

A Place for “Thin” Interposition? What John Taylor of Carolene and the Embargo Crisis have to offer regarding resistance to the Bush Constitution

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[Apologies for being brief where I should be long and long where I should be brief. Needless to say, the paper is an early draft and will benefit greatly from schmooze commentary.]

Over the past decade significant attention has been given to the study of constitutional shortcomings and failures. Scholars such as Mark Brandon¹ and Mark Graber² have extensively studied the degree to which the United States Constitution has failed to provide an operative political system and the impact of constitutional failure on American political development. Much of this scholarship has concentrated on the nineteenth century, particularly the period leading up to and immediately following the Civil War, but more recently, scholars have begun to examine contemporary constitutional failure. Sanford Levinson's recent book, *Our Undemocratic Constitution*, demonstrates the degree to which the United States Constitution fails to constitute a truly democratic political order and, thereby, fails to realize many of our most important political and social values. The point of Levinson's work is to get Americans to consider constitutional reform.³ However, Levinson readily acknowledges that Americans venerate their Constitution. The degree to which Americans are socialized to revere the Constitution creates a significant obstacle to constitutional reform insofar as reform requires Americans to admit that the venerable Constitution is fundamentally flawed. Past constitutional reformers have found the American civic religion too great a cultural barrier—and the strictures of Article V too great a burden—to achieve even minor constitutional reform.

Given that amendment is unlikely, it is worth considering what options are available to (1) enhance democratic practice and (2) protect liberties jeopardized by the partial realization of the unitary executive following September 11th, 2001. While early American constitutionalism is the source of many constitutional woes, it also provides resources for achieving the aspirations of constitutional reformers. In my schmooze ticket, I argue that the abandoned tradition of state interposition as found in the political theory of John Taylor of Carolene and the practice of New England states during the embargo crisis of 1808-9 affords a constitutional resource that can enhance majoritarian democratic practice and provide greater civil libertarian protection from executive authority.

The theory and practice of state interposition are widely associated with the doctrine of nullification; an association that undoubtedly arose from Calhoun's reliance on interposition theory to justify concurrent majorities. However, while interposition may be necessary for nullification, nullification is not necessary to interposition. As will be illustrated below, state interposition was closely linked with national popular majorities and a check on executive power. Interposition arose out of the advent of "party spirit" in government, which reduced the efficacy of ambition counteracting ambition among the various departments of government. Alterations to the distribution of power in the political system were more easily accommodated when partisan loyalty

¹ Mark E. Brandon, *Free in the World: American Slavery and Constitutional Failure*. Princeton: Princeton University Press, 1998.

² Mark A. Graber, *Dred Scott and the Problem of Constitutional Evil*. New York: Oxford University Press, 2006.

³ Sanford Levinson, *Our Democratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*. New York: Oxford University Press, 2006, 9.

trumped institutional prerogative. Early constitutional thinkers and political officials moved to counteract this development by distributing the interpretive enterprise more widely.

In many ways, the United States lost certain traditions that expanded the enterprise of constitutional interpretation. In the early American Republic, states were a vibrant source of constitutional innovation. Unfortunately, much of that tradition came to be associated with Southern illiberalism and the maintenance of ascriptive hierarchy. However, this was not always the case. During the Jefferson Administration, northeastern states asserted their authority to interpret the Constitution as a means of critiquing abusive executive power. State driven constitutionalism provided an important source of executive power on constitutional grounds, criticism largely absent today, and resulted in important constraints on power and policy changes.

This paper proceeds first by briefly explaining the political theory of John Taylor of Carolene. Taylor was the father of American interposition but is generally considered outside the traditional canon of great antebellum American political thinkers. Taylor's theories address many of the constitutional concerns later raised by contemporary scholars. Second, I provide a brief account of the embargo crisis that occurred at the end of Jefferson's presidency. Most importantly, states in the northeastern portion of the country responded aggressively to Jefferson's rapid accumulation of constitutionally suspect powers. State level responses helped limit Jeffersonian authority and mobilize the people against policies deemed illegitimate and constitutionally suspect. Finally, I conclude by making some (very) tentative conclusions and suggestions regarding the benefits of a constitutionalism inclusive of interposition given the relative similarities of contemporary events and the events of the early nineteenth century. Essentially, I describe a "thin" version of interposition tied to constitutional politics and national majorities that could help abate the trend of executive aggrandizement or, at least, ensure greater consensus prior to the full realization of those policies.

ROOTS OF INTERPOSITION

Interposition is best known as the predecessor of Calhoun's vision of concurrent majorities and nullification. Calhoun's theories have been widely discredited and, largely, abandoned as meritless and dangerous. However, early incarnations, both theoretical and practical, of interposition are surprisingly tempered and majoritarian when compared to Calhoun's doctrine. In part this was due to very different motivations. John Taylor of Carolene desired to protect majorities locally from minorities who seized power in the nascent national government. Taylor, like many of the Framing generation, expressed grave concerns over whether the institutions promulgated in Philadelphia would truly protect the general welfare.⁴ Specifically, Taylor feared that a factious

⁴ Taylor seems motivated by Federalist economic policy during the 1790s, which he argued were in consistent with the will of the country. This sentiment was widely shared among southern agrarians and the national elections of 1800 gives credence to the idea that the sentiment was shared to the north of the Mason-Dixon line.

minority would gain control over the national government to the detriment of the people's liberty.

Whereas Madison believed that any ruling cabal could be factious, Taylor argued majorities could never be factious as the majority *were the people*. The key to legitimacy in the new government was to ensure that the majority would always guide national policy-making. However, Taylor lacked faith in the newly constituted selection methods. Should national elections fail to achieve a government representative of the people, factious government could assert inappropriate prerogative over national policy-making. Of gravest concern, factious parties could render interpretations of the Constitution inconsistent with the general will and trammel the authority of resisting political institutions.

To protect the majority from factious oppression, Taylor theorized a role for state governments in constitutional politics that would afford the people greater civil libertarian protection. First, if/when the national government or a department of government illegitimately trammelled the liberties of the people, the state could interpose itself between the tyrannical national government and its citizens. Second, states would serve as a catalyst for action and conduit through which the people could form organized resistance. Despite calling on states for an important role in constitutional politics, Taylor believed that state interposition would occur rarely⁵ and only in *constitutional* controversies. When the mechanisms of selecting national officeholders worked properly, the national government would legislate consistent with the general welfare. However, when selection mechanisms failed to produce a regime in step with the polity *and* the regime attempted to instill a new constitutional order that encroached on the liberties of the people, states should act to interpose themselves to prevent harm befalling their citizens. Normal politics should take its due course but structural changes to the distribution of power in the national government could require state action on behalf of its citizenry. Thus, as Taylor declared, when factious regimes exercised contested constitutional authority, a state would contest the power but the “[o]pposition must... be constitutional.”⁶

To Taylor, the fact that the national government was given certain powers once held by the states, state governments retained the responsibility for protecting the liberty of their citizens. In large part, this responsibility flowed from a continuous responsibility to interpret the Constitution, which Taylor believed was a concurrent power shared by all political actors and institutions. However, Taylor was especially concerned with the loss of liberty to a factious and interested national government. Taylor claimed that “the force of self-love is as strong in majorities as in an individual, but its effect is precisely contrary. It excites one man to do wrong because he is surrounded with objects of

⁵ Taylor believed interposition was the last resort and “earnestly hope[d] that the ever-to-be-avoided contest [between state and national governments would] never occur.” *Construction Construed and Constitutions Vindicated*. Indianapolis: Liberty Fund, 1820, 60. Available at http://olldownload.libertyfund.org/EBooks/Taylor_0456.pdf. (Visited on November 5, 2006).

⁶ John Talyor of Carolene, *New Views of the Constitution of the United States*. Section VIII—The Federalist. Available at <http://www.constitution.org/jt/jtnvc.htm>. (Visited on November 4, 2006).

oppression, and majorities to do right because he can find none.”⁷ As Taylor saw it, factious coalitions could easily thwart the liberties of the people given the rise of partisan spirit. Whereas Madison vested his civil libertarian protection in jealous and competitive separate departments of government, Taylor postulated that these departments, unified by partisanship, could work in concert with each other to the detriment of the people. Another layer of protection was needed and Taylor believed state governments should play that role. When a factious national government attempted to alter the constitutional order, states intervened by declaring what one scholar of Taylor described as “declarations of disagreement.”⁸

Importantly, the point of these declarations was not to nullify the policy in question. Rather, public declarations of disagreement made states the focal point of political resistance to national policies. By refusing to capitulate to the constitutional innovation at issue, state governments attempted placed itself between the oppressor and the citizen. Of course, the tactics of resistance and delay likely had greater efficacy when the federal government lacked the bureaucracy it created in the twentieth century. However, Taylor was not just concerned about limiting the reach of the suspect federal policy, he also desired a source of mobilization against the illegitimate constitutionalism emanating from the national government. Typical of classical republican thought, Taylor had little faith that the people *alone* can resist federal encroachment. Action by the people themselves often looked like mobbish and lawless. First, the people lacked the necessary organization for proper (and peaceful) resistance. Second, a popular movement was susceptible to executive persuasion. Taylor argued the executive branch had special access to information that could be used to create public support for their positions. Of particular concern to Taylor, the president, as head of foreign and military matters, could claim unique knowledge, impossible to rebut, that would deflate resistance by the people.⁹ Since the people alone are not an appropriate source for constitutional resistance, states must interpose to maintain the constitutional status quo.

Of course, state resistance to national constitutional re-interpretation begs the question: To what end? Taylor acknowledged federal supremacy, rejected nullification, and dreaded civil war so what did state interposition accomplish? Taylor indicates two objects that can be achieved through interposition. First, state resistance creates a form of gridlock that slows the spread of the constitutional evil. Second, through the declaration of disagreement, the resisting state provides a constitutional alternative to the one promulgated by the national government. Taylor believed that there was a natural affinity between the people and their state governments that could trump the persuasive force of the executive. Whereas the people could not mobilize for themselves, the people could be trusted as the ultimate arbiter of constitutional controversies provided they had a choice. With states protecting against national oppression, the people would have the

⁷ Id.

⁸ C. William Hill, Jr. *The Political Theory of John Taylor of Carolene*. Rutherford: Fairleigh Dickinson University Press, 1977, 232.

⁹ John Taylor. *An Inquiry into the Principles and Policy of the Government of the United States*. New Haven: Yale University Press, 1950, 183.

time necessary to express their preference through the ballot¹⁰ or through the constitutional amendment process.¹¹ Taylor's faith in elections as the appropriate mechanism for resolving constitutional conflicts echoes his belief that state interposition was essentially majoritarian in nature.

INTERPOSITION AND EXECUTIVE POWER

As noted above, Taylor expressed particular concern over aggrandizement of power in the executive. More than any other institution, Taylor believed that the Framers erred instilling the president with authority too great for one individual to wield. In his words, "The presidency, gilded with kingly powers, has been tossed into the constitution, against the publick [sic] sentiment, and gravely bound in didatick [sic] fetters, like those which in England and France have become political old junk."¹² The problems of a single executive were aggravated by the rise of party spirit, which helped loyalty to the administration trump both institutional prerogative and public virtue. Factious government led to unconstitutional government.

While Taylor expressed concern over many facets of executive power, no where was the problem more acute than in the executive's war powers. With the ability of the president to use the party system, Taylor worried that a small number of party members could arrive at a decision that would plunge the nation into war. Dividing the war powers between Congress and the presidency did little to prevent inappropriate military action if members of Congress were more loyal to the president than their own institution. According to Taylor, war motivated by factious interest would violate the principles upon which the Constitution was founded. He seemed particularly concerned that war could be used to "wag the dog" even when the object and action were unpopular among the masses. War would always be profitable among certain elites and loyal citizens tended, at least in the short run to rally around the administration.¹³ Thus, executive war powers, "unsubjected to public opinion," could be used to advance presidential ambitions and prop up vulnerable office holders.

However, if properly enabled, the people could see through such misdirection. Taylor argued that "[w]ar, to rally the people round the government' was...but a shallow device."¹⁴ States could expose how executive policy harmed the liberties of the people and provide the leadership and resistance necessary for the people time to express their opposition. Expression would come through the democratic process. A sufficient number of elections would result in either successful removal of the factious government from office or, in the case of poorly functioning methods of selection, constitutional

¹⁰ Taylor's faith in elections is surprising given his concern that electoral mechanisms could bring a faction to power. However, Taylor seems to see such occurrences as anomalies that must be weathered by prohibiting the faction from doing grave damage to the Union.

¹¹ John Taylor, *Tyranny Unmasked*. Indianapolis: Liberty Fund, 1822, 141. Available at http://olldownload.libertyfund.org/EBooks/Taylor_0022.pdf. (Vistited on November 10, 2006)

¹² Taylor, *supra* note 9, at 194.

¹³ Taylor, *supra* note 11, at 40.

¹⁴ "John Taylor to Thomas Ritchie" *The Enquirer* March 14, 1809, 4.

amendment that would remedy the institutional evil resulting in factious government. Either way, state interposition would provide some measure of protection of liberty while the popular groundswell was building.

The current state of politics leads one to believe that many of Taylor's concerns have come home to roost. Executive ambitions have led to sweeping exercise of the war powers. The president's position in the party enabled the Administration to overcome congressional resistance to policies that reduce civil libertarian protections. True to Taylor's visions, the American people rallied around the Administration during wartime despite seeming trepidation about the leadership's judgment. Yet, despite pockets of resistance to Administration policies, state governments have been notable for their silence on the new constitutional order and the harm befallen civil libertarian protections. Today, we do not expect states to act as a Taylorian countervailing force. But such was not always the case. Taylor's theory was put to action, not in Calhoun's South, but in Webster's New England. During the Jefferson Administration, northern states responded to the national embargo by refusing to fully enforce the embargo and publicly declared their belief that several embargo measures (the fourth Embargo Act in particular) were unconstitutional. The effect was to limit the impact of Jefferson's policies and to institutionalize resistance to policies of contested constitutional legitimacy.

THE EMBARGO AND INTERPOSITION

By 1807, war between England and France began to take a major toll on the United States. Squeezed between Napoleon's Continental System and England's orders in council, US merchant vessels were regularly boarded, their freight seized, and their sailors impressed into foreign service. Such events came to a head when the British navy attacked the American merchant frigate *Chesapeake*. Less than two weeks later, President Thomas Jefferson described the events thusly:

And at length a deed, transcending all we have suffered, brings the public sensibility to a serious crisis, and forbearance to a necessary pause. A frigate of the US trusting to a state of peace and leaving her harbor on a distant service, has been surprised and attacked by a British vessel of superior force, one of a squadron then lying in our waters to cover the transaction, & has been disabled from service with the loss of a number of men killed & wounded. This enormity was not only without provocation or justifiable cause; but was committed with the avowed purpose of taking by force from a ship of war of the US a part of her crew: and that no circumstance might be wanting to make its character, the commander was apprised that the seamen thus forcibly ... were native citizens of the US.¹⁵

¹⁵ "Chesapeake Proclamation." The Works of Thomas Jefferson, Vol. 10. Paul L. Ford (ed.) New York: G.P. Putnam's Sons. Available online at: http://oll.libertyfund.org/Texts/Jefferson0136/Works/Vol10/0054-10_Pt06_1807.html#hd_1f054-10_head_177. (Visited on November 11, 2006)

Public outcry demanded action and, in the North, the action demanded was war. However, Jefferson steered a course intended to keep the US out of war but, in so doing, he would exercise unprecedented powers as the commander in chief and use the military for domestic law enforcement.

Jefferson realized that direct confrontation with either France or England would lead to US defeat. The US was not in a position to take on either the British navy or French land forces so Jefferson advocated economic warfare that would bring great pressure to bear on both countries, particularly England. Economic embargo promised, Jefferson believed, to be a new form of warfare that would swiftly demoralize the English and alter their willful antagonizing of American merchant ships. However, a successful embargo would mean eliminating all forms of international trade, which, in turn, would cause significant financial harm to the nation as a whole and disproportionate harm to the merchant class of the northeast.¹⁶ Creating international economic turmoil would require near-total compliance with the embargo and, to achieve this end, Jefferson demanded enforcement authority that bent the Constitution to his will.

Within four months of the embargo, Congress passed three enforcement laws at the president's request. In each case, the measures were passed with extraordinary rapidity due to "the operation of the Democratic-Republican machine"¹⁷ even to the point where the Senate suspended their requirement to read a bill on three consecutive days to pass the first embargo bill in a matter of hours. Numerous (Federalist) legislators complained about the lack of information coming from the Administration, which hampered congressional deliberations. Rep. Barent Gardenier (NY) claimed, "Darkness and mystery overshadow this House and the whole nation. We know nothing, we are permitted to know nothing. We sit here as mere automata; we legislate without knowing, nay, sir, without wishing to know, why or wherefore. We are told what we are to do, and...do it." Officeholders from the northeast also complained of the embargo's suspect constitutionality. Speaking from the floor of the House, Josiah Quincy (MA) noted the lack of express constitutional authorization for the embargo and asserted, "It was impossible that the Framers should presume that a power would be exercised which would exceed any exercised by the most despotic Governments in the world."¹⁸ Each embargo act contained provisions that arguably pushed the constitutional envelope, particularly as it pertained to executive authority¹⁹ but it was the fourth act that ran so far afield of the Constitution as to push New England states to interposition.

¹⁶ After several months of the embargo, one pamphleteer from New Hampshire wrote, "The embargo has destroyed our commerce, banished our seamen, reduced the value of the labours [sic] of our husbandmen to almost nothing, deprived many of our mechanics of the means of earning their bread, struck out of circulation the money of the country, multiplied lawsuits and executions, and will fill our jails with prisoners for debt. These are not exaggerations; they are but part of the evils under which we suffer; and infinitely greater may be expect to ensue." A Citizen, *An Address to the Citizens of New Hampshire Upon a Subject of the Greatest Importance* (1808).

¹⁷ Louis Martin Sears, *Jefferson and the Embargo*. New York: Octagon Books, 1966, 60.

¹⁸ *Annals of Congress*, House of Representatives, 10th Congress, 1st Session, 2076.

¹⁹ Leonard Williams Levy, *Jefferson and Civil Liberties: The Darker Side*. Cambridge: Harvard University Press, 97-99.

The fourth embargo act, authored by Jefferson and Secretary of the Treasury Albert Gallatin,²⁰ contained two provisions of dubious constitutionality. Section six of the fourth embargo act declared

“no ship or vessel having any cargo whatever on board, shall...be allowed to depart from any port of the US, for any other port or district of the United States, adjacent to the territories, colonies, or provinces of a foreign nation...without special permission of the President of the United States.”²¹

This had the dual effect of crippling commerce along the Canadian border and consolidating executive control over commercial activity throughout the northeast. Time and again, New Englanders asserted a right to engage in commercial activity and deemed the blanket prohibition unconstitutional. Contemporary scholars may take for granted the idea that Congress can prohibit certain (foreign) commerce, yet, as of 1808, “the power to regulate commerce had never been considered as an authority to prohibit it altogether.”²² Moreover, the provision that required merchant ships to receive “special permission” from Jefferson consolidated power in the executive to a degree that, Federalists argued, violated the allocation of powers within the constitutional system.

The enforcement mechanism in the fourth embargo act also raised serious constitutional concerns. Section seven permitted

the public armed vessels and gun boats of the United States shall, as well as the commanders or masters of the revenue cutters, and revenue boats, be authorized, and they are hereby authorized to stop and examine any vessel, flat, or boat, belonging to any citizen of the United States, either on the high seas, or within the jurisdiction of the United States, or any foreign vessel within the jurisdiction of the United States, which there may be reason to suspect to be engaged in any traffic or commerce, or the transportation of merchandise...contrary to the provisions of this act.

For the first time, the United States armed forces would be used for the purposes of domestic law enforcement against its own citizens. In essence, Jefferson turned his commander-in-chief powers inward in way unanticipated in the absence of insurrection.²³ Yet, the matter was never seriously discussed in Congress nor did Jefferson explain his rationale for requesting the power.

A secondary problem arose out of the authorization to search vessels upon mere suspicion. One contemporary Jeffersonian critic argues that the provision conflicted with

²⁰ All four embargo enforcement acts originated with the Administration and were passed by Congress with few substantive changes.

²¹ Statutes at Large, 10th Congress, 1st Session, April 25, 1808. Available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=002/llsl002.db&recNum=537>

²² Levy, *supra* note 19, at 101.

²³ Sears, *supra* note 17, at 161.

the language of the Fourth Amendment as it eliminated a need for either probable cause or a warrant.²⁴ However, public objections to the embargo never cited the Fourth Amendment even as they complained about the tyrannical nature of the provision.²⁵ Rather, complaints centered on how the provision aggrandized power in the executive and how it trampled upon the commercial liberties of the American people. A northern reading of the Constitution made commercialism central to constitutional protection and, as a consequence, Jeffersonian policies violated the Constitution.²⁶ Such an understanding of the Constitution could not stand and northeastern lawmakers soon threatened action to protect against further intrusion. As Josiah Quincy declared, "...whether in the Constitution itself the power of laying an embargo be given. If such a power exists, then it is idle to say that this is the last time it will be exercised; the *commercial States* will not rest until they shall bring forward amendments by which the power will be limited." Federalists in the House and Senate did not enjoy sufficient numbers to counter Jefferson's authority. However, the so-called commercial states moved quickly toward interposition.

Consistent with Taylorism, several New England states declared their disagreement over the constitutionality of the embargo and subsequent force acts. Yet, also consistent with Taylor's theory, these objections were pro-union and constitutional in nature. Harrison Gray Otis, a member of the famed Essex Junto and Massachusetts state legislator, suggested a conference "for the purpose of providing some mode of relief that may not be *inconsistent with the union of these states*."²⁷ Rather than a special convention, the Massachusetts House of Representatives moved against Jefferson by passing a report that condemned the fourth embargo act and declared it "in many respects unjust, oppressive and unconstitutional, and not legally binding on the citizens of this State."

The Connecticut General Assembly followed suit by passing a similar, if more stringent in tone, resolution. The Assembly noted that when facing a measure of dubious constitutionality it is

the duty of the legislative and executive authority in the State, to withhold their aid, and co-operation, from the execution of the act... While it is the duty of the Legislature to guard the sovereignty of the State, and your rights from encroachment, it continues to be your interest and duty, as peaceable citizens, to abstain from all resistance, against acts, which

²⁴ Levy, *supra* note 19.

²⁵ Thomas Y. Davies argues that the Framing generation understood the Fourth Amendment as limited in scope. The Fourth Amendment protected the home and personal effects only and did not apply to commercial structures and vessels. See Thomas Y. Davies, "Recovering the Original Fourth Amendment" 98 Mich. L. Rev. 547, 1999. But see Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*. New Haven: Yale University Press, 1998, 64-80.

²⁶ As Louis Martin Sears noted, the debates in Congress may have been the early formation of American laissez-faire economic policy. If nothing else, this policy wins many devotees in New England during 1807-1808. *Supra* note 17, at 160.

²⁷ David H. Fischer, *The Myth of the Essex Junto*, 21 *William and Mary Quarterly* 191, 232 (1964) (quoting Otis).

purport to be laws of the United States. Be advised to seek none but constitutional relief.

Later the same month, the General Assembly passed a special resolution that reiterated the unconstitutionality of the embargo force acts and instructed “persons holding executive offices under this State, are restrained by the duties which they owe this State, from affording any official aid or cooperation in the execution of the act aforesaid.” The measure applied equally to the state militia, which posed a problem for Jefferson’s plan to call forth the militia to supplement the regular army that was already enforcing the embargo.²⁸

The direct effects of the Massachusetts and Connecticut resolutions are unclear but, in both states and throughout the northeast, election results indicate that voters from New York to Maine largely approved of the continuing resistance effort. Federalists picked up 24 seats in the House almost all of which came from states in the northeastern part of the country.

The combination of state opposition, and continued popular resistance to the embargo proved fatal to the policy. Seeing both the state declarations and the election results, Jeffersonian Republicans in the House and Senate eagerly supported a less abrasive alternative. Jefferson was equally humbled. In February of 1809, Congress substituted non-intercourse for embargo. Non-intercourse was so innocuous that it posed no obstacle to foreign trade and international commerce quickly resumed to its pre-embargo levels. The anti-embargo response that began at the state level and, then, evolved into national policy “impos[ed] upon Jefferson the deepest humiliation of his career.”²⁹

As a matter of policy, the embargo’s end was a clear victory for the Federalists. As a matter of constitutional construction, the Federalists successfully ended a policy they viewed as tyrannical. However, the idea that the national government lacks the power to destroy foreign commerce never receives authoritative construction. In fact, the Supreme Court’s commerce clause jurisprudence decades later concretizes Jefferson’s take on national dominion over foreign and interstate commerce. Of course, this was John Taylor’s point. State interposition did not result in constitutional consensus, rather, it provided the time to create consensus on a contested constitutional power while minimizing the harm to civil liberties.

NINETEENTH CENTURY LESSONS FOR THE TWENTY-FIRST CENTURY

There are obvious parallels between events of the early nineteenth century and today. Jefferson sought and received significant new powers in the name of fighting a new war. Rather than thoughtful discussion regarding the new powers and their relation to existing allocation of powers, party spirit motivated Congress to approve

²⁸ Levy, *supra* note 19, at 114-115.

²⁹ Sears, *supra* note 17, at 190.

unprecedented and constitutionally questionable powers to the executive branch. Jefferson also turned the war powers inward not to quell insurrection or rebellion but to enforce the new war. Despite significant congressional majorities, there were reasons to doubt the majoritarian nature of these policies. The Constitution clearly allotted legislative representation not necessarily reflective of majoritarianism and, in the case of embargo, the country's (free) population centers were predominantly in areas of the country that opposed embargo.³⁰

Today, the Bush Administration claimed (and received) significant new authority to fight the war on terror. Congress's superficial debates have turned more on party spirit than substantive constitutional discourse. The resulting policies have utilized executive power to combat the war on terror in ways that directly trammel the liberties of US citizens. These policies have been promulgated by an Administration that came to power absent a national majority and bolstered by an undemocratic senate and malapportioned House. This is not to say that the American people haven't responded positively to certain anti-terror policies. However, the people have been offered few alternatives to current policy. The lack of options reflects a major difference between early nineteenth century resistance and events nearly two centuries later.

Taylor warned that the people themselves were not a viable source for resistance to the persuasive effect of the national executive. The unique position of the president in public life as head of state and head of the executive would have great persuasive effect on the people. The people alone could not be expected to see through executive deception. Taylor likely overstates the ineptitude of the people.³¹ However, dissent undoubtedly gains traction when powerful political actors and institutions take resonant positions. Or conversely, dissent concretizes when respected officials articulate alternative positions. Today, the Administration's near interpretive hegemony³² is notable given the absence of this dominance in early nineteenth century politics.

What I mean to suggest is the absence of a once robust constitutional tradition. States have played an inconsequential role in constitutional interpretation in the post-September 11th world even as the national government has moved against liberties state constitutions explicitly protect. Most recently, Section 7 of the Military Commission Act of 2006 prohibited courts from hearing "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such

³⁰ According to the 1810, the free population in the mid-Atlantic and northeastern states was approximately 1,268,761 while the free population in the South was 650,601. (The total population in the South was 1,047,296.) Population data are available at the Geospatial and Statistical Data Center (<http://fisher.lib.virginia.edu/>).

³¹ For one account of the people as a vigorous source of constitutional discourse in early America, see Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*. New York: Oxford University Press, 2005.

³² The Court has been one exception to this rule and challenged a few Administration policies. However, judicial response has been to require small correctives rather than overt challenges to the constitutionality of the Administration's policies. There is also a question as to the extent to which courts can mobilize popular dissent absent non-judicial institutions to provide organization and resistance.

determination.” Every state constitution (and that of Washington DC) contains a prohibition against suspending the writ of habeas corpus “except in cases of rebellion or invasion” and none of them qualify this in relation to citizenship. Six states contain absolute prohibitions on suspension of the Great Writ.³³ Contemporary politics does not require states to defend rights and privileges only in the shadows of constitutional provisions but those boldly articulated in both state and national constitutions. For those seeking a voice of resistance, states can provide such a voice if they recover interposition.

I do not mean to suggest state interposition for the sake of creating a political quagmire. Our system is sufficiently inefficient that we do not need to create greater opposition to change absent a fundamental challenge to the principles of constitutional democracy. Specifically, when there is (1) a change to the constitutional order to the detriment of civil liberties and (2) that runs counter to majoritarian references, interposition could ensure vigorous debate and a legitimate constitutional order. In this way, interposition would be quite thin in that its usage would be limited to extreme cases. However, in those cases, its value is inestimable.

Thin interposition is certainly relevant to contemporary politics. I do not believe I need to spill much ink on the changes to the constitutional order that have harmed civil liberties. Needless to say, constitutional innovations such as warrantless domestic eavesdropping, indefinite detention of alleged terrorists, and the suspension of habeas corpus for those deemed unlawful enemy combatants reduced civil libertarian protections. In addition, Administration policies have not enjoyed clear majoritarian support. In the case of the war on terror, despite the general support the Administration enjoys for its anti-terror policies (outside of the war in Iraq), specific, invasive policies do not enjoy nearly the same levels of support. A recent CBS News/New York Times poll indicated that Americans were split on whether “people suspected of involvement in terrorist attacks against the United States” should be tried by civilian or military commissions. An overwhelming majority (63%) favored following international agreements when it came to the treatment of “prisoners of war.”³⁴ The same poll indicated that fifty-seven percent of Americans believed the CIA should “abide by the same Geneva Convention standards that apply to the U.S. military” and should not “be able to use more forceful interrogation techniques than the Geneva Convention.” Polling numbers are not definitive here, but they indicate healthy dissent to Bush Administration policies that turn on American constitutionalism. Yet, unlike in Jeffersonian America, there has been no significant constitutional response from state institutions.

Beyond serving as a source for resistance, interposition shares two benefits with modern theories of departmentalism. First, a thin version of interposition spurs constitutional deliberation. Conflict over constitutional meaning will require the

³³ Louisiana, Missouri, Montana, North Carolina, Oklahoma, and Texas do not provide exceptions to the protection of habeas corpus. Louisiana and North Carolina provide that the writ “shall not be suspended” and Missouri, Montana, and Texas provided the writ “shall never be suspended.” Oklahoma’s Constitution states that the writ “shall never be suspended by the authorities of the state.”

³⁴ Polling numbers are available on line at <http://www.pollingreport.com/terror.htm>. (Visited on November 3, 2006)

competing institutions to vie for the hearts and minds of the polity. Campaigns to win popular support will require public discourse. I do not portend that the discourse will amount to the Hayne-Webster debate but forcing institutions to justify and explain constitutional innovations that harm civil liberties will, at a minimum, create pressures to develop sound reasons for the policy in question. This leads to the second benefit: consensus on constitutional policy. Deadlock over constitutional policy will be resolved but only after one side builds sufficient support either on the merits or through electoral victories. Much as the New England states were able to win anti-embargo support so to will future parties, institutions, and governments win support for their constitutional vision.³⁵ Interposition is not a guarantee of a strong civil libertarian regime but it is a democratic vision.

Finally, interposition provides a benefit quite distinct from theories of departmentalism. Departmentalism is largely concerned with co-equal interpretation at the national level but unified party control over the national government renders suspect departmentalism as a check on abusive authority. While interposition does not occur wholly outside of the American party system, it provides an opportunity for a party out of power at the national level to interject (potentially majoritarian) objections to the party in power's policy. Moreover, (as I have realized with my recent westward move) party ideology at the state level diverges widely from its parent national ideology.³⁶ This is far from a guarantee that states will act in opposition to the national government but it changes the incentive structure for action by reducing the effects of homogenous party ideology.

CONCLUDING THOUGHTS

I mentioned above that interposition is worth considering because of the unlikelihood of calling a constitutional convention with an eye toward reforming some of our constitutional stupidities. I do not fool myself by thinking that interposition has significantly higher probabilities of realization. However, interposition illustrates that vigorous practices existed in early American constitutionalism that speak to contemporary problems. Such practices were theorized to compensate for many of the constitutional deficiencies we now debate. Modern scholars and activists who wish to find ways to resist aspects of the twenty-first American Constitution will benefit from considering the merits of bygone constitutional traditions that helped advance democratic practice while resisting changes to the constitutional order.

Unfortunately for interposition, advocates for nullification used interposition theory to justify concurrent majorities. Yet, this development was contingent upon a

³⁵ In this way, breaking the constitutional deadlock will resemble Ackerman's theory of constitutional amendment outside of Article V, if without the constitutional moment. A series of electoral victories for the coalition endorsing the suspect constitutional innovation will signal popular support for it. A series of electoral defeats will signal popular rejection.

³⁶ Strands of libertarianism, found in both major parties in the non-coastal West, afford both the opportunity and motivation for constitutional dissent.

system bent on maintaining a constitutional evil. While many of the institutions that accommodated slavery still exist, the twenty-first century Constitution does not face the same pressures that led to nullification. A thin version of interposition seems viable in modern politics. In fact, historical analysis of American political history may reveal a recurrent tradition akin to interposition. The Southern Manifesto, written in response to *Brown v. Board of Education*, appears to be an effort at state interposition.³⁷ The Southern Manifesto would appear to be exactly the reason why interposition is undesirable. However, Michael Klarman notes, the response of southern states to *Brown* does more to marshal public opinion for desegregation than *Brown* did on its own.³⁸ Eventually, when northern whites faced a choice between *Brown* and the interposing southern States and the Southern Manifesto, they chose *Brown*. This is hardly a perfect story but it demonstrates that interposition may have merit even when employed for illiberal purposes.

Resisting the twenty-first century Constitution may require creative solutions and early American constitutionalism is a wellspring. Careful scrutiny of these constitutional traditions may reveal that they contain democratic resources useful for advancing democratic practice. The use of interposition by New England states to fight Jefferson's Embargo and the corresponding expansion of executive power demonstrates that it may have utility to contemporary progressives interested in combating the unitary executive. State-driven constitutionalism may not be as anathema to progressive constitutionalism as often thought. Whatever the merits of interposition, we should remember that contemporary problems are likely not wholly new and that past generations have fought similar constitutional battles. Their innovations are useful resources for contemporary constitutional problems.

³⁷ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004, 320.

³⁸ *Id.*, at 435.