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A PLACE FOR INTERPOSITION? WHAT JOHN TAYLOR OF CAROLINE AND THE EMBARGO CRISIS HAVE TO OFFER REGARDING RESISTANCE TO THE BUSH CONSTITUTION

BRADLEY D. HAYS*

Over the past decade, significant attention has been given to the study of constitutional shortcomings and failures. For example, a group of highly prestigious scholars recently detailed a laundry list of the deficiencies that they believe plague the American Constitution.¹ Scholars such as Mark Brandon and Mark Graber have extensively studied the degree to which the United States Constitution has failed to provide an operative political system and the impact of that constitutional failure on American political development.² Much of this scholarship has concentrated on the nineteenth century, particularly the period leading up to and immediately following the Civil War. However, increasingly scholars have begun to examine constitutional failure in light of contemporary politics and political values. Sanford Levinson's recent book, *Our Undemocratic Constitution*, discusses the degree to which the United States Constitution is "grievously flawed," failing to constitute a truly democratic political order and, thereby, failing to realize many of our most important political and social values.³ Levinson hopes "[t]o convince you that you should join [him] in supporting the call for a new constitutional convention."⁴ However, Levinson readily acknowledges one of the most significant obstacles that stand in the way of constitutional reform: Americans venerate

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1. See CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (asking several prominent constitutional law scholars for their opinion on what is the "stupidest" constitutional provision and cataloguing the responses).

2. See MARK E. BRANDON, FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE, at ix (1998) (discussing the "breakdown of constitutional order in the United States in the nineteenth century," specifically with regard to the institution of slavery); MARK A. GRABER, *Dred Scott* and the Problem of Constitutional Evil 2 (2006) (describing the development of "constitutional evil" in the context of slavery and the *Dredd Scott* decision).

3. See generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

4. *Id.* at 9.

their Constitution.⁵ 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.⁶ 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.⁷

Two concerns seem to dominate the work of Levinson and other progressive reformers: (1) the democratic deficit in most national institutions,⁸ and (2) the threat to civil liberties posed by a “too powerful president.”⁹ However, given the improbability of significant constitutional reform, it is worth considering what options are available to enhance democratic practice and protect civil liberties jeopardized by executive power. In this Essay, I turn to early American constitutionalism as a source for achieving the aspirations of constitutional reformers, if not altering existing institutions. Specifically, I argue that state interposition, as theorized by John Taylor of Caroline and practiced by several New England states during the Embargo Crisis of 1808–09, affords constitutional resources that can enhance democratic practice *and* provide greater civil libertarian protection from executive authority.¹⁰

In its original formulation, state interposition was fashioned as a means of protecting national popular majorities against executive authority. The advent of “party spirit” in the early-nineteenth century reduced the efficacy of Madisonian separation of powers.¹¹ When party loyalty trumps institutional prerogative, consolidation of power under one department of government is much more likely. Early constitutional thinkers and political officials, faced with both the threat and actual aggrandizement of power in the executive, moved to

5. *See id.* at 16–17 (noting that Americans “venerate the Constitution and find the notion of seriously criticizing it almost sacrilegious”).

6. *Id.*

7. *See id.* at 160 (arguing that Article V “works to make practically impossible needed changes in our polity”); *see also* Alan Gibson, *Desacralizing the Constitution*, 65 *REV. POL.* 131 (2003) (reviewing ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2002)) (stating that Americans’ reverence of the Constitution “makes amending the document—difficult enough through procedures set forth in it—even more difficult”).

8. *See* LEVINSON, *supra* note 3, at 6 (“I have become ever more despondent about many structural provisions of the Constitution that place almost insurmountable barriers in the way of any acceptable notion of democracy.”).

9. *Id.* at 79.

10. *See infra* Part I.

11. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2311, 2312–13 (2006).

counteract this development by theorizing a greater place for state governments in constitutional politics.¹²

In the early American Republic, state governments were a vibrant source of constitutional innovation. State governments and political actors expounded constitutional norms in an effort to define the new constitutional order.¹³ Unfortunately, much of that tradition came to be associated with Southern illiberalism and the maintenance of ascriptive hierarchy.¹⁴ However, federalism is an empty normative shell and neither need be, nor was it always, associated exclusively with the maintenance of white supremacy. During the Jefferson Administration, northeastern states asserted their authority to interpret the Constitution as a means of critiquing abusive executive power.¹⁵ State-driven constitutionalism provided an important critique of executive power on constitutional grounds (criticism largely absent today) and resulted in important constraints on power and policy changes.¹⁶

This Essay begins by briefly exploring the political theory of John Taylor of Caroline.¹⁷ Taylor was the father of interposition but is generally omitted from the canon of great political thinkers of antebellum America.¹⁸ Taylor's theories address several of the most pressing constitutional concerns in post-September 11th America.¹⁹ Next, I provide a brief account of the embargo crisis that occurred at the end of Jefferson's presidency.²⁰ States in the northeastern portion of the country responded aggressively to Jefferson's innovative and suspect enforcement authority. State level responses helped limit Jeffersonian authority and mobilize the people against policies deemed illegitimate and constitutionally suspect. Finally, I conclude by making some tentative suggestions regarding the benefits of a constitutionalism that reincorporates the interpretive authority of state level institutions and

12. See *infra* Part II.

13. See Keith E. Whittington, *The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change*, 26 *PUBLIUS* 1, 3–5 (1996) (discussing the Virginia and Kentucky Resolutions, which declared the Alien and Sedition Acts of 1798 unconstitutional, and the role of the states as constitutional interpreters and “guardians against the general government”).

14. See generally JOHN C. CALHOUN, *DISQUISITION ON GOVERNMENT* (C. Gordon Post ed., 1995).

15. See *infra* notes 99–105 and accompanying text.

16. See *infra* notes 106–111 and accompanying text.

17. See *infra* Parts I–II.

18. See, e.g., *AMERICAN POLITICAL THOUGHT* (Kenneth M. Dolbeare & Michael S. Cummings eds., 2004) (omitting Taylor in cataloguing and discussing influential American political thinkers); *THE DILEMMA OF AMERICAN POLITICAL THOUGHT* (Jeffrey L. Prewitt ed., 1996) (same).

19. See *infra* Part IV.

20. See *infra* Part III.

actors.²¹ Essentially, I describe a “thin” version of interposition tied to constitutional politics and national majorities that provides an institutional alternative to the present constitutional interpretive regime.

I. ROOTS OF INTERPOSITION

The rise of nascent political parties created numerous problems for early American political thinkers and actors. If party spirit undercut the system of separation of powers, what would protect against an illegitimate combination of powers under one branch of government? Similarly, if party spirit extended to the electorate, what would prevent political minorities from winning national office and creating public policy inconsistent with majority preferences? John Taylor of Caroline was one such political thinker in the early nineteenth century who feared that a factious minority would gain control over the national government to the detriment of the people’s liberty.²² To Taylor, Federalist economic policy of the 1790s indicated that regional-based coalitions could successfully control national policy to the detriment of the general welfare.²³ The central question, then, was how to protect liberty and the general welfare when a factious minority held power?

Whereas Madison believed that any ruling cabal could be factious,²⁴ Taylor argued that majorities could never be factious as the majority *were the people* and, thus, majoritarian policymaking defined the general welfare.²⁵ Taylor claimed that “[t]he 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 oppression; and majorities to do right, because they can find none.”²⁶ The key to legitimacy in government was to ensure

21. See *infra* Part IV.

22. See JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 96 (W. Stark ed., Routledge & Kegan Paul Ltd. 1950) (1814) (“[A]n individual or minority will be infinitely more likely to oppress a nation for self-gratification, than a nation, for the same end, to oppress an individual or minority.”) [hereinafter AN INQUIRY].

23. See EUGENE TENBROECK MUDGE, THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE 145–46 (AMS Press 1968) (1939); see also AN INQUIRY, *supra* note 22, at 477–92.

24. See THE FEDERALIST NO. 10, at 46 (James Madison) (Clinton Rossiter ed., 1999) (defining a faction as “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”).

25. AN INQUIRY, *supra* note 22, at 482; see also C. WILLIAM HILL, JR., THE POLITICAL THEORY OF JOHN TAYLOR OF CAROLINE 84–85 (1977) (comparing and contrasting Madison’s definition of “faction” with Taylor’s).

26. AN INQUIRY, *supra* note 22, at 389.

that the majority would always guide national policy making.²⁷ However, Taylor lacked faith in the newly constituted selection methods.²⁸ Should national elections fail to achieve a government representative of the people, factious government could assert inappropriate prerogative over national policy-making.²⁹ Of gravest concern, factious parties could render interpretations of the Constitution inconsistent with the general will and trammel the authority of resisting political institutions.³⁰

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, when the national government or one of its departments illegitimately encroached upon the liberties of the people, the state could interpose itself between the tyrannical national government and its citizens.³¹ Second, states could serve as catalysts for action and a conduit through which the people could form organized resistance.³² Despite calling on states for an important role in constitutional politics, Taylor believed that state interposition would occur rarely³³ and only in *constitutional* controversies.³⁴ When the mechanisms of selecting national officeholders worked properly, the national government would legis-

27. See MUDGE, *supra* note 23, at 95–97; see also JOHN TAYLOR, *NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES* (Leonard W. Levy ed., Da Capo Press 1971) (1823) [hereinafter *NEW VIEWS*].

28. See HILL, *supra* note 25, at 159–60 (“Taylor had serious doubts about the efficacy of elections, even when used along with separated powers, as in the United States, to preserve liberty.”).

29. *Id.* at 157–58.

30. See *AN INQUIRY*, *supra* note 22, at 174–75 (discussing how election and division of power must be used together to ensure that executive power is consistent with the public will, rather than the interests of any particular faction).

31. See *NEW VIEWS*, *supra* note 27, at 133 (asserting that a usurpation by Congress of the Constitution can only “be prevented by . . . a concurrent power in the state and federal governments to construe and preserve the constitution”); see also HILL, *supra* note 25, at 225–26.

32. See HILL, *supra* note 25, at 187 (“The existence of states gave the people regular channels for influencing the public affairs and governmental structure of the union, while the state governments allowed the population within each state an outlet for their frustrations.”); see also *NEW VIEWS*, *supra* note 27, at 187 (arguing that the state governments provide an “orderly and organized” check on the power of the federal government, without which the people would not be “sufficiently able and willing to act in concert”).

33. 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.” JOHN TAYLOR, *CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED* 156 (1820) [hereinafter *CONSTRUCTION CONSTRUED*].

34. Taylor tied state interposition to alterations to the constitutional order. *NEW VIEWS*, *supra* note 27, at 70–71. Taylor believed that state “[o]pposition must . . . be constitutional.” *Id.* at 71.

late 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 harmed the people's liberty, states could and should act to interpose themselves to prevent harm befalling their citizens.³⁵ Thus, normal politics should take its due course but structural changes to the distribution of power in the national government would meet with state action to protect states' citizenry.

Taylor argued that state governmental protection was necessary due to the relative ease with which a factious coalition—united by party spirit—could alter the political and constitutional order.³⁶ Because the national departments of government could be unified by partisanship, thereby undermining Madisonian separation of powers, another layer of protection was needed to protect citizen liberty.³⁷ State governments were detached from national partisan spirit and could better resist their impulses.³⁸ The capacity to resist partisanship was intertwined with the obligation of states to interpret the Constitution. To Taylor, constitutional interpretation was a concurrent power shared by all political institutions.³⁹ State governments were obliged to interpret the Constitution in ways consistent with the general welfare and the liberty of its citizenry. When the interpretation of the national government unsettled the national constitutional order, states were obliged to voice their dissent in the name of the people.⁴⁰

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.”⁴¹ 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.⁴² By refusing to capitulate to the

35. *Id.*

36. AN INQUIRY, *supra* note 22, at 560–62.

37. NEW VIEWS, *supra* note 26, at 76–77.

38. *See, e.g.*, AN INQUIRY, *supra* note 22, at 104–05 (stating that “among several hundred state governours [sic] who have already existed, not one instance has appeared of kingly qualities, of usurpation, or of war between neighbouring states”).

39. Joseph R. Stromberg, *Country Ideology, Republicanism, and Libertarianism: The Thought of John Taylor of Caroline*, 6 J. LIBERTARIAN STUD. 35, 42 (1982); *see also* CONSTRUCTION CONSTRUED, *supra* note 33, at 49–50.

40. NEW VIEWS, *supra* note 27, at 70; *see also* HILL, *supra* note 25, at 207 (“If Congress passed a law that was unconstitutional in a state’s judgment, that state must refuse to obey the law.”).

41. HILL, *supra* note 25, at 232.

42. *See id.* at 225–29 (discussing Taylor’s views on state interposition and arguing that Taylor disfavored a doctrine of nullification in favor of a process of “responsive amend[ment]”).

constitutional innovation at issue, a state placed itself between the oppressor and the citizen. Taylor did not rest the merits of interposition on the efficacy of abating national enforcement of the questionable policy.⁴³ Rather, he believed that states would serve as the foci for mobilization against the illegitimate policy. Taylor had little faith that the people *alone* could resist federal encroachment.⁴⁴ Worse, action by the people themselves often was mobbish and lawless.⁴⁵ The people lacked the necessary organization for proper (and peaceful) resistance and popular movements were susceptible to executive persuasion.⁴⁶ The latter point also fueled Taylor's suspicion of executive authority. Taylor argued the President could use his or her special access to information regarding military and foreign affairs to deflate resistance to executive policies.⁴⁷ Since popular movements were so vulnerable, state governments were needed to act on behalf of the people.

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.⁴⁸ So what would state interposition accomplish? Taylor indicated two objectives to be achieved through interposition. First, state resistance creates a form of gridlock that slows the suspect policy's enforcement. Second, through the declaration of disagreement, the resisting state provides a constitutional alternative to the one promulgated by the national government.⁴⁹ 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 properly mobilize to protect themselves, the people could be trusted as the ultimate arbiter of constitutional controversies provided they had a choice.⁵⁰ With states protecting against national oppression, the people would have the time necessary to express their preference through

43. See *id.* at 227 (stating that resistance by the states did not nullify the federal law); see also *NEW VIEWS*, *supra* note 27, at 70–71, 255–56.

44. *NEW VIEWS*, *supra* note 27, at 187–88, 257–59.

45. *Id.* at 186–88.

46. *Id.*

47. See *AN INQUIRY*, *supra* note 22, at 183–84 (arguing that, although elected democratically, the breadth of executive powers tends to tempt executives to act like monarchs).

48. See generally *HILL*, *supra* note 23, at 216–33.

49. *Id.* at 227. For example, as discussed below, New England states provided a constitutional alternative to Jeffersonian policies during the Embargo Crisis and their position helped concretize popular resistance. See *infra* Part III.

50. See *Stromberg*, *supra* note 39, at 42 (noting that Taylor believed that “ultimate sovereignty resides in the people” of the states, and that state interposition allowed them a means by which to assert that right).

the ballot⁵¹ or through the constitutional amendment process. Taylor's faith in elections as the appropriate mechanism for resolving constitutional conflicts echoes his belief that state interposition was essentially majoritarian in nature.

II. INTERPOSITION AND EXECUTIVE POWER

As noted above, Taylor expressed particular concern over aggrandizement of power in the executive.⁵² More than any other institution, Taylor believed that the Framers erred by instilling the President with authority too great for one individual to wield: "The presidency, gilded with kingly powers, has been tossed into the constitution, against the publick [sic] sentiment, and gravely bound in didactick [sic] fetters, like those which in England and France have become political old junk."⁵³ 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. In Taylor's opinion, factious government led to unconstitutional government.⁵⁴

While Taylor expressed concern over many facets of executive power, nowhere 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.⁵⁵ 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.⁵⁶ According to Taylor, war motivated by factious interest would violate the principles upon which the Constitution was founded.⁵⁷ He seemed particularly concerned that war could be used to "wag the dog" even when the action was unpopular among the masses.⁵⁸ War would always be profitable

51. 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. *AN INQUIRY*, *supra* note 22, at 174–75.

52. *See supra* notes 11–12 and accompanying text.

53. *AN INQUIRY*, *supra* note 22, at 174–75.

54. *See MUDGE*, *supra* note 23, at 105; *see also AN INQUIRY*, *supra* note 22, at 560–62.

55. *See AN INQUIRY*, *supra* note 22, at 172–73.

56. *Id.* at 193–94.

57. *See MUDGE*, *supra* note 23, at 110 (explaining that Taylor argued that "the war policy is defective in that the decision to wage a war is 'unsubjected to public opinion.' By his monopoly of military patronage and power of secret negotiation the president may resort to war to extend his personal power").

58. *Id.* at 109–10.

among certain elites and loyal citizens who tend, at least in the short run, to rally around the administration. Thus, executive war powers, “unsubjected to public opinion,” could be used to advance presidential ambitions and prop up vulnerable office holders.⁵⁹

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.”⁶⁰ In his opinion, states could expose how executive policy harmed the liberties of the people and provide the leadership and resistance necessary for the people 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 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.⁶¹ The President’s position in the party enabled the administration to overcome congressional resistance to policies that reduce civil libertarian protections.⁶² True to Taylor’s speculation, the American people rallied around the administration and its claims to special information regarding national security.⁶³ New innovative policies altered the pre-existing constitutional order in such a way as to centralize surveillance and detention authority.⁶⁴

Yet, neither the courts nor the legislature offered any real resistance to administration policies and, perhaps more notably, Americans hold few expectations that states should act as countervailing bodies.

59. *Id.*

60. John Taylor, *John Taylor to Thomas Ritchie*, THE ENQUIRER, Mar. 14, 1809, at 4.

61. See Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489, 517–20 (2006) (discussing the enhancement of presidential power under the administration of George W. Bush).

62. See Rick Klein, *Senate’s Passage of Detainee Bill Gives Bush a Win*, B. GLOBE, Sept. 29, 2006, at A1 (detailing recent congressional measures arguably representing a serious curtailment of civil rights, and the partisan backdrop that allowed for the success of the measures).

63. *Id.*

64. See Balkin & Levinson, *supra* note 61, at 520–25 (discussing the transformation of the United States into a “National Surveillance State”).

But such was not always the case. New England states acted in ways consistent with Taylorian interposition during the Embargo Crisis of 1808–09.⁶⁵ During the Jefferson Administration, several New England states responded to the national Embargo and coinciding Force Acts by resisting full enforcement of the embargo and publicly declaring 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.⁶⁶

III. THE EMBARGO AND INTERPOSITION

By 1807, war between England and France began to take a major toll on the commerce of the United States.⁶⁷ Squeezed between Napoleon's Continental System and England's Order in Council, U.S. merchant vessels were regularly boarded, their freight seized, and their sailors impressed into foreign service.⁶⁸ Such events came to a head when the British navy attacked the American merchant frigate *Chesapeake*.⁶⁹ Less than two weeks later, President Thomas Jefferson described the events, stating:

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. [sic] 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. [sic] a part of her crew: and that no circumstance might be wanting to make its char-

65. See *infra* Part III.

66. See *infra* Part III.

67. See John D. Forbes, *European Wars and Boston Trade, 1783–1815*, 11 *NEW ENG. Q.* 709, 722–23 (1938) (discussing the “disastrous” effect of the conflict on the American shipping industry).

68. See Thomas Jefferson, *Special Message on Commercial Depredations*, in 10 *THE WORKS OF THOMAS JEFFERSON* 530–31 (Paul L. Ford ed., 1905) (discussing the “great and increasing dangers” to American vessels, seamen, and merchandise as a result of the European conflict).

69. See LOUIS MARTIN SEARS, *JEFFERSON AND THE EMBARGO* 28 (1966) (“Any lingering dreams of overtures to Great Britain were rudely shattered by the *Chesapeake* outrage.”).

acter, the commander was apprised that the seamen thus forcibly . . . were native citizens of the US. [sic]⁷⁰

Public outcry demanded action and the action demanded was war.⁷¹ Jefferson steered a course intended to keep the United States out of war but, in so doing, he exercised unprecedented powers as the commander in chief, notably using the military for domestic law enforcement.

Jefferson realized that direct confrontation with either France or England would lead to a U.S. defeat.⁷² The American military 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.⁷³ Jefferson believed economic embargo would be a new form of warfare that could swiftly demoralize the English and alter their willful antagonizing of American merchant ships.⁷⁴ However, a successful embargo would mean eliminating all forms of international trade, which, in turn, would cause significant financial harm to the U.S. as well, with disproportionate harm to the merchant class of the northeast. 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.⁷⁵

Within approximately four months of the embargo, Congress passed three enforcement laws at Jefferson's request.⁷⁶ In each case, the measures were passed with extraordinary rapidity due to "the operation of the Democratic-Republican machine,"⁷⁷ even to the point where the Senate suspended its requirement to read a bill three times

70. Thomas Jefferson, Chesapeake Proclamation, in 10 THE WORKS OF THOMAS JEFFERSON, *supra* note 68, at 441–44.

71. See SEARS, *supra* note 69, at 29 (explaining how a "war spirit" spread through the country after the attack).

72. See, e.g., Lawrence S. Kaplan, *Jefferson, the Napoleonic Wars, and the Balance of Power*, 14 WM. & MARY Q. 196, 197 (1957) (noting that Jefferson "indicated through his embargo program that he understood the risks a small power would run in entangling itself in European wars").

73. See SEARS, *supra* note 69, at 3, 55–60 (noting Jefferson's view that a fight on the seas with England or a land fight with France were "quixotic" courses, and discussing Jefferson's reasoning in deciding to recommend to Congress the imposition of an embargo). In letters to Barnabas Bidwell, John Page, and William Duane, Jefferson noted that the United States needed time to prepare for war, and that efforts that would prolong the start of war would work to the benefit of the United States. 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 68, at 106–07, 119, 120.

74. Kaplan, *supra* note 72, at 201.

75. LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE 101–02 (1963).

76. *Id.* at 96–103.

77. SEARS, *supra* note 69, at 60.

on three separate days to pass the first embargo bill in a matter of hours.⁷⁸ Numerous (Federalist) legislators complained about the lack of information coming from the administration, claiming that this hampered congressional deliberations.⁷⁹ Rep. Barent Gardenier (NY) claimed, “Darkness and mystery overshadow the House and this 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.”⁸⁰ 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 of the Constitution should presume that a power would be exercised which should exceed any exercised by the most despotic Governments in the world.”⁸¹ Each Embargo Act contained provisions that arguably pushed the constitutional envelope, particularly as it pertained to executive authority, but it was the fourth Act that ran so far afield of the Constitution as to push New England states to interposition.⁸²

The fourth Embargo Act, authored by Jefferson and Secretary of the Treasury Albert Gallatin,⁸³ 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 United States, 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.⁸⁴

Jefferson’s belief that the national government’s commercial regulatory power included the power to prohibit commerce was far from established. As Leonard Levy noted, “the power to regulate commerce had never been considered as an authority to prohibit it altogether.”⁸⁵ The provision had the dual effect of crippling commerce along the Canadian border and consolidating executive control over

78. LEVY, *supra* note 75, at 96.

79. *Id.* at 98–99.

80. 18 ANNALS OF CONG. 1656 (1808).

81. *Id.* at 2076.

82. LEVY, *supra* note 75, at 101–02.

83. All four embargo enforcement acts originated with the administration and were passed by Congress with few substantive changes. *Id.* at 96–103.

84. Act of April 25, 1808, ch. 66, § 6, 2 Stat. 499, 500.

85. LEVY, *supra* note 75, at 101.

commercial activity throughout the northeast.⁸⁶ In response, New Englanders asserted a right to engage in commercial activity and deemed the blanket prohibition unconstitutional.⁸⁷ Commercial merchants in the northeast chafed, in particular, at the provision that required merchant ships to receive “special permission” from Jefferson, which consolidated power in the executive to a degree that, Federalists argued, violated the allocation of powers within the constitutional system.⁸⁸

The enforcement mechanism in the fourth Embargo Act also raised serious constitutional concerns. Section seven declared

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 in the transportation of merchandise . . . contrary to the provisions of this act⁸⁹

For the first time, the United States armed forces would be used for the purposes of domestic law enforcement against its own citizens.⁹⁰ In essence, Jefferson turned his commander-in-chief powers inward in a way unanticipated in the absence of insurrection.⁹¹ Yet, the matter was never seriously discussed in Congress, and Jefferson never explained his rationale for requesting the power.⁹²

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

86. See SEARS, *supra* note 69, at 145 (“The embargo shook to its foundations the entire economic structure of New England.”).

87. For example, the Boston Gazette published a vigorous critique that labeled Jefferson administration policies as “oppressive” and “originate[d] in imperfect conceptions of the interests of the whole.” B. GAZETTE, Jan. 27, 1809, at 1.

88. See SEARS, *supra* note 69, at 175 (chronicling public outcry at the new law).

89. Act of April 25, 1808, ch. 66, § 6, 2 Stat. 499, 501.

90. See LEVY, *supra* note 75, at 109 (noting that “it was a new departure in American history to send the navy into action, on a daily basis, not against a foreign enemy, but against American citizens”).

91. *Id.* at 102 (stating that the fourth Embargo Act “carried the Administration to the precipice of unlimited and arbitrary power as measured by any American standard then known”).

92. *Id.* at 101–02 (noting that the “special constitutional problems,” raised by the fourth Embargo Act “were not discussed either by the President or Congress”).

as it eliminated a need for either probable cause or a warrant.⁹³ However, public objections to the embargo never cited the Fourth Amendment even as they complained about the tyrannical nature of the provision.⁹⁴ Rather, complaints centered on how the provision aggrandized power in the executive and how it trampled upon the commercial liberties of the American people.⁹⁵ A northern reading of the Constitution made commercialism central to constitutional protection and, as a consequence, Jeffersonian policies violated the Constitution.⁹⁶ Such an understanding of the Constitution could not stand, and northeastern lawmakers soon threatened action to protect against further intrusion.⁹⁷ However, Federalists in the House and Senate did not enjoy sufficient numbers to counter Jefferson's authority.⁹⁸ This meant that resistance needed to come from the affected states.

Consistent with Taylor's theory of interposition, several New England states declared their disagreement over the constitutionality of the Embargo and subsequent Force Acts.⁹⁹ 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*."¹⁰⁰ 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."¹⁰¹

93. *Id.* at 102–05.

94. 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, 714 (1999).

95. LEVY, *supra* note 75, at 105–06; see also *supra* note 88 and accompanying text.

96. 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 won many devotees in New England during 1807–1808. See SEARS, *supra* note 69, at 160.

97. For example, Massachusetts instructed its delegates to Congress to repeal the embargo laws because "their effects are becoming daily and palpably more injurious." 1 AMERICAN STATE PAPERS, 728 (1808).

98. CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 263 (3d ed. 1994).

99. SEARS, *supra* note 69, at 143–49.

100. David H. Fischer, *The Myth of the Essex Junto*, 21 WM. & MARY Q. 191, 232 (1964).

101. See SEARS, *supra* note 69, at 185 n. 116 (quoting the Report of a Committee of the House of Representatives Respecting certain Military Orders issued by His Honor Levi Lincoln, Lieutenant Governor, and Commander in Chief of the Commonwealth of Massachusetts with the Documents referred to in the same).

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

the duty of the legislative and executive authorities 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 purport to be laws of the United States. Be advised to seek none but constitutional relief.¹⁰²

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.”¹⁰³ 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 already enforcing the embargo.¹⁰⁴

The direct effects of the Massachusetts and Connecticut resolutions are unclear but, in states throughout the northeast, election results indicate that voters from New York to Maine approved of the continuing resistance effort. Federalists picked up twenty-four seats in the United States House of Representatives, almost all of which came from states in the northeastern part of the country.¹⁰⁵

The combination of state opposition and continued popular resistance to the embargo proved fatal to the policy. With the unpopularity of the embargo manifesting in declarations of disagreement and adverse election results, Jeffersonian Republicans in the House and Senate eagerly supported a less abrasive alternative.¹⁰⁶ Jefferson was equally humbled. In February of 1809, Congress substituted non-intercourse for embargo.¹⁰⁷ Non-intercourse was so innocuous that it posed no obstacle to foreign trade and international commerce

102. *Id.* at 185–86 (quoting an address of the General Assembly to the People of Connecticut in 1809).

103. *Id.* at 186.

104. *Id.* The special resolution asserted the Assembly’s approval of the Governor’s refusal to allow the aid of military power to enforce the embargo. *Id.*

105. See CONGRESSIONAL QUARTERLY, *supra* note 98, at 293.

106. See Thomas Jefferson, Letter to Thomas Mann Randolph, 11 THE WORKS OF THOMAS JEFFERSON, *supra* note 68, at 96 (describing a sudden “revolution of opinion” in the House, causing members to vote for removing the embargo).

107. SEARS, *supra* note 69, at 190.

quickly resumed to its pre-embargo levels.¹⁰⁸ The anti-embargo response that began at the state level and had evolved into national policy “impos[ed] upon Jefferson the deepest humiliation of his career.”¹⁰⁹

As a matter of policy, the embargo’s end was a clear victory for the Federalists.¹¹⁰ 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 received authoritative construction. In fact, the Supreme Court’s Commerce Clause jurisprudence years later concretized Jefferson’s take on federal dominion over foreign and interstate commerce.¹¹¹ Of course, this represents 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.

IV. NINETEENTH-CENTURY LESSONS FOR THE TWENTY-FIRST CENTURY

Obvious parallels exist between events of the early-nineteenth century and today. Jefferson sought and received significant new powers in the name of fighting a new war.¹¹² Rather than thoughtful deliberation on the new powers and their relation to existing allocation of powers, party spirit motivated Congress to approve unprecedented and constitutionally questionable powers to the executive branch.¹¹³ Jefferson also turned the war powers inward, not to quell insurrection or rebellion, but to enforce the terms of the new war.¹¹⁴ 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.¹¹⁵

108. *Id.* at 194.

109. *Id.* at 190.

110. *See id.* at 195.

111. *See* *Gibbons v. Ogden*, 22 U.S. 1, 196–97 (1824) (holding that Congress’s power to regulate “commerce with foreign nations, and among the several States” is plenary).

112. *See* *AN INQUIRY*, *supra* note 22, at 189 (discussing the dangers of excessive executive power).

113. *See supra* notes 75–78 and accompanying text.

114. *See supra* notes 89–91 and accompanying text.

115. According to 1810 census data, the free population in the mid-Atlantic and north-eastern 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). Census Data for Year 1810,

Recently, the Bush Administration claimed (and received) significant new authority to fight the War on Terror.¹¹⁶ Congress's superficial debates turned more on party spirit than substantive constitutional discourse.¹¹⁷ The resulting policies have utilized executive power to combat the War on Terror in ways that directly trammel the liberties of U.S. citizens.¹¹⁸ These policies have been promulgated by an administration that came to power absent a national majority and bolstered by an arguably undemocratic Senate and malapportioned House.¹¹⁹ This is not to say that the American people have univocally expressed displeasure with administration policies at the polls.¹²⁰ 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.¹²¹ 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.¹²² The people alone could not be expected to see through executive deception. Taylor likely overstated the ineptitude

University of Virginia, Geospatial and Statistical Data Center, <http://fisher.lib.virginia.edu/collections/stats/histcensus/index.html> (last visited Nov. 19, 2007).

116. Balkin & Levinson, *supra* note 70, at 518; *see also, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States").

117. *See, e.g.*, Klein, *supra* note 62 (noting that Senate debates centered more on partisan politics than the constitutionality or advisability of the Act).

118. *See generally* AMERICAN CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 (2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>; AMERICAN CIVIL LIBERTIES UNION, THE SURVEILLANCE-INDUSTRIAL COMPLEX (2004), available at http://www.aclu.org/FilesPDFs/surveillance_report.pdf; Report, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since Sept. 11*, 17 HUMAN RIGHTS WATCH 1 (2005).

119. LEVINSON, *supra* note 3, at 50-52.

120. The Republican Party carried both the 2002 congressional election and the 2004 presidential and congressional elections. Gary C. Jacobson, *Polarized Politics and the 2004 Congressional and Presidential Elections*, 120 POL. SCI. Q. 199, 200 (2005).

121. *See* NEW VIEWS, *supra* note 27, at 187 ("To talk . . . of an American people, as sufficiently able and willing to act in concert, so as to furnish a security against the effects of a supreme concentrated power . . . to my mind conveys the idea of great ignorance or of great ambition."); *see also* Hill, *supra* note 25, at 226 (noting Taylor's lack of faith in the people's ability to effectively mobilize).

122. MUDGE, *supra* note 23, at 103-04.

of the people.¹²³ However, dissent undoubtedly gains traction when powerful political actors and institutions take resonant positions. Or conversely, dissent concretizes when respected officials articulate alternative positions. The Bush Administration's interpretive authority¹²⁴ is notable given the absence of executive interpretive dominion in early-nineteenth-century politics.

What this suggests 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 federal government has moved against liberties state constitutions explicitly protect.¹²⁵ 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 determination."¹²⁶ Every state constitution (and that of Washington, D.C.) 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.¹²⁷ Six states contain absolute prohibitions on suspension of the Great Writ.¹²⁸ Policies of the Bush Administration directly challenge the rights and privileges articulated in

123. The people were a vigorous source of constitutional discourse in early America. *See generally* LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

124. *See generally* Charlie Savage, *Bush challenges hundreds of laws: President cites powers of his office*, B. *GLOBE*, April 30, 2006, available at http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/; Bob Egelko, *How Bush Sidesteps Intent of Congress*, S. F. *CHRON.*, May 7, 2006, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/05/07/MNGELIN29G1.DTL>.

125. *See, e.g.*, Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 *BROOK. L. REV.* 1277, 1282 (2004) (noting that although there has been some state and local opposition to federal policies, "[i]n the overwhelming majority of cases . . . we can expect [state] cooperation to be forthcoming).

126. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635 (2006).

127. State constitutions can be found at <http://www.findlaw.com/11stategov/indexconst.html> and <http://www.constitution.org/cons/usstcons.htm>. (last visited Nov. 19, 2007).

128. 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," LA. CONST. art. I, § 21; N.C. CONST. art. I, § 21, and Missouri, Montana, and Texas provide the writ "shall never be suspended." MO. CONST. art. I, § 12; MONT. CONST. art. II, § 19; TEX. CONST. art. I, § 12. Oklahoma's Constitution states that the writ "shall never be suspended by the authorities of this state." OKLA. CONST. art. II, § 10.

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. However, when there is (1) a change to the constitutional order to the detriment of civil liberties, (2) that runs counter to majoritarian preferences, interposition could ensure vigorous debate and a legitimate constitutional order. Interposition would be quite limited in that it could only be used legitimately in rare instances. However, in those cases, its value is inestimable.

Interposition is certainly relevant to contemporary politics given the recent constitutional innovations such as warrantless domestic eavesdropping, indefinite detention of alleged terrorists, and the suspension of habeas corpus for those deemed unlawful enemy combatants that have diminished 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.¹²⁹ An overwhelming majority (sixty-three percent) favored following international agreements when it came to the treatment of “prisoners of war.”¹³⁰ A USA Today/Gallup 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.”¹³¹ Polling numbers are not definitive, 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.¹³²

129. Forty-nine percent preferred trial in an “open criminal court,” while forty-six percent preferred use of a “closed military court.” PollingReport.com, War on Terror, <http://www.pollingreport.com/terror.htm> (last visited Nov. 19, 2007).

130. *Id.*

131. *Id.*

132. The lack of constitutional response is interesting given that in areas other than the War on Terror, states have moved aggressively to either correct Bush administration policy (e.g., stem cell research), see Paul Elias, *Stem Cell Spotlight Falls on California*, K. C. STAR, NOV.

Beyond serving as a source for resistance, interposition shares two benefits with modern theories of departmentalism.¹³³ First, a thin version of interposition spurs constitutional deliberation. Conflict over constitutional meaning will require the competing institutions to vie for the hearts and minds of the polity. Campaigns to win popular support will require public discourse. Likely, the discourse will not amount to the Webster-Hayne debate,¹³⁴ but forcing officeholders 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 too will future parties, institutions, and governments win support for their constitutional vision. Interposition is not a guarantee of a strong civil-libertarian regime, but it holds the promise of greater democratic deliberation.

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.¹³⁵ 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, party ideology at the state level diverges widely from its parent national ideology.¹³⁶ 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.

3, 2004, at C1, or force the administration to act where it has chosen not to act (e.g., regulation of greenhouse admissions). *Mass. v. Envtl. Prot. Agency*, No. 05-1120, 127 S. Ct. 1438, slip. op. at 1–2 (2007).

133. For background on departmentalism, see generally Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994), and Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994).

134. THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION: SELECTED DOCUMENTS (Herman Belz ed., 2000).

135. Paulsen, *supra* note 133, at 225.

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

V. CONCLUSION

This Essay began by noting that interposition is worth considering because of the unlikelihood of sweeping constitutional reform. Of course, the probabilities of rehabilitating interposition are also quite low. However, interposition illustrates that vigorous practices existed in early American constitutionalism that speak to contemporary problems. Interposition was theorized to compensate for some of the same constitutional deficiencies we debate in contemporary America.¹³⁷ Modern scholars and activists who wish to find ways to resist aspects of the twenty-first-century 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.¹³⁸ Yet, this development was contingent upon a system bent on maintaining a constitutional evil. While many of the institutions that accommodated slavery still exist,¹³⁹ the twenty-first-century Constitution does not face the same pressures that led to nullification.¹⁴⁰ A properly tempered 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*,¹⁴¹ appears to be an effort at state interposition.¹⁴² The Southern Manifesto might appear to be exactly the reason why interposition is undesirable. However, as Michael Klarman notes, the response of southern states to *Brown* did more to marshal public opinion for desegregation than *Brown* did on its own. Eventually, when northern whites faced a choice between *Brown* and the interposing southern States and the Southern Manifesto, they chose *Brown*.¹⁴³ We may desire a system wherein progressive victories are realized overnight. However, the American constitutional order is not designed to facilitate such change. As such, we must consider

137. See generally AN INQUIRY, *supra* note 22.

138. See generally Calhoun, *supra* note 14.

139. See generally GRABER, *supra* note 2.

140. See generally ALFRED H. KELLY ET AL., 1 THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 201–02 (7th ed. 1991) for an examination of those pressures.

141. 347 U.S. 483 (1954).

142. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 320 (2004).

143. See *id.* at 436–37 (explaining how, after the riots in Birmingham in the early 1960s, Americans believed civil rights was America's most pressing issue, and most Americans supported the civil rights movement).

whether we might be better served by using the institutions we have to promote democratic dialogue and the protection of civil liberties.

Resisting undesirable changes to the American constitutional order requires creative solutions and early American constitutionalism is a wellspring. Careful scrutiny of these constitutional traditions reveals 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 has utility to contemporary progressives interested in combating the unitary executive. State-informed constitutionalism may not be anathema to progressive constitutionalism as often thought.

Whatever the merits of interposition, we should remember that current problems are likely not wholly new and that past generations fought similar constitutional battles. Their innovations are useful resources for contemporary constitutional problems.