PREEMPTIVE STRIKES

Gerard N. Magliocca: *Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes* (Lawrence, KS: University Press of Kansas, 2007. Pp. xi, 186. $29.95.)

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From the founding Federalists and Jeffersonian Republicans, through Jacksonian Democrats and their opponents, to the abolitionist movement and Lincoln's Republican Party, *Andrew Jackson and the Constitution* chronicles the rise and fall of successive generations, each inspired by its collective experiences to acquire political power in order to incorporate its constitutional views indelibly into the framework of the American regime. But while the title of the book may prompt familiar thoughts about popular reform, democratization, tumultuous party politics, or landmark Supreme Court cases, its author aims to unveil "fresh ideas about our constitutional past" (129).

Gerard Magliocca proposes an intriguing reading of "how our Constitution changes over time"—but not a reading of the text itself or of how it should be interpreted. In his view, such an analysis has "no natural starting point"; constitutional history, like a stream of Heraclitus, "is always in motion" (7). With the first sentence of his first chapter, Magliocca launches a rhetorical preemptive strike against objections to the approach outlined in his introduction. There he insists that "our constitutional past, present, and future" should be regarded as a work-in-progress, evolving from generation to generation according to a cyclical and "predictable" pattern. "Reform leads to resistance, and resistance leads to reform." This basic truth (repeated *verbatim*: 48, 112) underlies the clash of "constitutional generations" and the historical process by which constitutional perspectives are engendered and perpetuated, then subsequently altered or abolished. Our constitutional texts, he therefore concludes, must not be extracted by "judges and scholars" from the nontextual circumstances within which they first emerged and were later construed (127–28).

Magliocca, in other words, views constitutional history not as "the product of careful and thoughtful deliberation" but as a process of "creative destruction," a dangerous metaphor adapted from economic theories of free markets to capture his sense that constitutional change is driven by "unleashing the disruptive energy of . . . uninhibited political competition" (3). As his analysis makes all too clear, this process does not guarantee progress. Reformers eager to tear down often neither fulfill intentions to rebuild nor foresee unintended consequences of radical actions, such as the legitimization of unprecedented or traditionally eschewed means to accomplish partisan political ends. Opposition parties that rise out of obscurity into office also confront the necessity of perpetuation; they, too, become entrenched as the establishment and conceal their innovations behind an illusion of continuity to preempt

attacks on a new order. But the metaphor opposes this conservative bid to force the genie of revolution back into the bottle, since it elevates impersonal forces over human beings as the primary agents of constitutional developments.

Setting aside for a moment misgivings about this historicist approach, there is much to be learned from the book's analysis. In part one (chapters 1–6), Magliocca offers a detailed, at times even fascinating, narrative of the path blazed by Jacksonians across the landscape of constitutional law as this generation sought to displace the "old" Federalist order with its own reforms in support of states' rights and the restriction of federal powers. In part two (chapters 7–9), he observes how this preceding generational conflict left a powerful impression on abolitionists and Republicans in their epoch-making struggle to overthrow the dominant Jacksonian order. Heavily annotated with references to Supreme Court cases and constitutional commentaries, Magliocca's discussion complements seminal studies of this era by Arthur Schlesinger Jr. (*The Age of Jackson*, 1945) and Richard Hofstadter (*The Idea of a Party System*, 1969), and recent works by Sean Wilentz (*Andrew Jackson*, 2005; *The Rise of American Democracy*, 2005).

In 1824 and 1828, Andrew Jackson rode a wave of anti-Federalist discontent and popular outrage at entrenched privileges in federal government as the first "outsider" to win the executive office. Apparent corruption in the (Second) National Bank had stimulated a financial and political crisis, further provoked by Chief Justice John Marshall's arguments in *M'Culloch* v. *Maryland* (1819), affirming the constitutionality of the Bank. This ruling, according to Magliocca, sought to justify the vast expansion of implied federal powers by the preceding "generation" of Federalists and Jeffersonian Republicans. Here we note a disconcerting tendency in the argument to fit history into the "generational model" by glossing details, not defining terms (see below), or collapsing distinctions. Treating the quarrels of strange bedfellows as negligible, he fuses otherwise bitter rivals into a single "constitutional generation" opposed by a Jacksonian generation no less plagued by a lack of internal cohesion (see 20–21). This raises the question as to what exactly constitutes a "constitutional generation"—not to mention the elusive "generational regimes" announced in the subtitle but absent from the text. Magliocca asserts that a "unique set of collective experiences" characterizes each generation and serves as its "chief frame of reference" for political action. We are thus led to believe by the terms of his analysis that developments in our constitutional history have been "dictated" (21, 62, 127) by the "narrow perspective of experience" and prejudice (13)—or worse, by mere accident and chance (see below).

Magliocca's narration of political events is more persuasive. He demonstrates that once in office, Jackson's confrontation with Congress and the Supreme Court over the scope of federal powers had far-reaching impact; specifically, he strategically exercised the veto power, used sparingly by his six predecessors, to obstruct national improvements proposed by Congress

in 1830 and the Congressional renewal of the Bank's charter in 1832. Magliocca hails the latter as "the most consequential veto of all time" (51), because it set a precedent for energetic presidential action, heralding the advent of "the executive branch as the driving force for constitutional reform" (56). In effect, Jackson drew up new constitutional battle lines, disregarding the traditionally binding character of "legislative precedent" (30–32) and even casting doubt on the legislative as the most representative branch of government (54–57)—a fundamental tenet of the Federalist Constitution (see 75–76). He further called into question the unsettled doctrine of judicial review, formulated by Marshall in *Marbury* v. *Madison* (1803) and echoed in his attacks on Jacksonian-sponsored Indian Removal laws in *Cherokee Nation* v. *Georgia* (1831) and *Worcester* v. *Georgia* (1832).

Marshall's sweeping *dicta* in *Worcester* reached well beyond the issues on appeal to deliver what Magliocca provocatively calls "the Supreme Court's first preemptive opinion" (43, 79). What is striking about such a decision is its "aggressive response" targeted at anticipated reforms and its "extraordinary effort" in reasoning exerted to raise and incorporate unnecessary legal issues in an unprecedented, innovative, and comprehensive manner (see 42–47, 79, 100–107). Marshall thus had disguised as "a real case" what was in fact an "advisory opinion"—of the sort understood to be "prohibited" by the Constitution (50) since 1793—in order to launch a preemptive strike on Jacksonian reformers in defense of his own dying generation's constitutional views (51, 59). This preemptive opinion, however, was ignored by the State of Georgia and by Jackson, who rightly boasted that Marshall's ruling "fell stillborn" in the absence of executive support (49). In his "Veto Message" of 1832, Jackson advanced his position, seeking to render obsolete key rulings of the Federalist Court—*M'Culloch* and *Marbury*—with the bold assertion, in his presidential version of *dicta*, that each branch of the federal government must be "guided by its own opinion" in interpreting the Constitution (32, 54–57; cf. 8–9, 30–31, 75–76). Jackson's re-election seemed to stamp his proclamation with popular approval.

The confrontation escalated in Jackson's second term. With the House controlled by Jacksonians, the Senate abandoned impeachment proceedings against Jackson and voted to declare his actions to destroy the Bank "unconstitutional," an arguably unconstitutional and (to date) unprecedented Censure Resolution. Jackson retaliated with an equally unprecedented "Protest Message" that "symbolically vetoed" the censure. Magliocca sees this "pattern of tit-for-tat retaliation" as an inevitable "new phase" in the constitutional cycle determined by "the logic of escalation." His terms again shift to fit his argument, speaking of staunch Senate resistance to Jackson by "conservatives" led by Clay, Webster, and Calhoun (59). The precise generational difference between Jacksonians and Whigs is unclear, as is the basis for the puzzling association of "traditionalists like Clay" with the Federalist Marshall, on one hand, and with "a secessionist" like Calhoun, on the other (60–65). Consistent with his suppression of first principles, Magliocca

ignores the reasons why Jackson drove Calhoun, his fellow advocate for states' rights and former vice-president, into the arms of Clay, his defeated presidential rival, by adamantly refusing to allow South Carolina to void a federal law and even vowing to order in national troops if the State acted on its threats of nullification and secession. This wedge issue, which had caused—and would cause—one generation to splinter into several factions, reveals a stubborn adherence to limits imposed by constitutional principles that even a hard-core reformist like "Old Hickory" was unwilling to transgress (cf. 112–13).

When the Jacksonians gained the Senate, the censure was expunged, and Jackson moved quickly to perpetuate the views of his constitutional generation by "packing" the Supreme Court, the last bulwark of "traditionalists"—including, upon the death of Marshall in 1835, having Roger Taney confirmed as chief justice. True to the spirit of Jackson, the Taney Court refused to recognize the authority of *Worcester* or *M'Culloch* in its decisions. But the much anticipated coup de grace of *M'Culloch* was never administered for lack of a suitable case appearing before the Supreme Court (71). Magliocca speculates almost wistfully on the "crucial omission" in our constitutional history, "the most notable exception" to the cyclical pattern of his analysis; namely, the Jacksonians' failure to settle the generational dispute over implied federal powers by reversing *M'Culloch* and writing "into doctrine" a central tenet of their own reforms.

The omission was due to the "sudden death" of Harrison, which, like the assassination of Lincoln in the next generation, Magliocca cites as an example of how "chance," "luck," or "fortune" can intervene to "jolt" the generational cycle and "redirect" the path of constitutional history, without stopping or reversing the "cyclical pattern" of legal evolution. The contested expansion of federal powers under the "Necessary and Proper" clause, and the nascent doctrine of judicial review, he believes, would have suffered serious blows to their long-term viability, if Harrison had lived and Taney repudiated *M'Culloch*. In the end, with the Jacksonian generation on the decline, Taney had no choice but to follow another precedent of Marshall, delivering the defining "preemptive opinion" of his own generation—and, after *Marbury,* only the second explicit venture in judicial review—in *Dred Scott* v. *Sandford* (1857). This last-ditch act of "judicial resistance" was intended to halt the "yearning for reform" by abolitionists and the Republican Party (100). Like that of Marshall, Taney's preemptive strike ultimately missed its mark; indeed, it backfired. Lincoln construed the opinion "not as a final blow" but as an occasion "to engage the electorate" in dialogue (110–12). Magliocca, unfortunately, has little to say about Lincoln's radical reading of the Constitution in light of the Declaration, or the first principles upon which his deliberations were candidly based.

Lincoln as president would act with Jacksonian energy. He defied the authority of *Dred Scott* and denied that the Supreme Court had the authority to settle constitutional questions—in his first Inaugural Address, in signing

into law a bill abolishing slavery in the territories, and in issuing the Emancipation Proclamation. Eventually, the Reconstruction generation "overruled" *Dred Scott* in a rare maneuver not attempted since 1795, by inscribing its views directly into "the legal firmament" with the creation of a new set of constitutional texts: the Thirteenth, Fourteenth, and Fifteenth Amendments. Magliocca shows how this reversal revived Marshall's landmark decisions and then enshrined them in constitutional history as authoritative precedents. Salmon Chase, nominated as chief justice by Lincoln upon the death of Taney in 1864, declared that Marshall's interpretation of the Constitution in *M'Culloch* had always been sound, and had "finally settled, so far as judicial decisions can settle anything," the constitutionality of implied federal powers (123–25). The major rulings of Taney were relegated to exile and infamy.

Andrew Jackson and the Constitution raises important questions about the metamorphosis of our constitutional history. The grand narrative of constitutional generations, political escalation, and preemptive strikes is particularly engaging, in part because it reveals an inherent tension between the "separate but equal" powers established by the Constitution. However, the full implications of its thesis and approach for the study of American constitutionalism and statesmanship should not be ignored. With each rhetorical "turn" of "the constitutional cycle," Magliocca's analysis assumes the mantle of inevitability and the governing metaphor shifts from economics to mechanics, rendering political deliberation and prudence subordinate to process. Republican government is no longer conceived as a blessing preserved by a frequent recurrence to fundamental principles, and it goes without saying that "the important question" as to whether human beings are, indeed, capable of "establishing good government from reflection and choice" (*Federalist Papers*, no. 1) is all but silenced.

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THE TRAVAILS OF LIBERAL CONSTITUTIONALISM

Howard Schweber: *The Language of Liberal Constitutionalism* (Cambridge, UK: Cambridge University Press, 2007. Pp. v, 386. $96.00.)

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The Language of Liberal Constitutionalism is an extraordinarily ambitious work that covers a vast range of material from Bodin to contemporary material, from epistemology and semantics to constitutional theory. Howard Schweber has incorporated nearly every work of relevance available into his deeply informed discussion. Consequently, there is much to be learned from serious study of this work as well as with critical engagement with it. Because of the constraints of space, my focus will be on the latter.