posturing for the upcoming campaign, but he did feel that something was not quite right about Jackson's particular use of the veto, even if he could not clearly articulate those concerns. For many politicians, objections to the muscular use of veto power would never be justified by anything other than vague feelings. Eventually, Clay joined Webster in the realization that the issue was not the veto power itself, but the transformative purpose that animated Jackson's vetoes.¹⁸⁴

The electoral results generated by this intense debate were mixed. Jackson's bank veto message was widely disseminated during his victorious 1832 campaign. Clay's supporters committed a disastrous blunder by distributing thousands of copies of the message throughout the country in the belief that it would hurt the President's chances.¹⁸⁵ Instead, Jackson soundly defeated Clay 219-49 in the Electoral College,¹⁸⁶ and the Democrats gained working control of the House.¹⁸⁷ On the Senate side, however, the Great Triumvirate of Webster, Clay, and John C. Calhoun held sway as part of an anti-Jackson majority.¹⁸⁸ Both sides began mobilizing for the next electoral struggle, and once again it would be mediated by the bank battle and a veto adaptation.

C. Censure of the President-Constitutionality

In the aftermath of the election, the President resumed his campaign against the bank by beginning the removal of its federal deposits into state banks, initiating the so-called "Deposit Crisis."¹⁸⁹ In a nineteenth-century version of the Saturday Night Massacre, Jackson had to remove two Treasury Secretaries before he could get his plan carried out by Roger B. Taney, the future Chief Justice and chief political henchman of the President.¹⁹⁰ When Congress reconvened in December 1833 for what came to be known as its "Panic Session," the

183. See *supra* Part II.A-B.

184. See *infra* text accompanying notes 220-23. The bank veto was ultimately sustained in the Senate. See JACKSON, *supra* note 44, at 43.

185. See JACKSON, *supra* note 44, at 43.

186. See 2 REMINI, *supra* note 125, at 390.

187. See SKOWRONEK, *supra* note 6, at 470 n.49.

188. See HOLT, *supra* note 121, at 26; SKOWRONEK, *supra* note 6, at 148, 470 n.49.

189. See, e.g., PETERSON, *supra* note 6, at 14.

190. See BINKLEY, *supra* note 6, at 76; SKOWRONEK, *supra* note 6, at 149; see also SCHLESINGER, *supra* note 6, at 65 (describing Taney as the "spearhead of radicalism in the new cabinet"). Jackson's actions were quite controversial at the time since a president's authority to fire Cabinet secretaries was not clearly estab-

pressing constitutional question was whether a president had the power to unilaterally destroy an institution—the bank—explicitly authorized by legislation until the charter expired in 1836.¹⁹¹ Meeting this challenge generated a new round of reflection on the meaning of Jackson's bank veto, and culminated in unconventional actions on both sides of Pennsylvania Avenue.

Jackson announced his withdrawal strategy in a report read to the Cabinet shortly before Congress' return, and used that occasion to widen the scope of presidential power still further.¹⁹² The bank veto had claimed that the constitutional issue would be resolved by the election of a new Congress that reflected popular sentiment.¹⁹³ Rewriting history at an astonishing pace, Jackson's cabinet report now characterized the decision to recharter the bank in an election year as a deliberate attempt to "put the *President* to the test,"¹⁹⁴ and therefore "the President consider[ed] his reelection as a decision of the people against the bank."¹⁹⁵ After spending four years rejecting the authority of past practice and legislative supremacy, Jackson was now minimizing Congress' importance in order to reverse those traditional understandings in favor of a doctrine of presidential supremacy based on electoral campaigns.¹⁹⁶ Only the rock of the Senate stood against this revolutionary tide.

Reaction against the President's latest move was swift, as Senator Clay introduced a resolution censuring Jackson's actions as unconstitutional.¹⁹⁷ Before exploring the censure debate in depth, it would help to explain why this unprecedented remedy was chosen by Clay. The anti-Jackson majority in the Senate was in a bind. As Clay later

lished. See 3 ROBERT V. REMINI, *ANDREW JACKSON: THE COURSE OF AMERICAN DEMOCRACY, 1833-1845*, at 101 (1984).

191. See BINKLEY, *supra* note 6, at 77; PETERSON, *supra* note 6, at 14; SKOWRONEK, *supra* note 6, at 150.

192. See Andrew Jackson, Removal of the Public Deposits (Sept. 18, 1833), in 3 MESSAGES, *supra* note 2, at 5. Calhoun considered this report to be a blatant appeal to the people. See 10 CONG. DEB. 211 (1834) (statement of Sen. Calhoun).

193. See *supra* text accompanying note 170.

194. Jackson, *supra* note 192, at 6.

195. *Id.* at 7.

196. See 3 REMINI, *supra* note 190, at 159-60.

197. See 10 CONG. DEB. 58-59 (1834) (statement of Sen. Clay). The resolution read as follows:

That, by dismissing the late Secretary of the Treasury because he would not, contrary to his sense of his own duty, remove the money of the United States in deposit with the Bank of the United States and its branches, in conformity with the President's opinion; and by appointing his successor to effect such removal, which has been done, the President has assumed the exercise of a power over the treasury of the United States, not granted to him by the constitution and laws, and dangerous to the liberties of the people.

Id. at 58. Although the word "censure" was not actually used in the resolution, virtually everyone in the Senate referred to Clay's resolution as a censure.

described the situation, "No Senator believed, in 1834, that, whether the President merited impeachment or not, he ever would be impeached . . . by a majority of his political friends in the House of Representatives."¹⁹⁸ Since no articles of impeachment would be forthcoming from a House stacked with the President's supporters, censure was an unorthodox second-best solution designed to express the Senate's opinion on Jackson's continuing campaign against the bank and appeal to the people for support.¹⁹⁹ For Senator Thomas Hart Benton—the Jacksonian leader in the Senate—censure was "purely and simply for popular effect. Great reliance was placed upon that effect. It was fully believed . . . that a senatorial condemnation would destroy whomsoever it struck—even General Jackson."²⁰⁰

Jackson and his supporters in the Senate attempted to discredit the Censure Resolution as (1) "wholly unauthorized by the constitution, and in derogation of its entire spirit," and (2) a meritless attack on the President's official conduct.²⁰¹ The primary constitutional argument of the President and other Democrats was that the Senate *alone* could not lawfully censure executive conduct that might eventually be the subject of an article of impeachment from the House.²⁰² For Jacksonians, senatorial censure invaded the exclusive privilege of

198. 13 CONG. DEB. 434 (1837) (statement of Sen. Clay). This comment was made during the successful effort to expunge the censure of President Jackson from the Senate Journal in 1837. Since the Expunging Resolution revisited the arguments made during the original censure debate, the discussion surrounding expungement will be referenced together with the 1834 censure. See *infra* notes 203, 207, 209, 214, 216 and text accompanying note 207.

199. See 10 CONG. DEB. 58-59 (1834) (statement of Sen. Clay); SPITZER, *supra* note 11, at 37.

200. 1 THOMAS HART BENTON, THIRTY YEARS' VIEW 423 (New York, D. Appleton & Co. 1854) [hereinafter BENTON, THIRTY YEARS' VIEW]. Benton was a leading theorist of Jacksonian Democracy and a sophisticated constitutional scholar whose contributions have not received enough attention. See SCHLESINGER, *supra* note 6, at 59-61 (outlining Benton's career in the vanguard of Jackson's movement); see also THOMAS H. BENTON, EXAMINATION OF THE DRED SCOTT CASE (photo. reprint 1969) (New York, D. Appleton 1857). His leadership role on behalf of Jackson was particularly ironic since they shot it out in an 1813 bar room duel. See 2 REMINI, *supra* note 125, at 60 (describing Benton and Jackson's reconciliation many years after the duel).

201. 10 CONG. DEB. 1318 (1834). The protest was a written proclamation issued by Jackson after the passage of the Censure Resolution. For more on the protest as a "veto" of the Censure Resolution on the merits, see *infra* text accompanying notes 234-39.

202. See, e.g., 10 CONG. DEB. 1322 (1834) (protest of President Jackson); *id.* at 1467 (statement of Sen. Kane) ("[T]he members voting for the resolution have, at least, forever disqualified themselves from being his triers upon a regular prosecution for this alleged violation of duty, by forming and expressing an opinion on his guilt."); *id.* at 1550 (statement of Sen. Grundy) ("[T]he Senate has solemnly declared that the facts do exist; they were found before the trial commenced, before the accusation was preferred, and found by the ultimate triers of the facts, and their finding is on record.").

the House to impeach and made it impossible for the Senate to impartially judge any impeachment article that could ultimately be issued by the House on the charges discussed by the Censure Resolution.²⁰³ As Jackson himself put it, the Senate was "convert[ing] themselves into accusers, witnesses, counsel, and judges, and prejudg[ing] the whole case—thus presenting the appalling spectacle, in a free state, of judges going through a labored preparation for an impartial hearing and decision, by a previous *ex parte* investigation and sentence against the supposed offender."²⁰⁴

Clay and his senatorial allies rejected this objection and argued that the impeachment process did not preempt the Senate's right to condemn Jackson's conduct.²⁰⁵ In his speech introducing censure, Clay contested this line of constitutional attack:

I wish to anticipate and answer an objection which may be made to the adoption of the [Censure Resolution]. It may be urged that the Senate, being, in a certain contingency, a court of impeachment, ought not to prejudge a question which it may be called upon to decide judicially. . . . Now, it would be most strange, if, when its constitutional powers were assailed, it could not assert and vindicate them, because, by possibility, it might be required to act as a court of justice. . . . [D]oes any one believe that the president will now be impeached? And shall we silently sit by . . . because, against all human probability, he may be hereafter impeached?²⁰⁶

On the question of whether the Senate could censure a president *after* the House had voted for impeachment, Jackson's position was unclear. He argued in his protest message that the President was entitled to the procedural protections provided by an impeachment trial in the Senate. *See id.* at 1320-21 (protest of President Jackson). But Jackson's position did not preclude a president from waiving those protections and accepting censure, or from being censured after an acquittal in the Senate trial.

203. *See, e.g.*, 10 CONG. DEB. 98 (1834) (statement of Sen. Benton) (calling upon the Senate "to consider what was due to the House of Representatives, whose privilege was invaded, and who had a right to send a message to the Senate, complaining of the proceeding, and demanding its abandonment"); *id.* at 1159 (statement of Sen. Wright) ("If any cause can be more sure than another, to render the Senate odious to the people of this country, it will be attempts here to assume the duties of the immediate representatives of the people; to constitute ourselves the accusers as well as the judges . . ."); *see also* 13 CONG. DEB. 449 (1837) (statement of Sen. Buchanan) (claiming during debate on the Expunging Resolution that the Senate's censure "prejudged the case" against Jackson).
204. 10 CONG. DEB. 1322 (1834) (protest of President Jackson).
205. *See, e.g., id.* at 1520-21 (statement of Sen. Bibb); *id.* at 1670-71 (statement of Sen. Webster).
206. *Id.* at 75 (statement of Sen. Clay). Clay also asserted that the censure merely condemned Jackson's acts and not his motives, and further claimed that a president could not be impeached without the state of mind of "deliberate purpose of usurpation." *Id.* Jackson strongly contested the notion that the censure did not impugn his motives. *See id.* at 1320 (protest of President Jackson) ("That the resolution does not expressly allege that the assumption of power and authority which it condemns, was intentional and corrupt, is no answer to [my] view of its character and effect.").

Clay's reliance upon the impossibility of impeachment as a justification for senatorial censure was a persuasive argument in 1834 against the Jacksonians' first set of constitutional objections. Nevertheless, when the Senate ultimately expunged the Censure Resolution in 1837, it rejected Clay's position and concluded that censure had been unconstitutional *because the Senate had passed it without any action by the House*.²⁰⁷

207. The Expunging Resolution stated, in pertinent part:

And whereas the Senate being the constitutional tribunal for the trial of the President, when charged by the House of Representatives with offences against the laws and the constitution, the adoption of the said [censure], before any impeachment preferred by the House, was a breach of the privileges of the House; not warranted by the constitution; a subversion of justice; a prejudication of a question which might legally come before the Senate; and a disqualification of that body to perform its constitutional duty with fairness and impartiality, if the President should thereafter be regularly impeached by the House of Representatives for the same offence.

13 CONG. DEB. 504 (1837).

This was the *only* constitutional objection made by the Senate when it expunged the censure of Andrew Jackson, although the Expunging Resolution did criticize the censure extensively on its merits. *See id.* at 503. The hortatory introduction of the resolution did state that censure had been illegal because it was passed "without going through the forms of an impeachment, and without allowing to [Jackson] the benefits of a trial, or the means of defence," *id.*; however, these statements cohere perfectly well with the conclusion that censure by the Senate *alone* was constitutionally defective. There is no evidence to support the further contention that the expungement of the 1834 censure was based on an understanding that congressional censure of a president was *per se* unconstitutional, or that the Senate could not censure a president after the House had voted for impeachment. These omissions are significant because many Senators opposed to the original Censure Resolution did, in fact, argue that any censure of a president undertaken by one or both houses of Congress would be illegal. *See infra* text accompanying notes 208-16.

Much of the discussion in 1837 centered around the problem of whether one Senate had the power to erase a resolution passed by a previous Senate. *See, e.g.*, 13 CONG. DEB. 450 (1837) (statement of Sen. Buchanan) ("Do the Senate possess the power, under the constitution, of expunging the resolution of March, 1834, from their journals . . . ?"). The Senate's conclusion that it did have that power bears directly on the question of whether the House possesses a similar power to expunge the bill of impeachment passed against President Clinton. The only distinction between the two is that impeachment has a privileged place under the Constitution, whereas senatorial censure outside the impeachment process was more constitutionally dubious. On the other hand, this does not really speak to the legitimate power of one House of Congress vis a vis its predecessor. Moreover, one could argue that the constitutional requirement that the Senate "keep" a Journal, U.S. CONST. art. I, § 5, cl. 3, also made the Censure Resolution constitutionally privileged from expungement, *see* 13 CONG. DEB. 500 (1837) (statement of Sen. Webster) ("The words are, that 'each House shall KEEP a journal of its proceedings.' No gloss, no ingenuity, no specious interpretation, and much less can any fair or just reasoning reconcile the process of expunging with the plain meaning of these words . . .").

A second constitutional argument advanced by the President and his allies—repeated in a slightly different form during the Clinton impeachment debate—was that *any* congressional censure of a president would exceed Congress' Article I, Section 8 powers.²⁰⁸ Although this contention took a back seat to the aforementioned debate about the Senate's special role in the impeachment process, what was said about Congress' power to censure adhered closely to the substantive constitutional battle lines that already separated Jackson from his opponents. The Democrats argued that the Censure Resolution, much like internal improvements or a national bank, was beyond the legislative power delegated to Congress.²⁰⁹ Senator Benton led the charge on the floor by citing eight points that he thought "explode[d]" the contention of Senator Webster that censure was a legitimate congressional act.²¹⁰ In language that echoed Jackson's narrow view of federal authority in the veto messages, Senator Forsythe scoffed at the existence of any congressional power to censure a president: "Where is that to be found? Nowhere. The right of the Senate rests upon implication" ²¹¹

Jackson's senatorial foes replied by articulating an expansive—albeit somewhat vague—definition of Congress' authority that encompassed censure and conformed to a constitutional philosophy of legislative preeminence that was under heavy assault. Clay pro-

208. It is noteworthy that—unlike the view expressed frequently in the Clinton case—the Censure Resolution was never classified by anyone in 1834 as an unconstitutional "bill of attainder," U.S. CONST. art. I, § 9, cl. 3, although some did condemn it as an unwarranted "judicial" (i.e. non-legislative) action in lieu of a Senate impeachment trial, *see, e.g.*, 10 CONG. DEB. 1351 (1834) (statement of Sen. Benton). Jackson did opine that "[t]he judgment of guilty by the highest tribunal in the Union; the stigma [censure] would inflict on the offender . . . [is] the very essence of . . . punishment." *Id.* at 1321 (protest of President Jackson). But Senator Clay rejected the idea that his resolution punished Jackson. *See id.* at 1569 (statement of Sen. Clay) ("[T]he Senate will not, and has not, expressed itself in such manner as to imply criminal guilt in the violation."). Even Jackson's Senate defenders did not accept the argument that censure constituted an illegal legislative punishment. They focused on whether censure was within Congress' affirmative grant of power pursuant to Article I, Section 8, not whether censure ran afoul of any specific limit on Congress' power.

209. *See, e.g.*, 10 CONG. DEB. 1158 (1834) (statement of Sen. Wright) ("[The censure] proposes no legislative act, nor does it assert any legislative power."); *id.* at 1319 (protest of President Jackson) ("[The censure] asserts no legislative power; proposes no legislative action; and neither possesses the form nor any of the attributes of a legislative measure."); *see also* 13 CONG. DEB. 414 (1837) (statement of Sen. Niles) (arguing during the expunging debate that "it is not the doctrine of the constitution; one independent department of the Government cannot inquire into and pass sentence of condemnation against the acts of another independent department, except so far as the constitution has allowed it to be done, and according to its forms").

210. 10 CONG. DEB. 1697 (1834) (statement of Sen. Benton).

211. *Id.* at 1653 (statement of Sen. Forsythe).

claimed with mock surprise that he "had supposed the right of the Senate to express its opinion, in any form, as to a violation of the constitutional power of Congress, would not be seriously questioned. What part of the constitution restrains it?"²¹² Others justified the Censure Resolution with abstract principles such as the "right inherent in all men, and in all bodies, to express their opinions,"²¹³ the Senate's right of "self-preservation,"²¹⁴ or the right of "self-defense."²¹⁵ What connected all of these constitutional arguments for censure was the belief of Jackson's opponents that Congress retained broad powers to act on behalf of the national welfare, and that those powers had to be pressed to their limit to rein in Jackson's revolutionary presidency.²¹⁶

D. Censure of the President-The Merits

Although technical constitutional considerations played a significant role in the debate, most of the action in the Senate focused on the merits of Jackson's conduct as an aspiring transformative president. Clay's speech introducing the Censure Resolution explicitly contested Jackson's veto adaptation and the legitimacy of constitutional change led by the President without an amendment passed pursuant to the

212. *Id.* at 1569 (statement of Sen. Clay).

213. *Id.* at 1406 (statement of Sen. Ewing).

214. 13 CONG. DEB. 494 (1837) (statement of Sen. Ewing) (debate on the Expunging Resolution).

215. 10 CONG. DEB. 1668 (1834) (statement of Sen. Webster).

216. No definitive constitutional judgment on the congressional censure of a president was rendered in the 1830s. Only two Senators commented specifically on censure as a remedy for conduct falling short of an impeachable offense, but their statements were not very illuminating. *See* 10 CONG. DEB. 1521 (1834) (statement of Sen. Bibb) ("Such political action, short of [impeachment], is one of the checks and guards against disorders and aggression properly resulting from the structure of our Government, and so intended."); 13 CONG. DEB. 467 (1837) (statement of Sen. Bayard) (commenting during the expunging debate that censure was "highly expedient, as a check or caution to the wantonness or heedlessness of executive power, and as a measure short of impeachment").

Although the Jacksonian era itself does not answer the question of whether censure is constitutionally permissible, the context against which the debate occurred offers some guidance for the Clinton situation and the future. The Jacksonian critics of censure embraced a philosophy of limited congressional power and therefore refused to accept the notion that censure—a power not expressly delegated to Congress—could be created by implication. As will soon become evident, this constitutional vision triumphed in the short-run. In the decades since, however, Jackson's narrow view of congressional authority has been rejected, and Congress now wields extraordinarily broad power pursuant to Article I, Section 8, beyond the imagination of even Clay and Webster. As a result, the premise that the Democrats used to attack censure in the 1830s is no longer viable. Moreover, there is no other obvious candidate capable of supporting an argument that presidential censure—whether passed by Congress as a whole or by the Senate following an impeachment by the House—is unconstitutional. *See supra* note 202.

procedures laid out in Article V. The Senator opened his speech with ominous rhetoric:

We are . . . in the midst of a revolution, hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man. The powers of Congress are paralyzed, except when exerted in conformity to his will, by frequent and an extraordinary exercise of the executive veto, not anticipated by the founders of the constitution, and not practised by any of the predecessors of the present Chief Magistrate.²¹⁷

The transformation of the presidency through the veto was the heart of the matter for the Senator from Kentucky. Clay's survey of precedent led him to conclude that the President did not possess the power to remove deposits from the bank. He then turned his scorn towards Jackson's claim that the election had given him a mandate to terminate the bank in this fashion.²¹⁸

To counter Jackson's position on this latter point, Clay employed two arguments that would be raised frequently during the censure debate. First, he claimed that Jackson did not represent popular opinion in any special way because presidential elections were not referenda on policy issues: "The election of a President, in itself, gives no power, but merely designates the person who, as an officer of the Government, is to exercise power granted by the constitution and laws."²¹⁹ In the alternative, Clay rejected the idea that the Constitution could be changed solely by presidential leadership and without a formal amendment:

I am surprised and alarmed at the new source of executive power which is found in the result of a presidential election. I had supposed . . . that the constitution could only be amended in the mode which it has itself prescribed But it seems that if, prior to an election, certain opinions, no matter how ambiguously put forth by a candidate, are known to the people, these loose opinions, in virtue of the election, incorporate themselves with the constitution, and afterwards are to be regarded and expounded as parts of the instrument!²²⁰

Since Clay himself was responsible for putting the bank issue at the forefront of the 1832 campaign,²²¹ his claim that the question had

217. 10 CONG. DEB. 59 (1834) (statement of Sen. Clay).

218. *See id.* at 65-66 (statement of Sen. Clay).

219. *Id.* at 66 (statement of Sen. Clay). Clay's personal view was that "[a]fter an election is fairly terminated, I have always thought that the best way was to forget all the incidents of the preceding canvass, and especially the manner in which the votes had been cast." *Id.* at 82. Of course, this view was fiercely contested by the Democrats. *See, e.g., id.* at 344 (statement of Sen. Forsythe) ("The issue, the Senator well knows, is made by the two parties . . . and all the parties who were connected with it in the struggle for power—they made the issue—they presented the question distinctly and intelligibly to the people."); *id.* at 774 (statement of Sen. Hill) ("The people was the tribunal to which the bank appealed; it was the tribunal of the bank's choice. The decision was against the bank.").

220. *Id.* at 84-85 (statement of Sen. Clay).

221. *See supra* text accompanying notes 147-48.

been "ambiguously put forth by a candidate" was somewhat disingenuous. But his statement was quite remarkable in another respect. It could have been uttered, without a single change, by opponents of the constitutional legitimacy of the New Deal, or by current opponents of academic theories that justify informal constitutional amendments.²²² Instead, we find that Clay placed the issue of informal constitutional change on the table more than a century ago in response to the transformative aspirations of Andrew Jackson's presidency.²²³

Senator Benton, in reply to Clay, offered up a different vision of democracy:

The senator from Kentucky calls upon the people to rise, and drive the Goths from the capitol. Who are those Goths? They are General Jackson and the democratic party,—he just elected President over the senator himself, and the party just been made the majority in the House—all by the vote of the people. It is their act that has put these Goths in possession of the capitol to the discomfiture of the senator and his friends²²⁴

The outlines of the censure debate were now clear. For Jacksonian Democrats, the popular sovereignty expressed by several recent *elections* was every bit as authoritative as the popular sovereignty embodied by our *constitutional structure*. Clay and his supporters, however, deemed the popular sovereignty expressed at the Founding to be superior to the mandate now claimed by the victorious "Goths" led by President Jackson.

Debate on the Censure Resolution lasted for three months, and the leading lights of the Senate picked up on Clay and Benton's themes. Calhoun agreed with Clay that a revolution was in progress, and believed that the veto, "a power intended as a shield, to protect the executive against the encroachment of the legislative department . . . [was now] intended as a sword, to defend the usurpation of the Executive."²²⁵ Talk of revolution stirred Senator William C. Rives of Virginia to join Benton and defend Jackson's bid for presidential transformation by matching Clay and Calhoun blow for blow:

I agree with [Clay], sir; we are in the midst of a revolution—a happy and auspicious revolution, like the "civil revolution of 1800," which, according to Mr. Jefferson was "as real a revolution in the principles, as that of '76 was in the form, of our Government." A like salutary revolution "in the principles of the Government," we have seen accomplished during the past five years of [Jackson's] administration.²²⁶

222. See, e.g., Henry Paul Monaghan, *We the People(s), Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

223. Clay's speech closed with the famous line: "The premonitory symptoms of despotism are upon us; and if Congress do not apply an instantaneous and effective remedy, the fatal collapse will soon come on, and we shall die—ignobly die—base, mean, and abject slaves; the scorn and contempt of mankind; unpitied, unwept, unmourned!" 10 CONG. DEB. 94 (1834) (statement of Sen. Clay).

224. 1 BENTON, THIRTY YEARS' VIEW, *supra* note 200, at 409.

225. 10 CONG. DEB. 216 (1834) (statement of Sen. Calhoun).

226. *Id.* at 289 (statement of Sen. Rives).

Rives went on to hail the end of internal improvements, the bank, and "the American System of the honorable Senator himself," all of which had been overthrown by the veto power.²²⁷ Senator Hill followed Rives by repeating the Jackson/Jefferson comparison, claiming that both had fought against corruption to restore the Constitution's true meaning.²²⁸

Opinion on these efforts to legitimize Jackson's actions by drawing an analogy to Jefferson split two ways. Some Senators conceded that Jackson was leading a revolution, but condemned that revolution as purely dictatorial.²²⁹ Senator Thomas Ewing, on the other hand, commented that "the present bears no close analogy to [the Jeffersonian] era" since Jackson was consolidating power in the presidency while Jefferson had demonstrated respect for the other branches.²³⁰ A careful review of Jefferson's administration makes Ewing's historical analysis look suspect,²³¹ but the Senator was asking the right question: Did Jackson have the kind of support that Jefferson once used successfully to change the Constitution? In one important respect, the answer was clearly no. Senator Southard made the obvious point that the Senate had also been elected after the 1832 campaign, and an anti-Jackson majority had been returned.²³² This was made abundantly clear when the Senate passed the Censure Resolution in March 1834;²³³ an act that appeared to signal the end of Jackson's transformative momentum.

E. Protest

Since the Senate resorted to an unconventional Censure Resolution to puncture the President's balloon, we should not be shocked to learn that Jackson responded with an equally unprecedented protest to symbolically veto the censure.²³⁴ Part of the protest challenged the constitutionality of censure,²³⁵ but most of the message was devoted to defending the President's actions on the merits.²³⁶ Towards the

227. *Id.* (statement of Sen. Rives).

228. *See id.* at 801 (statement of Sen. Hill).

229. *See id.* at 178 (statement of Sen. Southard); *id.* at 381-82 (statement of Sen. Sprague); 3 REMINI, *supra* note 190, at 149.

230. 10 CONG. DEB. 329 (1834) (statement of Sen. Ewing). John Tyler expressed a similar skepticism about the Democrats' comparison of Jackson with Jefferson. *See infra* text accompanying notes 274-76.

231. *See supra* text accompanying notes 101-04.

232. *See* 10 CONG. DEB. at 178 (1834) (statement of Sen. Southard) ("What Congress was to bear this verdict to the Capitol? The present—that now in actual session in that very Capitol—members elected amidst those discussions—of which, sir, I am one!").

233. *See id.* at 1187.

234. *See id.* at 1317-36 (protest of President Jackson).

235. *See id.* at 1318-23 (protest of President Jackson).

236. *See id.* at 1323-36 (protest of President Jackson).

end of his message, Jackson again asserted that he was "the direct representative of the American people,"²³⁷ and appealed to them to reject a government supported by "powerful monopolies and aristocratic establishments."²³⁸ Upon receipt of the protest, Clay remarked: "[T]his protest is but a new form of the veto. That conservative provision of the constitution has been most remarkably expanded and employed under the present administration."²³⁹

Jackson's protest ignited a new round of senatorial debate on the legitimacy of the President's actions. Senator Poindexter condemned Jackson's "attempt to make this body the conduit of his popular appeals to the people."²⁴⁰ Senator Benton replied that whether the Senate liked it or not, the protest "will be compared with speeches delivered for three months in this Capitol, against this President, and an enlightened and upright community will decide between the language of the defence, and the language of the accusation."²⁴¹ Calhoun was particularly upset by Jackson's claim that the President was the direct representative of the people, and offered this sharply punctuated rejoinder: "What effrontery! What boldness of assertion! The immediate representative! Why, he never received a vote from the American people. He was elected by electors, elected either by the people of the States or by their Legislatures . . ."²⁴² Unfortunately for Calhoun, no matter how many times he asserted that the President did not represent the popular will, the South Carolinian's allies in Congress needed a victory at the polls if they were to make that claim stick.

The protest also intensified senatorial reflection on the legitimacy of constitutional change pursued without a formal amendment. Senator Benjamin Leigh warned that "[a]n appeal of the President to the American people against the Senate, with a view to accomplish, or even to suggest a change, formal or informal, in the constitution of the latter, through the direct intervention of the people, is, in its very nature, of a revolutionary tendency" since such presidential campaigning would allow Jackson to impose his constitutional will.²⁴³ Webster asked if the President's concept of a popular mandate extended to

237. *Id.* at 1333 (protest of President Jackson).

238. *Id.* at 1335 (protest of President Jackson).

239. *Id.* at 1570 (statement of Sen. Clay).

240. *Id.* at 1336 (statement of Sen. Poindexter).

241. *Id.* at 1349 (statement of Sen. Benton).

242. *Id.* at 1646 (statement of Sen. Calhoun); *see also* Daniel Webster, The Presidential Protest (May 7, 1834), in 7 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 103, 144 (1903) ("Where, then, is the authority for saying that the President is the direct representative of the People? . . . I hold this . . . to be [a] mere assumption, and [a] dangerous assumption.").

243. 10 CONG. DEB. 1376 (1834) (statement of Sen. Ewing).

changing the Constitution itself.²⁴⁴ After all: "Why may he not say, 'I am about to introduce new forms, new principles, and with a new spirit; I am about to try a political experiment, on a great scale; and when I get through with it, I shall be responsible to the American people . . . ?'"²⁴⁵ Defending the Senate to the last, Webster concluded by vowing: "We shall hold on, sir, and hold out, till the people themselves come to its defence."²⁴⁶

Few showed up to defend Webster's Alamo. Jackson achieved a rare sixth-year surge in congressional strength, as the Democrats swept into control of the Senate and retained their strong grip on the House.²⁴⁷ Through his clever adaptation of the veto power, Andrew Jackson had overcome serious institutional resistance to win overwhelming popular support for a new constitutional vision driven from the White House.²⁴⁸ The question of how that vision would be implemented now took center stage.

F. Transformational Aspirations Confirmed

Maybe this all seems too good to be true. Although President Jackson broke with prevailing methods of constitutional interpretation, repudiated longstanding ideas about the limited role of the presidency, laid waste to the American System, and behaved in a manner that many of his opponents and supporters recognized as constitutionally

244. *See id.* at 1687 (statement of Sen. Webster).

245. *Id.* at 1687-88 (statement of Sen. Webster).

246. *Id.* at 1689 (statement of Sen. Webster).

247. *See* 3 REMINI, *supra* note 190, at 315; SKOWRONEK, *supra* note 6, at 153 & 470 n.49. Attributing this result to local causes unrelated to the debate in Washington utterly fails to explain the national trend or the number of seats that fell to Jackson's supporters. *See* HOLT, *supra* note 121, at 36. Of course, there remain two ways to interpret the national verdict from the midterm elections. The Democrats' victory could have been triggered by a popular decision to endorse Jackson's brand of presidentialism against the Senate's traditional view, or the crucial issue may have just been the bank's continued existence. This ambiguity makes drawing broad conclusions about a popular ratification of Jackson's veto adaptation dangerous, but that concern will be less serious when we examine the decisive midterm elections of 1842. *See infra* text accompanying notes 330-31.

248. Constitutional change elaborated through an unconventional institutional struggle mediated by elections rings true with the theory of dualism set forth by Bruce Ackerman. *See* 1 ACKERMAN, *supra* note 74; 2 ACKERMAN, *supra* note 4. On the other hand, this analysis also points out a weakness in using his theory as an interpretive tool rather than as only a descriptive one. Just as many have criticized the approach espoused by Alexander Bickel as requiring judges with extraordinary philosophical and scholarly abilities unlikely to exist on any real Supreme Court, *see* BORK, *supra* note 8, at 189-91; JOHN HART ELY, *DEMOCRACY AND DISTRUST* 56-59 (1980); *see also* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (2d ed. 1986) ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government."), Ackerman's theory demands judges with tremendous historical acuity.

transformative, some doubt may remain that the President's vetoes were truly concerned with *higher* lawmaking. Therefore, I now want to step outside the veto framework to examine Jackson's behavior after he finally gained control of Congress, and try briefly to identify some of the doctrinal goals of the President's movement.

In two crucial respects, Jackson's use of the presidency foreshadowed FDR's informal methods of constitutional amendment during the New Deal. First, Jackson's supporters in Congress succeeded in expanding the Supreme Court's membership from seven to nine, and thereby gave Jackson and his hand-picked successor, Martin Van Buren, two additional appointments to the Court.²⁴⁹ In other words, Jacksonian Democrats engaged in Court-packing, and unlike FDR's Court-packing bill of 1937, Jackson's Court-packing bill of 1837 actually passed. Second, Jackson nominated staunch partisans such as Roger Taney to the Court.²⁵⁰ Taney's case is particular illustrative because he was considered so rabidly pro-Jackson that the previous Senate had rejected his nomination to be Treasury Secretary and then an Associate Justice.²⁵¹ Nevertheless, a new Democratic Senate confirmed Taney to replace Chief Justice Marshall in 1836, and he was followed by other active Jacksonians.²⁵² Jackson's intent to transform the Constitution could not have been clearer by the time he left office.

The paramount doctrinal goal of Jackson's supporters was the reversal of *McCulloch* in the Supreme Court, and there is considerable evidence that they thought the decision's demise was only a formality. As was noted earlier, in the final days of Jackson's presidency the

249. See Act of Mar. 3, 1837, ch. 34, 5 Stat. 176; 1 ACKERMAN, *supra* note 74, at 76. The story behind the Court-packing statute is a fascinating mix of politics, policy reform, and constitutional dynamics, but that story will have to await a more comprehensive discussion of the relationship between Jacksonian Democracy and the Court. See *supra* note 8.

250. See Massey, *supra* note 143, at 8.

251. See *id.*

252. See 1 ACKERMAN, *supra* note 74, at 76; 3 REMINI, *supra* note 190, at 267-68, 315-16; Massey, *supra* note 143, at 8-9. At the same time, Jackson also got another of his early supporters, Phillip Barbour, elevated to the Court. See 3 REMINI, *supra* note 190, at 315-16; Massey, *supra* note 143, at 8-9; *supra* text accompanying note 143.

Jackson's use of the presidency and his Supreme Court appointments to pursue a vision of limited government bears a striking resemblance to the Reagan presidency. Both Jackson and Reagan sought to advance an ambitious constitutional agenda notwithstanding their lack of control over the Congress. But while Reagan controlled the Senate—and therefore the ability to place his ideological supporters on the Court—for most of his tenure, Jackson had to fight a pitched political battle just to win control of the Senate by the end of his second term. This structural difference tells us a great deal about how to interpret the constitutional behavior and impact of the Reagan administration and the Reagan Court. See, e.g., *Alden v. Maine*, 119 S. Ct. 2240 (1999); *United States v. Lopez*, 514 U.S. 549 (1995); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *McCleskey v. Kemp*, 481 U.S. 279 (1987).

Democrat-controlled Senate passed the Expunging Resolution to erase the 1834 censure.²⁵³ The floor manager of the resolution was none other than Senator Benton—now the leader of the Jacksonian majority in the Senate—and in his introductory remarks he expressed the Democratic view of the constitutional significance of Jackson's presidency by focusing on the destruction of the bank: "In this single act he [Jackson] has vindicated the constitution from an unjust imputation, and knocked from under the decision of the Supreme Court the assumed fact on which it rested. *He has prepared the way for a reversal of that decision . . .*"²⁵⁴

Not only did Benton believe *McCulloch* was on the way out, but he mused openly about how a proper test case could be brought to a Court the Democrats believed was on their side. Here is the next portion of his remarks:

[I]t is a question for lawyers to answer, whether the case is not ripe for the application of that writ of most remedial nature . . . —the venerable writ of *audita querela defendantis*—to ascertain the truth of a fact happening since the judgment, and upon the due finding of which the judgment will be vacated.²⁵⁵

This statement requires some explanation. A writ of *audita querela* was the common law equivalent of a motion seeking relief from a judgment.²⁵⁶ Benton was claiming that, in the years following the decision in *McCulloch*, the assumed fact upon which the opinion rested—that a national bank was "necessary" to the fiscal operations of the Federal Government—had been proven false.²⁵⁷ Therefore, in Benton's view, the judgment in *McCulloch* should be vacated due to this change in the "fact" the decision relied upon.

At first glance, Benton's reading of constitutional law seems deeply flawed, but in reality it reflects a subtle awareness of the legal obstacles confronting the Jacksonian movement. Every first-year law student knows that *McCulloch* relied on the rationale that "necessary" in the Necessary and Proper Clause should be read to give Congress broad discretion over the means it chooses to implement policy.²⁵⁸ The fact that the country could manage without a national bank had nothing to do with this conclusion, and hence a writ of *audita querela* would have been inappropriate. There is another interpretation of Benton's statement, however, that focuses on the problem of just how the Democrats could bring a test case to challenge the constitutionality of a bank that no longer existed. Jackson had been so successful in destroying the bank in the political branches that the Supreme Court

253. See 13 CONG. DEB. 502-04 (1837); *supra* note 207.

254. 13 CONG. DEB. 387 (1837) (statement of Sen. Benton) (emphasis added).

255. *Id.* (statement of Sen. Benton).

256. See BLACK'S LAW DICTIONARY 131 (6th ed. 1990); FED. R. CIV. P. 60(b).

257. 13 CONG. DEB. 387 (1837) (statement of Sen. Benton).

258. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-14 (1819).

would have no easy vehicle to reverse *McCulloch*. In this light, Benton's appeal for a writ of *audita querela*, which Senator Bayard called "a new attribute of power, and a most extraordinary mode of proceeding,"²⁵⁹ was a brilliant solution. It would allow someone who had been denied relief when the bank still existed to bring a new case that squarely presented the constitutional question. If, as Benton must have assumed, the new Jacksonian justices were eager to take on such a case in spite of the shaky legal basis of the writ, then the reversal of *McCulloch* could still be achieved.

There is no evidence that any such writ was ever sought. Perhaps the Democrats decided that overruling *McCulloch* was unnecessary, or that it could await another day.²⁶⁰ Their focus on reversing the case, however, provides support for the argument that Jackson's presidency was intended to effect sweeping constitutional change outside of the ordinary Article V process. Before Jackson's movement could emerge victorious, one final hurdle remained.

V. CONSOLIDATION AND POPULAR RATIFICATION: JOHN TYLER

The Democratic dominance established in the aftermath of the Deposit Crisis lasted until 1840, when the opponents of Jacksonism swept into Congress and the White House under the Whig Party banner.²⁶¹ This part explains how the Whigs consciously attempted to repudiate the transformative veto precedents set by Jackson, and illuminates the role John Tyler played in reaffirming those precedents by his resolute use of the veto in the face of escalating institutional threats.²⁶² President Harrison's death and Tyler's decision to veto a new bank combined to ensure that Jackson's successful constitutional transformation would take a political, rather than a doctrinal, form. In this constitutional drama, Tyler's bank vetoes served as the functional equivalent of an opinion overruling *McCulloch*.

259. 13 CONG. DEB. 469 (1837) (statement of Sen. Bayard).

260. Given the modern canonization of *McCulloch*, it may be startling to learn that the opinion's view of federal power under the Necessary and Proper Clause was *never* cited by the Taney Court except in dissent. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 542 (1857) (McLean, J., dissenting). *McCulloch* was, in fact, virtually a dead letter from the 1830s until Reconstruction. See *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870).

261. See PETERSON, *supra* note 6, at 29-30.

262. It is unclear exactly why the Whigs chose to reopen this can of worms. The best explanation is that Jackson's presidency was followed by a severe economic panic, and therefore Whigs such as Clay may have believed that the American people would see Jackson's policies as the cause of that downturn and support a wholesale rejection of them. Cf. *id.* at 21-23 (describing the Panic of 1837).

A. The Constitutional Significance of William H. Harrison

To the extent that anyone remembers the first Whig President, William Henry Harrison, it is usually for his early and unexpected death. Yet before succumbing to pneumonia, Harrison managed to make one significant contribution to our constitutional discourse in his Inaugural Address.²⁶³ The new President began by setting forth his view that "the great danger to our institutions does not appear to me to be in a usurpation by the Government of power not granted by the people, but by the accumulation in one of the departments of that which was assigned to others."²⁶⁴ Harrison identified this danger as the President's recent exercise of legislative power through the veto.²⁶⁵ After all: "[I]t is preposterous to suppose that a thought could for a moment have been entertained that the President, placed at the capital, in the center of the country, could better understand the wants and wishes of the people than their own immediate representatives"²⁶⁶ With this statement, Harrison sought to revive the doctrine of legislative supremacy that Jackson had successfully overthrown.

Harrison's discussion of the veto continued towards a counterrevolutionary crescendo. Since the President was an inferior representative of the popular will, in Harrison's view the veto was inappropriate in cases of ordinary legislation, and this position was confirmed "from the fact of its never having been thus used by the first six Presidents."²⁶⁷ Andrew Jackson was the seventh President, so Harrison was strongly implying that Jackson's use of the veto was illegitimate. Moreover, Harrison stated that "I believe with Mr. Madison that 'repeated recognitions under varied circumstances in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications in different modes of the concurrence of the general will of the nation'" settled constitutional questions.²⁶⁸ The Madisonian veto limit, along with the principles of precedential interpretation and legislative supremacy that it embodied, was on the loose again.

Since the new Whig Congress was preparing to wipe out Jackson's substantive achievements, Harrison's modest pledge of legislative def-

263. See Harrison, *supra* note 26, at 5. Although Inaugural speeches usually consist of meaningless blather, Harrison's is worthy of serious scholarly attention. Not only was his statement the longest ever given, but it had been carefully edited by Webster to reflect Whig ideology. See BINKLEY, *supra* note 6, at 35; SPITZER, *supra* note 11, at 39. Since the Whigs had not formulated a platform in 1840, see PETERSON, *supra* note 6, at 27, the address also was the first major public statement of the party's plans following the election.

264. Harrison, *supra* note 26, at 7.

265. See *id.* at 9.

266. *Id.* at 10.

267. *Id.*

268. *Id.* at 11.

erence took on an ominous air. The leader of this Congress was none other than Senator Clay, who had prepared a package that included a recharter of the Bank of the United States.²⁶⁹ Clay pressured the President to get the ball rolling by calling a special session and Harrison agreed.²⁷⁰ At this point, fate intervened and Harrison dropped dead.²⁷¹ The Vice-President, John Tyler, moved into the White House, and the Virginian's interpretation of the veto power put him on a constitutional collision course with Congress.

B. And Tyler Too

Predicting the impact of the change from Harrison to Tyler was difficult because, while Tyler was a disaffected states' rights Democrat, he had supported Jackson's vetoes of the Maysville Road and the bank.²⁷² Clay expressed optimism: "I can hardly suppose that V.P. Tyler will interpose any obstacle to the adoption of measures on which the Whigs are generally united."²⁷³ This view was supported by Tyler's vehement opposition to Jackson's actions during the Deposit Crisis, when then-Senator Tyler had expressed skepticism about any legitimate link between Jackson and Jefferson's presidencies.²⁷⁴ Tyler believed that Jefferson had shown nothing but deference to Congress, therefore "[t]o quote his name in justification, or even in excuse, of these proceedings, is to do his memory the greatest injustice."²⁷⁵ Jacksonian Democrats were not the party of Jefferson, since "[i]ts work is that of President-making."²⁷⁶

Unfortunately for the congressional Whigs, Tyler's opposition to president-making did not extend to the veto power. A bill to recharter the Bank of the United States was passed by the special session in August 1841, but it was promptly stamped with a veto.²⁷⁷ Tyler argued that the authority of the proposed national bank to place branches within the states without their consent was unconstitutional.²⁷⁸ Thinking that it could meet the President's objections, Con-

269. See BINKLEY, *supra* note 6, at 91; PETERSON, *supra* note 6, at 37.

270. See PETERSON, *supra* note 6, at 37-39.

271. See *id.* at 41. John Tyler was the first Vice-President to succeed to the presidency because of a presidential death.

272. See *id.* at 19.

273. Letter from Henry Clay to N. Beverley Tucker (Apr. 15, 1841), in LYON G. TYLER, 2 THE LETTERS AND TIMES OF THE TYLERS 30, 30 (Richmond, Whittet & Shepperson 1885).

274. See 10 CONG. DEB. 677-78 (1834) (statement of Sen. Tyler).

275. *Id.* at 677 (statement of Sen. Tyler).

276. *Id.* at 678 (statement of Sen. Tyler). The Whigs threw this speech back at Tyler after his vetoes of the bank recharter. See, e.g., CONG. GLOBE, 27th Cong., 1st Sess. app. at 386-87 (1841) (statement of Rep. Botts).

277. See JACKSON, *supra* note 44, at 57; Tyler, *supra* note 18, at 63. The veto was sustained by the Senate 24-25. See JACKSON, *supra* note 44, at 59.

278. See JACKSON, *supra* note 44, at 58; Tyler, *supra* note 18, at 65-68.

gress quickly passed an amended bank recharter, but this too was vetoed on constitutional grounds.²⁷⁹ As one commentator put it: "The ensuing outburst of fury against the President at this second veto has probably been equalled only by the merciless attack on Andrew Johnson and his supporters by the Radical Unionists after the Civil War."²⁸⁰ With the exception of Secretary of State Webster, Tyler's entire cabinet resigned in protest.²⁸¹

Obviously, Harrison's death was an unlucky accident for Clay and his congressional allies, but their attempt to turn back the clock was also fraught with deeper structural problems. Returning to the Madisonian notion of legislative precedent as binding authority in constitutional interpretation was a tenet of the Whig Congress²⁸² and looked like an effective device to nullify the impact of Jackson's tenure. Unfortunately, practice was no longer a reliable guide. Jackson's innovations had ruptured the lines of precedent on both the status of the bank and the proper use of the veto power.²⁸³ Tyler pointed this out in his first bank veto message when he noted that "[t]he country has been and still is deeply agitated by this *unsettled* question."²⁸⁴ Only if Tyler repudiated Jackson's precedents as illegitimate—a position strongly implied by Harrison's Inaugural Address—would a practice-based argument succeed in reversing the Jacksonian tide.²⁸⁵ For all his skepticism about "president-making," however, Tyler was unwilling to classify the last decade as an illegal amendment of the Constitution. The Whigs in Congress would need another approach.²⁸⁶

279. See SPITZER, *supra* note 11, at 41-42; John Tyler, Veto Message (Sept. 9, 1841), in 4 MESSAGES, *supra* note 2, at 68. Tyler's action was upheld 80-103 in the House. See JACKSON, *supra* note 44, at 62.

280. BINKLEY, *supra* note 6, at 94-95. The Congressional Globe is replete with condemnations of Tyler's "misuse" of the veto power. See, e.g., CONG. GLOBE, 27th Cong., 1st Sess. app. at 391 (1841) (statement of Rep. Mason); *id.* app. at 472 (statement of Rep. Thompson).

281. See BINKLEY, *supra* note 6, at 95; PETERSON, *supra* note 6, at 85-87.

282. Whig senators and representatives asserted the superiority of practice and legislative precedent. See, e.g., CONG. GLOBE, 27th Cong., 1st Sess. app. at viii (1841) (statement of Rep. Jones); *id.* app. at 364 (statement of Sen. Clay); *id.* app. at 371-72 (statement of Sen. Morehead).

283. See 3 REMINI, *supra* note 190, at 160 ("What made it worse was the precedent Jackson was setting for future Presidents—whether they followed the precedent or not. It was there. It was waiting to be used.").

284. Tyler, *supra* note 18, at 63-64 (emphasis added).

285. See *supra* text accompanying notes 267-68.

286. See CONG. GLOBE, 27th Cong., 1st Sess. app. at 393 (1841) (statement of Rep. Mason) (discussing the Jacksonian precedent and concluding: "Upon this dishonored, and, as it was to be hoped, exploded rule, I am sorry to say, the President has acted in exercising the veto power."); see also JACKSON, *supra* note 44, at 74 ("James Madison probably would have approved the Whig programs that Tyler rejected. . . . Tyler, therefore, drew more upon the practices of Jackson for his bank and tariff vetoes than he did from Madison.").

Thus, in true Jacksonian fashion, the Whigs tried to argue that the 1840 election had given them a popular mandate to remake the law, but so long as Tyler remained firm in his opposition, one electoral victory was not going to be enough.²⁸⁷ Representative Henry Wise pointed to this gap in the Whig argument as it pertained to the bank question:

[T]here was another mode of deciding this question, besides repeal, and that was before the Supreme Court. God forbid that he should say any thing disparagingly of that sacred tribunal; but he would ask, if the distinguished gentleman, who removed the public deposits from the Bank of the United States [Taney] was not at the head of it, and if a majority of its members, was not of that school of politicians, who believed a Bank of the United States to be unconstitutional?²⁸⁸

Wise understood that Jackson's political success was now reflected by a Court dominated by his partisans. Because Jackson's movement won several highly-charged elections, it had earned the public support necessary to transform constitutional understandings as reflected by the composition of the Court. One contrary election could not overturn this result, and Wise wondered about the strength of the purported Whig mandate:

Suppose this question goes before the Supreme Court, and they take it up as an original question, what will be the result? I say then to you wait—there is a lion in your path. It is time that you have the power to remove that lion by increasing the circuits, and appointing new judges enough to have a majority of them in favor of the Bank; but will you incur so fearful a responsibility—will you agitate the country for such a purpose?²⁸⁹

Previously we saw Jackson's opponents grapple with the challenge of trying to stop a presidential transformation. Now the mirror-image of that problem was at hand; namely, how could an informal constitutional transformation be reversed? Wise's answer was to campaign for the support necessary to pack your own Court. A second alternative was to enact a formal constitutional amendment to erase the informal version created by Jackson. The Whig Congress would pursue both strategies.

While the Whigs were on the horns of this political dilemma, the question of the Court's attitude towards any new bank bill also demonstrates how the fluke of Harrison's death had robbed Jacksonian Democracy of the chance to achieve its *doctrinal* goal of reversing *McCulloch*. Harrison had pledged to respect the wishes of a Whig Congress that was clearly bent on passing a new bank bill. That statute would have given the Democrats exactly the test case Senator Benton

287. Unless, of course, Tyler took Clay's advice and decided to let the bank bill become law without a presidential signature. See CONG. GLOBE, 27th Cong., 1st Sess. app. at 222 (1841) (statement of Sen. Clay). For more on the Whig "mandate," see *id.* app. at 472 (statement of Rep. Thompson).

288. *Id.* at 299 (statement of Rep. Wise).

289. *Id.* (statement of Rep. Wise).

had attempted to craft in 1837 with a writ of *audita querela*.²⁹⁰ Then, as Representative Wise indicated, the challenge to the bank would have gone before a Supreme Court packed with Jackson's anti-bank appointees. An opinion reversing *McCulloch*, over Justice Story's probable dissent, would have been a Jacksonian landmark in our constitutional heritage. Instead, Harrison caught pneumonia and Tyler's very different views fueled the vetoes cascading down from the White House. Ironically, Jackson's transformation of the veto into a powerful presidential weapon gave Tyler the tool he needed to block the creation of the very case that would have written one of Jackson's major achievements into judicial doctrine.

Nevertheless, the possibility remained that Tyler's opposition would be only a temporary barrier to the ultimate success of a Whig counterrevolution. Following the resignation of the Cabinet, the Whigs set their constitutional campaign in motion with an unprecedented decision. A rump Congress composed of the Whig legislative caucus passed a manifesto expelling Tyler from the party, and it declared that a constitutional amendment abolishing the veto power was now necessary to end "the same kind of suffering inflicted during the last twelve years by the maladministration of the Executive Department."²⁹¹ Since the Whigs lacked the votes to override Tyler's vetoes, it was obvious that they could not muster the support necessary for an amendment. Nevertheless, placing the veto question at the center of the national agenda would make for a great campaign issue in the midterm elections of 1842. At the close of the Twenty-Seventh Congress's first session, Senator Clay taunted the Democrats: "Let the Senator from Pennsylvania and his party war, if they will, for Executive supremacy—for the arbitrary principle that the will of one man shall prevail against the will of the whole country. We are willing to go before the people upon that issue"²⁹²

C. Climax of the Veto Controversy

The Senate took the lead in the tumultuous Second Session of the Twenty-Seventh Congress with Clay's introduction of the veto amendment, and debate on the proposal had a flavor similar to that of the Censure Resolution eight years earlier.²⁹³ In his remarks, the Sena-

290. See *supra* text accompanying notes 255-57.

291. PETERSON, *supra* note 6, at 90. A similar amendment had been introduced in the lame-duck session of the Twenty-Third Congress. See 11 CONG. DEB. 540 (1835) (statement of Sen. Kent).

292. CONG. GLOBE, 27th Cong., 1st Sess. app. at 344 (1841) (statement of Sen. Clay). Clay's persistence is pressing the question of congressional-executive relations may have been poor politics, but it was critically important in clarifying the constitutional issues at hand.

293. The amendment read, in part:

tor from Kentucky identified the issue as one of unanticipated executive power:

Any one at all acquainted with the contemporaneous history of the Constitution, must know that one great and radical error which possessed the minds of the wise men who drew up that instrument was an apprehension that the Executive department of the then proposed Government would be too feeble to contend successfully in a struggle with the power of the Legislature . . .²⁹⁴

Senator William Archer also pounded away at this theme, for in his view the United States of the 1840s was a polity where "[t]he real effect had been to resolve all discussions of policy as well as party—the entire action of the people and the government—into the vortex of the Presidential election."²⁹⁵ As a result, the veto "had lost its character of a guard—had become an *engine* in the hand, from which aggression and disturbance must come, if they were to visit the Constitution."²⁹⁶

Defenders of the veto power emphasized its limited purpose of transferring institutional disputes to the decision of the voters, and rejected the doctrine of legislative supremacy.²⁹⁷ Senator (and future President) James Buchanan pointed out "[t]he fallacy of [Clay's] argument, from beginning to end, consists in the assumption that Congress, in every situation and under every circumstance, truly represent[s] the deliberate will of the people."²⁹⁸ Senator (and future Justice) Woodbury drove the Democrats' case home by emphasizing that this proposed structural change was really about reversing the substance of Jackson's destruction of the American System.²⁹⁹ For all the sound and fury in the Senate, however, the most contentious veto discussion of all was about to get under way in the House.

The necessity of reauthorizing the tariff triggered a major escalation in the veto crisis, as congressional Whigs sought to use the threat of government insolvency to force President Tyler to either accept their program or exercise his veto in a manner that would sink the government's finances and bring the veto power into disrepute on the

[W]hen a bill which shall have passed the Senate and House of Representatives of the United States shall be returned by the President, with his objections to his approbation and signature, if, upon its reconsideration, it shall again pass each House by a majority of all the members belonging to such House, notwithstanding the President's objections, it shall become a law; and the requisition by the existing Constitution of two-thirds of each House again to pass the bill in such case is hereby annulled.

CONG. GLOBE, 27th Cong., 2nd Sess. 164 (1842).

294. *Id.* at 165 (statement of Sen. Clay).

295. *Id.* app. at 153 (statement of Sen. Archer).

296. *Id.* (statement of Sen. Archer).

297. *See id.* app. at 134, 139 (statement of Sen. Buchanan); *id.* at 167 (statement of Sen. Preston) ("In truth, there was only one department of the Government that was truly Democratic, and that was the Executive.").

298. *Id.* app. at 136 (statement of Sen. Buchanan).

299. *See id.* app. at 163 (statement of Sen. Woodbury).

eve of the election.³⁰⁰ Under the Tariff Compromise of 1833 that ended South Carolina's threat of nullification, tariff rates would be reduced to 20% on June 30, 1842.³⁰¹ The tariff reduction presented problems since the Treasury was already having difficulty meeting its obligations under existing tariff rates and faced the prospect of halting significant government projects for lack of funds.³⁰² To prevent the rate reduction, a new tariff bill had to be passed by June 30, otherwise the Treasury would possess no power to raise tariffs above 20%.³⁰³ Tyler was willing to go along with some tariff increase, but in exchange he demanded that the distribution of revenues from public land sales to the states be halted.³⁰⁴ Without this deal, a tariff increase could not be justified by revenue necessities alone, and instead would constitute a restoration of the protectionism of the American System.

Congressional Whigs saw their chance to make mischief and sent a provisional tariff bill to the President on June 24 which was vetoed five days later.³⁰⁵ The "little tariff" bill would have temporarily halted the planned rate reduction without suspending the distribution of public land sale revenues.³⁰⁶ Since the deadline of June 30 was about to come and go, Tyler's veto meant that the government was going to start running out of money.³⁰⁷ One Whig newspaper helpfully suggested that a way out of the deadlock was for "an overgrown Whig ruffian" to choke [Tyler] to death," or if that was unpalatable, perhaps "he ought to be shot down in his tracks, as he walks along."³⁰⁸ The response in the House was more muted, but everyone understood that the veto power would be a crucial issue in the upcoming elections.³⁰⁹ Representative Lane announced that "[t]he issue was now truly

300. The government shutdown of 1995 is familiar to us, but the threat of a governmental shutdown was also employed by a Democratic Congress against President Rutherford B. Hayes in 1879. See 2 ACKERMAN, *supra* note 4, at 473 n.126.

301. See Act of March 2, 1833, ch. 55, 4 Stat. 629; PETERSON, *supra* note 6, at 98-101; 3 REMINI, *supra* note 190, at 38-39.

302. See PETERSON, *supra* note 6, at 98-101.

303. See JACKSON, *supra* note 44, at 64; PETERSON, *supra* note 6, at 101.

304. See JACKSON, *supra* note 44, at 65; PETERSON, *supra* note 6, at 100.

305. See John Tyler, Veto Message (June 29, 1842), in 4 MESSAGES, *supra* note 2, at 180; PETERSON, *supra* note 6, at 101-02.

306. See JACKSON, *supra* note 44, at 65; PETERSON, *supra* note 6, at 101.

307. See CONG. GLOBE, 27th Cong., 2nd Sess. 706 (1842) (statement of Sen. Crittenden); PETERSON, *supra* note 6, at 101.

308. JACKSON, *supra* note 44, at 66 (quoting JONESBOROUGH WHIG, July 13, 1842).

309. See, e.g., CONG. GLOBE, 27th Cong., 2nd Sess. 699 (1842) (statement of Rep. Profitt); *id.* at 714 (statement of Rep. Payne). For more on the tenor of the discussion, see SPITZER, *supra* note 11, at 46-47, who characterized it as possessing an "invective rarely heard in Congress."

presented between the President of the United States and the Representatives of the people."³¹⁰

Attempts to address the growing fiscal crisis culminated in another veto and a set of unorthodox institutional solutions reminiscent of the Deposit Crisis. Resolutions were introduced in the House to begin an impeachment inquiry against the President, but Whig leaders felt they did not have the votes to carry it off successfully.³¹¹ Therefore, they decided to raise the stakes by presenting Tyler with a new tariff reauthorization that would *permanently* void the pending tariff reduction while continuing the distribution of public land revenues.³¹² Despite the Treasury's desperate state, Tyler vetoed that bill as well in August 1842, and the government remained paralyzed.³¹³

Upon receiving this veto message, the House moved to commit the bill to a special select committee rather than proceed with an ordinary override debate.³¹⁴ Representative John Quincy Adams, who had been turned out of office by Jackson in 1828, declared that "the executive and legislative branches of the Government are placed in a state of civil war, and for which there was, in his opinion, no remedy, but that remedy which the people must take in their own hands."³¹⁵ He proposed that a committee of thirteen, which coincidentally included eleven Whigs, be designated to report back to the full House on the tariff veto.³¹⁶ The majority and minority reports of the select committee were issued just a few months before the midterm elections, and they read just like campaign platforms.³¹⁷

Adams read the majority report on the floor, and forcefully delineated the Whig philosophy that condemned the veto adaptations of the past decade. Their position was that "[i]n the spirit of the Constitution of the United States, the executive is not only separated from the legislative power, but made dependent upon, and responsible to it."³¹⁸ This clarion call for a restoration of legislative supremacy was followed by a rejection of Tyler's rationale for vetoing the tariff bills, and

310. CONG. GLOBE, 27th Cong., 2nd Sess. 700 (1842) (statement of Rep. Lane). The tariff veto was sustained by a vote of 97-114. See *id.* at 717.

311. See PETERSON, *supra* note 6, at 102-03.

312. See JACKSON, *supra* note 44, at 68-69.

313. See PETERSON, *supra* note 6, at 104.

314. See CONG. GLOBE, 27th Cong., 2nd Sess. 875 (1842).

315. *Id.* at 871 (statement of Rep. Adams); see also *id.* at 906 (statement of Rep. Adams) ("The vetoes of President Jackson were all, in [my] opinion, among the most pernicious acts that could have been committed for the people of the United States and their highest interests.").

316. See JACKSON, *supra* note 44, at 69; SPITZER, *supra* note 11, at 48.

317. See CONG. GLOBE, 27th Cong., 2nd Sess. 894-901 (1842).

318. *Id.* at 894 (report of the Select Committee). This report has sometimes been characterized as a censure of President Tyler, but virtually no members of the House referred to it that way, despite the recent experience with a Censure Resolution during the Deposit Crisis.

the suggestion quoted at the beginning of this article that impeachment was justified and an amendment curtailing the veto was necessary.³¹⁹ Instead of vigorously pursuing these formal remedies, however, the Select Committee made a slightly different suggestion: "[The majority] see[s] that the irreconcilable difference of opinion and of action between the legislative and executive departments of the Government is but sympathetic with the same discordant views and feelings among the people. To them alone the final issue of the struggle must be left."³²⁰ The *National Intelligencer* described the majority report as a "text-book for the whole army of Whigs all over the Union."³²¹

This explicit appeal to the voters was matched with equal passion by the minority reports of the Select Committee. Representative Thomas Gilmer, the only Whig who dissented from the majority report, issued a statement that another member described as "a labored defence of the acting President, and an open advocacy of Executive supremacy."³²² Gilmer attacked the "unprecedented and extraordinary" maneuver of the House in referring the veto to a committee,³²³ and questioned the strategy his party was employing to frame the fall campaign: "[W]ill the country tolerate a suspension of the entire Government until a political dispute is settled . . . ?"³²⁴ The dissenting Democrats were more circumspect, for in their view these institutional struggles over the Constitution's meaning were perfectly normal:

American republican annals are a continued series of formidable conjunctures, without detriment to the republic The charitable ballot-box is always at hand, with inestimable relief, to vent all passions. . . . Let the battements of this Capitol continue to rock with salutary agitation. Our reliance is in the majestic strength and serenity of a sovereign people.³²⁵

Although the House voted to accept the committee's report, a proposed constitutional amendment to eliminate the veto failed on a party line vote.³²⁶

President Tyler's response to this circus in the House was to mimic his predecessor by issuing a protest against the report of the Select Committee.³²⁷ This action indicates the extent to which Tyler had

319. See *id.* at 894-96; *supra* text accompanying note 1.

320. CONG. GLOBE, 27th Cong., 2nd Sess. 896 (1842) (report of the Select Committee).

321. JACKSON, *supra* note 44, at 71 (quoting NATIONAL INTELLIGENCER, August 17, 1842).

322. CONG. GLOBE, 27th Cong., 2nd Sess. 896-99 (1842) (counter-report of Rep. Gilmer); see *id.* app. at 932 (statement of Rep. Rayner); PETERSON, *supra* note 6, at 105.

323. CONG. GLOBE, 27th Cong., 2nd Sess. 896 (1842) (counter-report of Rep. Gilmer).

324. *Id.* at 898 (counter-report of Rep. Gilmer). The same question confronted Newt Gingrich and the congressional Republicans in 1995.

325. *Id.* at 901 (minority report of the Select Committee).

326. See PETERSON, *supra* note 6, at 105.

327. See Tyler, *supra* note 2, at 190.

come to accept Jackson's precedents as legitimate, but the language of Tyler's protest also deserves attention.³²⁸ Tyler acknowledged that he was "a President without a party," but nonetheless vigorously defended the veto power against the House's accusations.³²⁹ He couched his appeal to the people in terms that bear repeating: "I represent the executive authority of the people of the United States, and it is in their name . . . that I protest against every attempt to break down the undoubted constitutional power of this department without a solemn amendment of that fundamental law."³³⁰

The nation faced a fundamental choice. Congressional Whigs made it clear in their 1841 manifesto and 1842 legislative actions that they were intent on eliminating the veto power and bringing the President to heel. Tyler was just as clear in his vetoes and protest message that he was not about to give in. When the electoral results finally came in, the Whigs barely maintained their Senate majority and suffered a catastrophic defeat in the House, going from a 133-102 advantage to a 142-79 disadvantage.³³¹

D. The Dust Settles

At first the Whigs acted as if nothing had changed, but soon the message of the voters was heard and the veto controversy began to recede. In the lame-duck session of the Twenty-Seventh Congress, the long-promised resolution of impeachment was introduced by Representative John Botts.³³² He charged President Tyler, *inter alia*, with "an arbitrary, despotic, and corrupt abuse of the veto power."³³³ After a brief debate, impeachment was defeated by the Whig House 127-83,³³⁴ indicating that by this point the party was coming to grips with the popular verdict. Webster opined that the differences between the

328. Tyler had voted against accepting Jackson's protest during the Deposit Crisis. See PETERSON, *supra* note 6, at 106.

329. See Tyler, *supra* note 2, at 192.

330. *Id.* at 193. A tariff compromise was finally worked out at the end of August. See PETERSON, *supra* note 6, at 106-08.

331. See PETERSON, *supra* note 6, at 167. The Twenty-Seventh Congress was a dress rehearsal for the events surrounding Reconstruction. See HOLT, *supra* note 121, at 124. In both cases, the elected President died and was replaced by someone who alienated the congressional majority of his own party. This successor was forced to resort to frequent vetoes to impose his policy preferences, and in both cases the midterm elections became critical to resolving the institutional struggle. The only difference is that John Tyler prevailed against the Whigs in 1842, whereas Andrew Johnson lost overwhelmingly to the Republicans in 1866. There is another irony in this parallel between Tyler and Johnson: Andrew Johnson was one of the new Democratic House members swept into office by the 1842 landslide. See HANS L. TREFOUSSE, ANDREW JOHNSON 56 (1989).

332. See CONG. GLOBE, 27th Cong., 3rd Sess. 144 (1843) (statement of Rep. Botts).

333. *Id.* (statement of Rep. Botts).

334. See *id.* at 146.

Whig Congress and Tyler "respect[ed] matters which all now admit were of no importance,"³³⁵ and during the remainder of Tyler's presidency the legitimate scope of the veto power was not seriously questioned.

Nevertheless, a new presidential election loomed. But James K. Polk's 1844 victory over Clay³³⁶—the leading critic of the veto—moved the veto issue towards its final resting place. Polk was an effective representative of Jackson's legacy, as he had served as the Democratic Speaker of the House during the Deposit Crisis.³³⁷ Moreover, in Polk's 1844 platform, the veto power was explicitly mentioned for the first time as a major position of the Democratic Party.³³⁸

In his final annual message, President Polk offered a eulogy on the veto battle that had roiled American politics for fifteen years.³³⁹ He stated that: "I deem this the more necessary because, after the lapse of nearly sixty years since the adoption of the Constitution, the propriety of the exercise of this undoubted constitutional power by the President has *for the first time* been drawn seriously in question by a portion of my fellow-citizens."³⁴⁰ Now, unless Polk's head had been buried in the sand recently, he could not possibly have believed this statement. Nevertheless, it made sense if the President was engaged in a bit of myth-making to consolidate the Jacksonian revolution.

In the course of his address, Polk retold the story of the rise and fall of the American System, and drew two conclusions about the veto power.³⁴¹ First, "[i]t is not alone hasty and inconsiderate legislation that [the President] is required to check; but . . . measures which he deems subversive of the Constitution or of the vital interests of the country."³⁴² Second, "[i]n withholding from it his approval and signature he is executing the will of the people, constitutionally expressed,

335. PETERSON, *supra* note 6, at 167.

336. See PETERSON, *supra* note 6, at 243. The Democrats also regained control of the Senate to erase completely the result of 1840. See *id.*

337. See *id.* at 225.

338. [W]e are decidedly opposed to taking from the President the qualified veto power by which he is enabled, under restrictions and responsibilities amply sufficient to guard the public interest, to suspend the passage of a bill, whose merits cannot secure the approval of two-thirds of the Senate and House of Representatives, until the judgment of the people can be obtained thereon, and which has thrice saved the American People from the corrupt and tyrannical domination of the Bank of the United States.

DONALD BRUCE JOHNSON & KIRK H. PORTER, NATIONAL PARTY PLATFORMS 1840-1972, at 4 (5th ed. 1973).

339. See James K. Polk, Fourth Annual Message (Dec. 5, 1848), in 5 MESSAGES, *supra* note 2, at 629, 662-70.

340. *Id.* at 662 (emphasis added).

341. See *id.* at 654-62.

342. *Id.* at 662.

as much as the Congress that passed it."³⁴³ Madison's understanding of the limits on the veto power was virtually forgotten, and the president was now an equal partner in the constitutional debate. The veto, and the presidency, stood free to transform the Constitution again in the face of future crises.³⁴⁴

VI. CONCLUSION

Jacksonian Democracy represents the great unturned stone of our constitutional past. Beneath that stone lies the answers to many specific constitutional questions such as presidential censure. The main story of those years, however, is how Andrew Jackson used his veto pen to transform the presidency from a pliant servant of congressional will into an energetic agent of the popular will. He strove mightily to legitimate a presidential process of constitutional change quite different from a traditional Article V amendment. Then, within a few years of Jackson's tenure, the remarkable presidency of John Tyler shed light on the difficulties involved in reversing such an informal constitutional amendment. Finally, the sources demonstrate how political alignments were crucial in shaping the form through which the Jacksonian revolution was preserved. Only the accident of President Harrison's death prevented one of our most important Supreme Court landmarks—*McCulloch v. Maryland*—from being openly repudiated by the Court.

Defining what constitutes a legitimate basis of legal change is the essence of constitutional theory. This article's survey of the rich history and rhetoric of the Jacksonian era shows that the possibility of a president legitimately changing the Constitution through repeated electoral victories is not just a theory grafted onto past events. Instead, the issue of presidential transformation was once squarely presented to political elites and ordinary voters and given overwhelming approval. Even though Jacksonian Democrats make up the lost tribe of our constitutional heritage, their contributions to popular governance still demand our respect and careful attention.

343. *Id.* at 665.

344. Polk's Whig successors from 1849-53, Zachary Taylor and Millard Fillmore, refrained from using the veto, but they were the last Presidents to do so. *See JACKSON, supra* note 44, at 99. Neither President, however, sought to reopen the debate over the veto power itself. Indeed, Taylor—a general who was elected for his military heroism—believed “that traditional Whig policies must be shelved and that he [should] run a non-partisan, rather than an exclusively Whig, administration.” *HOLT, supra* note 121, at 413.