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## **Balkinization Symposium on Christian G. Fritz, Monitoring American Federalism: The History of State Legislative Resistance**

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Monday, June 26, 2023

## **Interposition as a Tool Used to Monitor American Federalism**

Guest Blogger

For the Balkinization symposium on Christian G. Fritz, [Monitoring American Federalism: The History of State Legislative Resistance](#) (Cambridge University Press, 2023).

Christian G. Fritz

Jack Balkin deserves huge thanks for organizing this symposium on *Monitoring American Federalism: The History of State Legislative Resistance*. I am grateful for the engagement of all of the commentators. Their close reading of the book and their thoughtful observations and questions have given me, and the readers of this symposium, much to think about as we continue to wrestle with the dynamic nature of American federalism.

Three broad issues emerge from the comments. First, is the question of how to define interposition? Second, is the “slippery slope” question: does the concept of interposition inevitably invite or lead to nullification and secession? And third, does interposition have relevance today? My response below is primarily directed towards those three issues.

### **How to Define Interposition within the Broader Scope of State Resistance**

Virtually all of the commentators have raised questions about the definition and terminology surrounding the term “interposition” and struggles over its meaning. My book defines interposition as “*a formal state protest against actions of the national government designed to focus public attention and generate interstate political pressure in an effort to reverse the national government’s alleged constitutional overreach.*” (5) These protests were a subset of “instructing and requesting” resolutions of state legislatures and form part of America’s vibrant “constitutional politics,” to use Mark Graber’s phrase.

My book looks first at the origins of the concept of interposition, early uses of interposition, and expands to include other forms of state resistance to federal power that included northern states’ personal liberty laws in the 1850s and southern states’ actions in the 1950s to prevent integration, as well as more modern efforts to push back against federal authority. The book analyses the writings of James Madison as they pertain to interposition and theories of federalism, but the book is not a defense of either Madison or state interposition. Moreover, the book does not rely on abstract thinking about federal versus state relations, but analyses the substantive claims represented by the economic and political interests of states, including resistance to federal taxation, debt, militia authority, war powers and infrastructure investments.

That said, much of the confusion surrounding the meaning of interposition stems from the fact that James Madison advanced the idea of *two very different* types of interposition, each

resting on a different political and constitutional basis and each calling for distinctly different political action.

During the debates over the ratification of the Constitution, Madison—along with Alexander Hamilton in *The Federalist*—laid out all of the elements of what the book refers to as sounding the alarm interposition. That form of interposition was a constitutional tool employed by state legislatures intended to “sound the alarm” about perceived overreaching by the national government. Sounding the alarm interposition was designed to work through state legislative and gubernatorial political pressure in garnering interstate support in efforts to reverse the alleged overreach.

In *The Federalist*, Madison and Hamilton advanced the argument for interposition as a **rhetorical device** to help secure the Constitution’s ratification. Soon, however, this idea of interposition took on a life of its own, perhaps not unexpectedly as state and federal actors began working out the meaning of the newly-birtherd concept of divided sovereignty and overlapping jurisdictions.

Neither Madison or Hamilton used the term interposition in their *Federalist* essays, nor did Virginia’s legislature use that specific word when it invoked sounding the alarm interposition in 1790, and neither did the state legislatures that passed interposition resolutions in the aftermath of the *Chisholm* case in 1793. Thus, without being named as such, the genesis of the idea of sounding the alarm interposition surfaced in *The Federalist* and was practiced by state governors and legislatures after the Constitution’s ratification.

When interposition was first invoked in 1790 and then later, governors and state legislators (as well as commentators on their actions) routinely described their efforts as “sounding the alarm” about constitutional overreaching in the course of initiating interstate communication. This, as well as explicit references to *The Federalist* establishes the “causal link” [Grace Mallon](#) seeks between the early and later practice of interposition and *Publius*’s essays. (59, 82, 109, 113, 118, 123, 150, 174, 278)

However, in 1798 Madison introduced a *second* version of interposition while drafting resolutions for Virginia’s legislature responding to the draconian Alien and Sedition Acts. Those Acts contained provisions that Hamilton considered “highly exceptionable.” (92) Madison invoked the tool of sounding the alarm type of interposition in Virginia’s Seventh Resolution. But, in Virginia’s Third Resolution he described a different constitutional principle that theoretically gave the collective “people of the states” acting in “their highest sovereign capacity” the power to “interpose” in the final resort if the national government overreached its constitutional powers in an egregious manner. My argument is not, as [David Schwartz](#) asserts, that Madison used the word interpose “incorrectly.” Rather, Madison was describing an interposition entirely different from sounding the alarm.

This second type of interposition that Madison theorized was an **extra-constitutional action** (what he called “ultra-constitutional.”) (218) This action was not a step that a single state legislature or the people of any single state could take. Madison described the principle in the Virginia legislature’s Third Resolution to be “theoretically true.” (121) This

Third Resolution version of interposition was a theoretical matter, independent of the sounding the alarm interposition described in *The Federalist* and invoked by the Virginia legislature in its Seventh Resolution in 1798, as he explained in his Report of 1800.

[Sandy Levinson](#) is surely correct that James Madison left much to be desired as a constitutional theorist, throwing out ideas that he did not fully explain or develop. If the prospect for confusion and purposeful misuse was not already great, Madison used the word “interposition” in his Report of 1800 when identifying the theoretical right of the people of the states “to interpose” in Virginia’s Third Resolution. But in the same report, Madison explicitly defended sounding the alarm interposition without using the term “interposition.” My surmise is that Madison was indulging in his passion for abstractly theorizing, but he considered the Alien and Sedition Acts such a dire threat to the newly created constitutional system that it warranted bolder political language to counter a federal government willing to destroy freedom of speech and the press.

Indeed, Madison’s Virginia Resolutions and his Report introduced enough loose terminology to open the door for those who eventually sought to appropriate the term interposition to justify the doctrine of nullification. *Madison’s language in the Third Virginia Resolution “effectively narrowed the distance between sounding the alarm interposition and nullification.”* (7) Moreover, we know that words once placed in the public arena inevitably take on a life of their own beyond the control of those who initially articulate them.

By the late 1820s and 1830s, would-be nullifiers had transformed sounding the alarm interposition by converting Madison’s theoretical statement of a collective right of parties to the federal constitutional compact into an option for every individual state to veto or nullify acts of the national government. Even as Madison and others tried to distinguish sounding the alarm interposition from nullification, increasingly the term interposition was interchangeably used with nullification. Such overlapping terminology persisted even as sounding the alarm interposition continued to be practiced, most notably by both Northern and Southern legislatures before and during the Civil War.

[Alison LaCroix](#) and [Edward Purcell](#) raised two additional questions about the definition of interposition. [LaCroix](#) asks if the passage of the Eleventh Amendment is best described as “a moment of interposition.” She accurately captures the complex history that surrounded the struggle over sovereign immunity in the 1790s, including competing views of jurisdiction and the nature of sovereignty. Notwithstanding that history and varying reactions to the *Chisholm* decision, state legislators did perceive the decision to be an intrusion on the sovereignty retained by states under the Constitution, so passage of the amendment included an initial interposition response.

In a similar way, the Virginia legislators in 1790 who sounded the alarm about the assumption of state debts resented that fact that their state (having made considerable payments on its debt) would bear a greater economic burden than other states who had not taken steps to fulfill their obligations. State legislatures that opposed rechartering the First Bank of the United States hoped to avoid the competition that a national bank posed to state banks. In their resistance, as with resistance to the *Chisholm* decision, state

legislators *also* identified a ground for opposition that squarely rested on the idea that the federal government had in some manner overreached its legitimate constitutional authority. In that sense, each of these episodes warrant being considered examples of sounding the alarm interposition.

[Purcell](#) rightly points out that if the term “interposition” is employed to embrace the range of state resistance to federal authority and policies from the 18th century to the present, it “loses any clear and specific meaning.” If, on the other hand, one focuses on the implementation of sounding the alarm interposition after the ratification of the Constitution to the 1870s, there is an identifiable tradition of employing the constitutional tool that Madison and Hamilton described in *The Federalist*.

As Purcell suggests, how to employ the term “interposition” outside of that sounding the alarm context and beyond the 1870s is challenging. Indeed, when the Seventeenth Amendment in 1913 created the direct election of Senators, state legislatures no longer could rely on sending instructions to oppose constitutional overreaching by the federal government. Yet, interposition persisted as an ongoing political theory establishing the validity of states advocating limits on national power and the idea that a monitoring function should be exercised by state officials or endorsed by decisions of the Supreme Court.

### **Was There a “Slippery Slope” Implied by Interposition?**

Even as Madison and Hamilton described what became the constitutional tool of sounding the alarm interposition, they occasionally used language that alluded to potential state resistance that went beyond the pacific limits of that tool and were arguably grounded in the well-known and widely accepted right of revolution. Armed resistance or other forceful opposition to the national government clearly went beyond the sounding the alarm function of interposition. In noting such language, I indicate that the concept of interposition was “potentially dangerous from the beginning.” (31)

But if the idea of political action beyond peaceful protests and declarations was a possibility recognizable from the start, what is striking about the history of sounding the alarm interposition is how consistently it was practiced as a constitutional tool for nearly a century after its articulation. State legislative actions drifting over the line beyond the sounding the alarm function were exceptions to the rule. Examples of nineteenth-century slippery slopes where the line was crossed included: Pennsylvania’s opposition to the *Olmstead* case (1803), the Hartford Convention’s Report (1814), and Wisconsin’s challenge to the Fugitive Slave Act of 1850. The book indicates how vigorously each of these uncommon occurrences was met with popular denunciation and opposition from states and the federal government. Thus, the numerous instances of state resistance through interposition (including the relatively few examples that went beyond sounding the alarm) were all part of the inevitable testing of the limits of popular sovereignty and constitutional rights.

I agree with both Levinson and Schwartz that Madison was in no position to claim a right to control the meaning found in his Third Resolution. He bears responsibility for using language that failed to clearly explain in what ways the sovereign underlying the Federal Constitution might act in theory and how that *hypothetical right* was permissible within America's constitutional framework.

Madison's Virginia Resolutions and his explanatory Report may well have, in [Levinson's words](#), shared "intellectual space" with Jefferson's draft of the Kentucky Resolutions. Nonetheless, there was a crucial difference between Madison's notion of interposition (either the sounding the alarm version or the theoretical right of the collective people) and the germ of the idea of nullification (or the individual state veto) that some have detected in the Kentucky Resolutions.

The greatest impetus toward nullification in Jefferson's draft of the Kentucky Resolutions did not come from his use of the word "nullification" or his repeated description of the Alien and Sedition Acts as utterly "void and of no force." *Rather, the entering wedge of the argument for nullification (and ultimately secession) rested on Jefferson's description of the Constitution and those of other sovereign states' theorists as a compact in terms that were crucially different from how Madison understood that compact.*

Jefferson's understanding of the constitutional compact identified "co-states" as the parties to the Constitution, with each state "an integral party." Jefferson's description of a compact between independent sovereign states *invited* action by an individual state. Madison's version of the Constitution as a compact, on the other hand, *precluded* action by an individual state. For Madison, the parties to the constitutional compact were the collective We the People of all of the states "in their highest sovereign capacity"—clearly not individual states or even the people of individual states.

For Madison, the Constitution's foundation precluded the theory of nullification. Although the Constitution rested on the same sovereign source as state constitutions, there was one crucial difference. Since the Constitution was "a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes" (217-218), it could not be altered or annulled by individual states—as the people of a given state were free to do with respect to their own state constitution. Ratification entailed the sovereign people of each state acting *in concert* with the sovereign people of other ratifying states. The same concerted action of its creation governed its alteration. Changing the Constitution required collective action by the parties—the people in the states, and not in a single state.

Interposition did not rest on the sovereignty of a state or the sovereignty of the people of a state. Rather, it emerged from a constitutional arrangement that distributed power between two levels of government and therefore invited an oversight of the federal-state divided sovereignty the Constitution established. In contrast, nullification and secession—to claim constitutional legitimacy—relied on the existence of a compact composed of *independent* sovereign states—something that Madison rejected and argued had never formed the sovereign foundation of the Constitution.



Madison's concept of what he called "a middle ground" (197) of the founding of the Constitution rejected the tendency of his contemporaries to describe the establishment of the Constitution in binary terms: either the product of one national people or the creation of sovereign states. Despite the fact that Americans at the time (and later observers) were captivated by the dual positions of nationalists versus sovereign states rights' theorists, careful scholars of American history have long recognized that the debates over the foundation of the Constitution have involved more than those two positions. [1]

Importantly, sounding the alarm interposition had always been deemed appropriate whenever a perception of overreaching by the federal government was noted. It had never rested on the establishment of egregious overreaching or as Madison phrased it in Virginia's Third Resolution, "a deliberate, palpable, and dangerous" action of the national government. Thus, Levinson's suggestion that there might always be a temptation to slide from interposition to nullification downplays the more routine exercises of interposition.

Madison understood the resolution of the tensions of federalism and the dynamics of striking a balance between the national and state levels of government to be a protracted and prolonged process of adjustment among many constitutional actors—and not simply the Supreme Court. He hoped that "jarring opinions between the national and State tribunals will be narrowed by successive decisions, sanctioned by the public concurrence" and eventually reduced to "a regular course of practice." (186)

### **Is There Contemporary Relevance for Interposition?**

The starting point for considering the core dilemma of American federalism is Madison's concept of the Constitution creating a "compound republic" which established a governmental structure that was "partly federal" and "partly national." (1,15) Despite the contested history of the phrase "states' rights," there was an uncontestable core of relevance to the idea in 1787 as well as today. If the Constitution did not create a completely consolidated national government (which ardent Federalists at the time of ratification vehemently denied), states' rights ultimately served as a check on unlimited national power that could extinguish state authority.

[Jessica Bulman-Pozen](#) insightfully explores the question I posed at the end of the book: how should we "think about and practice federalism today" in the light of the long and partisan history of interposition practiced by state legislatures. She points to the effects of relentless gerrymandering which have frequently rendered state legislatures far less representative of the majority of the citizens of their state and she identifies state actors other than state legislatures that might lay a more valid claim as the voice of the people: governors, attorneys general, judges and even the people themselves in states having the mechanism of the initiative.

The history of state legislatures serving as one of the sentinels of the balance of federalism reflects a broader vision of constitutional discourse in which multiple parties and groups—and not the Supreme Court alone—played a role in ensuring that the federal government stayed within its proper bounds. Article VI of the Constitution calls for all federal *and* state

officials and not merely state legislators, to support the Constitution “by oath or affirmation.” Throughout American history, many state legislators took that oath to mean not only obeying constitutional acts of the national government, but identifying and resisting unconstitutional acts of that government. The obligation and duty of political engagement and action clearly extended well beyond state legislators and included the other state actors identified by Bulman-Pozen and seems perfectly consistent with the history of interposition.

David Schwartz faults the book for not reframing American federalism. To my mind, that task belongs in the public arena. The job of a legal historian (and historians generally) is to take the past on its own terms and offer the best analysis of events without a presentist agenda or perspective. What my study of American federalism suggests is that there is no “solution” to the balance of federalism, there is only a constant and necessary dialogue about the line between national and state power.

There never was—nor will be—federal-state equipoise; each generation is left to struggle with establishing a suitable tension between the two levels of government. And as messy as this might be, it may be a positive thing that a bright line and a strict division has not been established. As Heather Gerken suggests, we need to reconceptualize federalism as a new “operating system” in which federal and state governments “govern shoulder-to-shoulder in a tight regulatory space.” (300) Arguably, that tension provides some freedom and “play in the joints” to facilitate accommodations that will inevitably shift over time as we continue to re-create our federalism.

[1] See for example, Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States Rights, and the Nullification Crisis* (1987), 11; Michael Les Benedict, “Abraham Lincoln and Federalism,” 10 *Journal of the Abraham Lincoln Association* (1988), 1 at 4-19; Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (1989), 134-135; H. Jefferson Powell, “The Principles of ’98: An Essay in Historical Retrieval,” 80 *Virginia Law Review* (1994), 689 at 717 (“For Madison, the Constitution was the creature of collective action by the states as a body”); Andrew C. Lenner, “John Taylor and the Origins of American Federalism,” 17 *Journal of the Early Republic* (1997), 399 at 422.

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