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# Interposition: A State-Based Constitutional Tool That Might Help Preserve American Democracy

Christian G. Fritz

***Interposition was not a claim that state sovereignty could or should displace national authority, but a claim that American federalism needed to preserve some balance between state and national authority.***

Most Americans have never heard of interposition. If they have heard of interposition, they may associate the term with South Carolina Senator John C. Calhoun and the Nullification Crisis in the 1830s in defense of southern states' rights and slavery—or with anti-school integration opponents of the U.S. Supreme Court decision *Brown v. Board of Education of Topeka* in 1954.

In the 1830s, Calhoun argued that individual states had the authority to nullify any federal laws that they believed were unconstitutional—a theory that paved the road to the Civil War. Similarly, in the 1950s and 1960s, white supremacists rejected *Brown's* mandate to integrate schools and sought to nullify the Supreme Court's ruling by invoking “interposition.”

Interposition's alleged complicity with nullifiers and segregationists placed “interposition” under a cloud. But that stigma overlooks the history of interposition as a legitimate constitutional tool that has been used by states throughout our history and which is designed to monitor the equilibrium of federalism established by the Constitution. Equally overlooked is the origin of interposition in *The Federalist Papers*.

As a constitutional tool, interposition was the formal protest by a state legislature that an action of the national government was unconstitutional. Thus, interposition was a political process involving three elements as described by James Madison and Alexander Hamilton in *The Federalist Papers*. First, state legislatures were well-placed to act as monitors for the people of the equilibrium of federalism since they represented all of the people of a state and were in frequent communication with the state's elected members of Congress. Second, state legislatures could identify and declare their perception of any encroachments by the national government on the authority of the state governments—or the rights of the people. Both Madison and Hamilton described this step as sounding the alarm. Third, they envisioned state legislatures initiating interstate efforts to bring widespread attention to the alleged enlargement of the national government's powers. Neither of them suggested that the “alarm” was a nullification of any acts taken by the national government.

Unlike judicial review, interposition did not have immediate constitutional effect, but was designed to work through political pressure in attempting to maintain an equilibrium between the national and state governments by enabling state legislatures to express and coordinate their discontent over federal laws and measures perceived as constitutional overreaching. Interposition was *not* a claim that state sovereignty could or should displace national authority, but a claim that American federalism needed to preserve some balance between state and national authority.

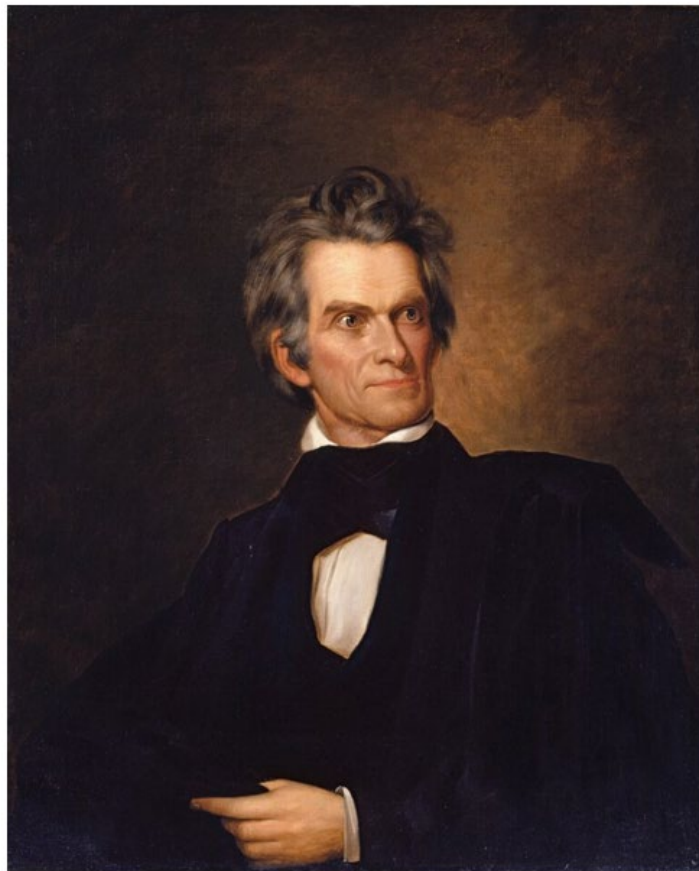


Figure 1: John C. Calhoun misconstrued James Madison's original thinking about interposition into a supposed right of state nullification of federal law. John C. Calhoun, ca. 1845, George Peter Alexander Healy, public domain, via [Wikimedia Commons](#).

Mainly written by Alexander Hamilton and James Madison (with a few by John Jay), the *Federalist* essays are the most famous arguments supporting the ratification of the proposed Constitution drafted by the constitutional convention in 1787. Although often praised for their contribution to political theory, the essays were first and foremost designed to blunt opposition to the proposed Constitution and to secure the Constitution's ratification by the states.

The main objection to the Constitution was that its distribution of powers undermined the authority of states and would inevitably lead to their extinction by a too powerful federal government. Sensitive to that charge, Hamilton and Madison sought to allay such fears by stressing how states could preserve their authority and check potential overreaching by the national government with a variety of political options, including the use of interposition.

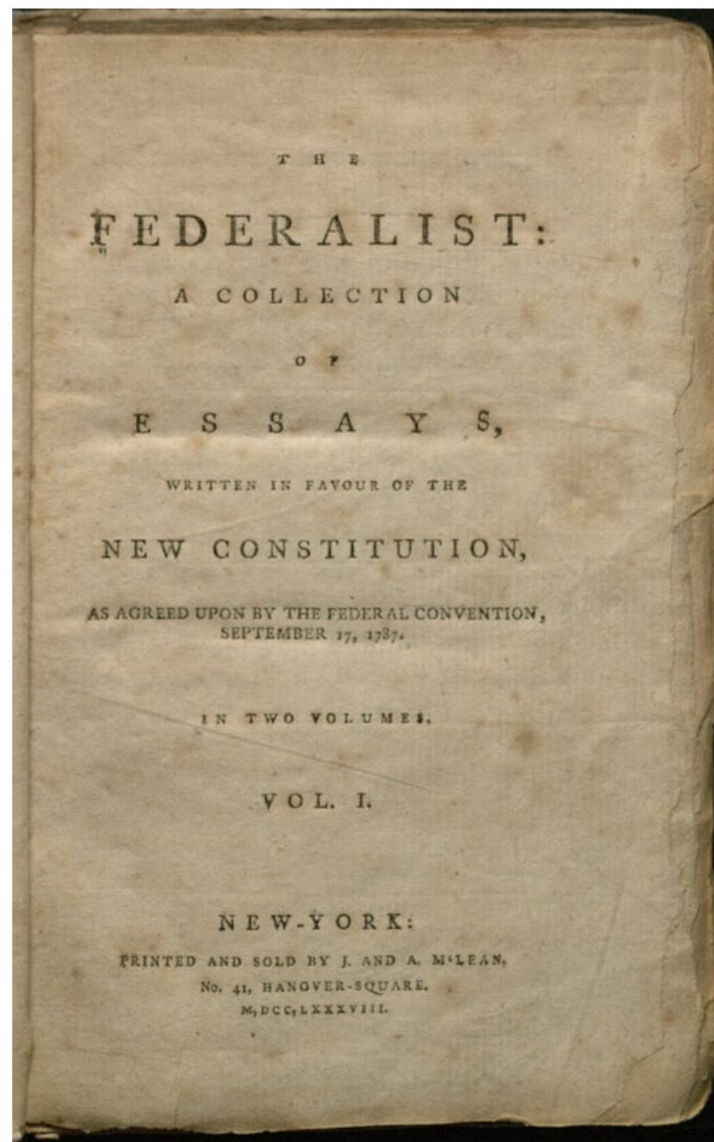


Figure 2: The title page of *The Federalist* essays urging the ratification of the Constitution. *Federalist* Cover, 1778, Yale Law Library, CC BY 2.0, via [Wikimedia Commons](#).

Hamilton and Madison believed that instead of giving the national government *too much* power, the proposed Constitution had not given it *enough* power. Madison was bitterly disappointed that the constitutional convention had not included a provision in the proposed Constitution giving Congress a veto over any proposed state legislation. During the ratification debates, Hamilton and Madison argued that the principal danger of governmental overreaching came from the states, who were likely to undermine the authority of a weak national government.

Nonetheless, Hamilton and Madison responded to Anti-Federalists who opposed the proposed Constitution by stressing the power retained by the states. In a series of *Federalist* essays, they described the powerful role that state legislatures would play as “sentinels” or “guardians” of the balance of authority between the two levels of government. If the national government unduly expanded its constitutional authority, state legislatures would, in their words, “sound the alarm.” Although never using the word “interposition,” what Hamilton and Madison described in their essays precisely foreshadowed the steps that became a common practice among state legislatures soon after the Constitution’s ratification.

Sounding the alarm (hereafter, interposition) was not simply a mechanism for individual states to take immediate political action, but a means of stimulating a nationwide conversation through interstate cooperation. When states joined together to focus their attention on the national government’s constitutional overreaching, the resulting political pressure had the potential of producing a correction or reversal of such overreaching. That pressure might induce the federal branches involved to reverse course and in the case of Supreme Court rulings deemed wrongheaded, to create support for constitutional amendments to reverse such rulings.



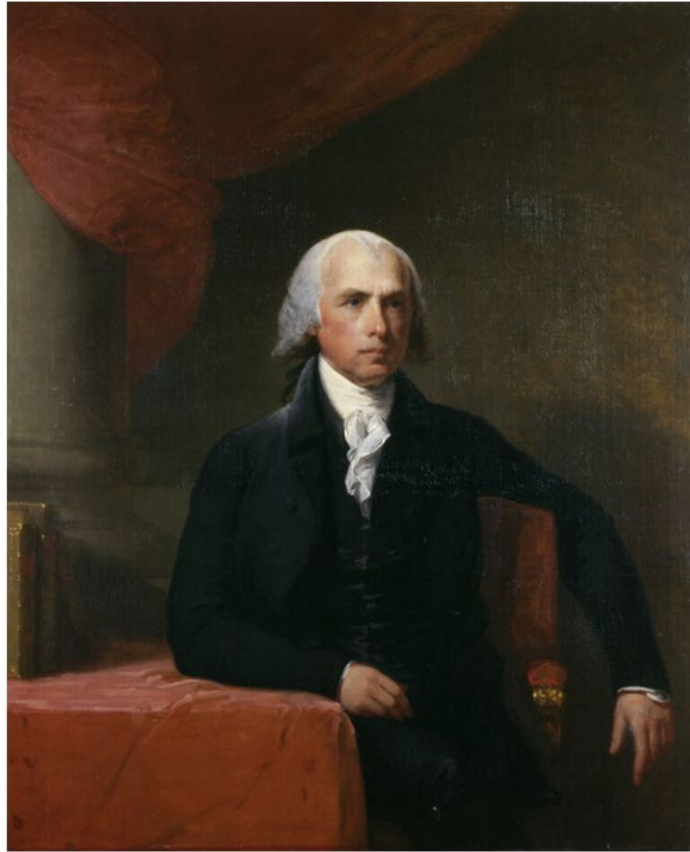


Figure 3: James Madison, the co-author of interposition as described in *The Federalist*. James Madison, ca. 1805-07, Gilbert Stuart, public domain via [Wikimedia Commons](#).

In describing interposition as a tool that state legislatures could use to maintain federalism, Hamilton and Madison made a rhetorical argument in the heat of the debate. At that time, neither Hamilton nor Madison wanted to see state legislatures act with greater vigor under the Constitution particularly since they lamented how much authority those legislatures had wielded under the Articles of Confederation.

Hamilton and Madison wrote what they did to persuade states to ratify the proposed Constitution and their words—as they soon discovered—took on a life of their own. With the success of ratification, Hamilton may well have wished to put the interposition arguments he had made in *The Federalist* behind him. But his description of interposition came back to haunt him—and far sooner than he imagined.

As President Washington’s first secretary of the treasury, Hamilton was the architect of an ambitious scheme for the nation’s economic development. The national sweep of Hamilton’s plans immediately aroused suspicions. One point of contention was his desire to assume the Revolutionary War debt of the states, in effect nationalizing that debt. The governor of North Carolina considered the congressional act assuming state debts an “extraordinary measure” that would diminish “the independence and internal sovereignty of the state.” David Stuart, Washington’s close friend, warned the President that Virginians viewed assumption as a seizure of power by “unwarrantable constructions of the Constitution.”

When Virginia's legislature joined North Carolina's governor in protest in 1790 about the assumption plan and questioned its constitutionality, Hamilton was furious. He vented to U.S. Supreme Court Justice John Jay: "This is the first symptom of a spirit which must either be killed or will kill the constitution of the United States." Hamilton ignored the fact that state legislators were behaving precisely as he and Madison had outlined in *The Federalist* whenever legislators perceived constitutional overreaching by the federal government. Indeed, just a few years later in 1793, the Supreme Court decided *Chisholm v. Georgia*, holding that individuals could sue states in federal court. That decision generated widespread interposition by state legislatures throughout the country and ultimately resulted in *Chisholm's* effective reversal with the passage of the Eleventh Amendment.

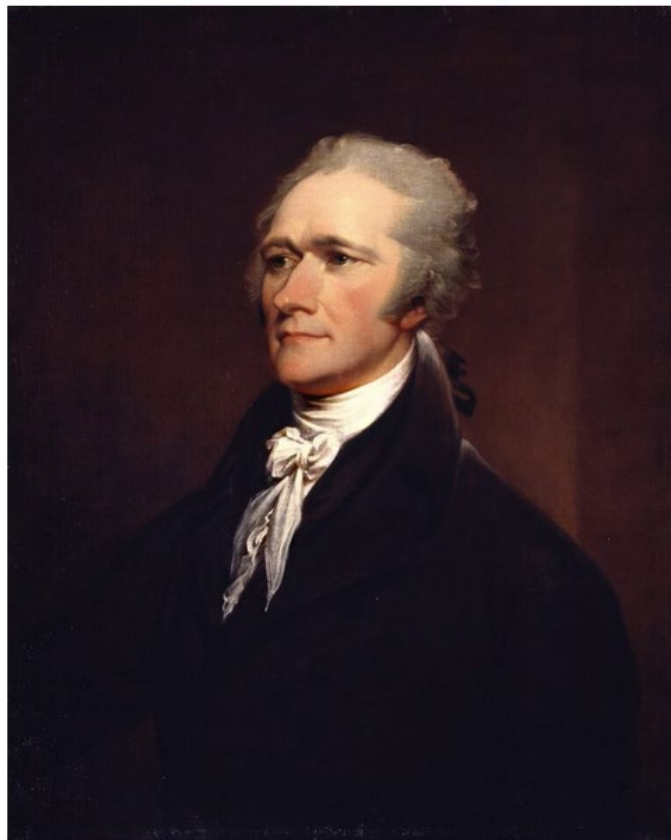


Figure 4: As Treasury Secretary, Hamilton denied his earlier enthusiasm for state interposition. Alexander Hamilton, 1806, John Trumbull, public domain, via [Wikimedia Commons](#).

In contrast to Hamilton's hostile reaction to interposition, his co-author of the concept, James Madison warmed up to the idea. While both had been worried about the lack of national power during the ratification debates, Madison relatively quickly developed concerns about what he perceived as excessive claims for national powers. In particular, he identified a dangerous shift undercutting a balance between state and national powers in the financial schemes Hamilton advanced for Washington's administration. If national powers needed to be enhanced, Madison wanted those changes to occur through formal constitutional amendment. By 1792, Madison thought that if Hamilton's broad construction of implied powers for the national government prevailed, the Constitution "had better be thrown into the fire at once."

In 1798 Madison, along with Jefferson, produced the Virginia and Kentucky Resolutions, protests by those two state legislatures about the unconstitutionality of the Alien and Sedition Acts. The Alien Act empowered the President to deport any aliens he deemed “dangerous to the peace and safety” of the nation or suspected of “treasonable or secret machinations” without due process. The Sedition Act criminalized any conspiracy “to oppose any measure” of the national government and prohibited the “writing, printing, uttering or publishing” of any “false, slanderous, and malicious writing” tending to bring the national government into “contempt or disrepute.” Even Hamilton, after reading the bill that became the Sedition Act, thought that some of its provisions were “highly exceptionable.” Both acts sought to stifle political opposition, constrain free speech, and especially targeted newspapers not friendly to the Federalists or President Adams.

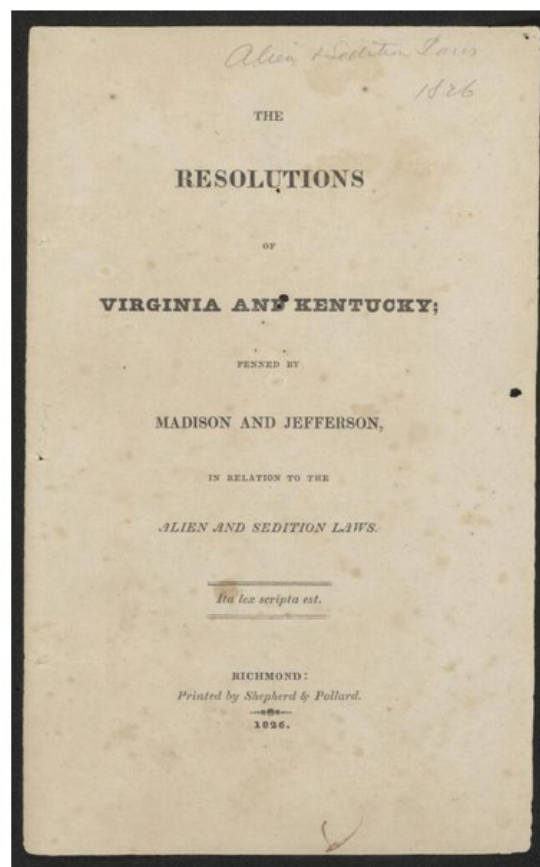


Figure 5: The Virginia and Kentucky Resolutions became the basis of the so-called Principles of '98. Title page of *The Resolutions of Virginia and Kentucky* (Richmond: Shepherd & Pollard, 1826). *Library of Congress*.

Although those Resolutions introduced confusion about interposition and would be relied on to advance the dangerous doctrine of nullification, they were, in fact, classic statements of states using interposition. Misconceptions surrounding the Virginia and Kentucky Resolutions stem from thinking that they were independent creations of Madison and Jefferson and not part of an earlier pattern of interposition that traced its roots to *The Federalist*. The Resolutions are incorrectly viewed as originating the idea that John C. Calhoun would develop into his theory of nullification or an individual state veto.



In Virginia's Resolutions, Madison neither described what became the theory of nullification nor did he allude to the natural law right of revolution. Instead, he described two distinct types of interposition, each resting on a different basis and calling for vastly different political action. Failing to appreciate that distinction misled Madison's contemporaries as well as later generations who continued to invoke what they called the "Principles of '98."

When Madison described a right to "interpose" in Virginia's Third resolution, he referred to the *theoretical* right of the collective people who were the sovereign foundation of the Constitution to serve as the ultimate arbiter of the existence of egregious constitutional overreaching by the national government in the final resort. When Madison wrote that the people as the parties to the constitutional compact retained a theoretical right to "interpose," he was not talking about the preexisting practice of sounding the alarm interposition. This theoretical right contained in the third resolution was different from what he described in Virginia's seventh resolution as the right of state legislatures to interpose by sounding the alarm when faced with they believed were ordinary, unconstitutional acts of the national government.

In his Report of 1800 explaining his resolutions, Madison defended sounding the alarm interposition in explicit terms by citing his and Hamilton's language in *The Federalist* describing such a role for state legislatures and the practice of interposition after ratification. Nonetheless, Madison bore the responsibility for not clearly distinguishing the theoretical right of the people from the right of legislatures to sound the alarm in his original resolutions.

Identifying the Virginia and Kentucky Resolutions as part of a preexisting practice of interposition is complicated because both Madison and Jefferson were sometimes ambiguous and because Madison repeatedly restated his complex views. The wording of Jefferson's draft of the Kentucky Resolutions also prompted ominous speculation. While neither "nullification" nor "null" appeared in Kentucky's 1798 Resolutions, the fact that Jefferson included those words in his draft has led many scholars to assume that he, and by association Madison, anticipated and provided support for the nullification doctrine later advanced by Calhoun. Indeed, Jefferson's formulations eventually resonated with a sovereign states' rights tradition that merged the two sets of resolutions under the slogan, the "Principles of '98."

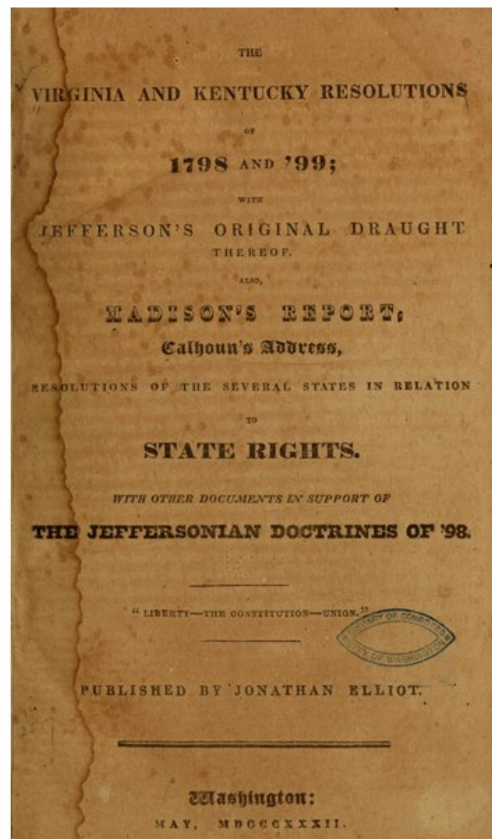


Figure 6: Title page of Jonathan Elliot's compilation of documents related to the Virginia and Kentucky Resolutions. Elliot's compilation aptly illustrates how the original concept of sounding the alarm interposition became intermeshed with nullification theories by advocates of nullification. *The Virginia and Kentucky Resolutions of 1798 and '99; with Jefferson's Original Draught Thereof. Also, Madison's Report, Calhoun's Address, Resolutions of the Several States in Relation to States Rights* (Washington: Jonathan Elliot, 1832), *Library of Congress*.

As finally adopted, both sets of resolutions served to sound the alarm about the Alien and Sedition Acts. Virginia's legislature declared the acts "unconstitutional" while Kentucky's described them as "not law" but "altogether void" and "of no force" and "effect." Despite the different wording, both sets of resolutions offered the same judgment: that the acts exceeded the constitutional authority of the federal government. Virginia's and Kentucky's legislatures, like previous legislatures invoking interposition, asked the state's governor to share the resolutions with other state governors and with the state's congressional delegation.

The interposition directed at the Alien and Sedition Acts galvanized political support that helped elect Thomas Jefferson President. His election ushered in the so called "Revolution of 1800" that displaced Federalist control of the presidency with the first of several Republican administrations. Given Jefferson's and Madison's role in drafting the Virginia and Kentucky Resolutions, it might seem ironic that their administrations confronted interposition during their presidencies as well. However, given the inherent fluidity of federalism, interposition inevitably came to be used by all parties to resist policies of the national government whenever it might be said that the party in power had thrown the federal system out of constitutional balance.

In Jefferson's second term, his embargo policy, beginning with the Embargo Act of 1807, prompted an interposition movement by Federalist state legislatures in New England. Although the embargo was repealed by the time of James Madison's inauguration in March 1809, other decisions of Madison's administration—many related to the War of 1812—stimulated additional instances of interposition as state legislatures challenged the constitutionality of various acts of his administration.

The culmination of resistance to Madison’s policies related to the war was the assembly of delegates from five Federalist-dominated New England states on December 15, 1814 in Hartford, Connecticut. After meeting behind closed doors, the convention adopted a report accusing Madison’s administration of misconstruing the Constitution and exceeding its constitutional authority. Given “a total disregard for the Constitution,” the report stated that it was appropriate for individual states to offer their “decided opposition.”



Figure 7: A satirical cartoon depicting how the Hartford delegates were commonly labeled traitors and disunionists, with King George III urging the states of Massachusetts, Connecticut, and Rhode Island to take “the leap” of secession. A three-person delegation (upper left), sent by the Massachusetts legislature with copies of the Hartford Convention’s resolutions arrived at Washington just as news was received about Andrew Jackson’s victory over the British at the Battle of New Orleans and word that a peace treaty was nearing completion at Ghent. *The Hartford Convention, or, Leap no Leap* (Windsor, VT: Anonymous, 1815). Courtesy, American Antiquarian Society.

In justification, the report paraphrased Madison's third Virginia resolution, but in a manner that allowed state legislatures to act in ways that Madison had limited to "the states," by which he meant *only* the people of the states in their highest sovereign capacity. The report asserted that "in cases of deliberate, dangerous, and palpable infractions of the Constitution, affecting the sovereignty of a State, and liberties of the people; it is not only the right but the duty of such a State to interpose its authority for their protection."

Despite the Hartford Report's claims, nullifying national laws deemed unconstitutional far exceeded the role of state legislatures to use interposition to challenge the unconstitutionality of laws that Madison had endorsed in Virginia's seventh resolution. Moreover, nullifying acts of the federal government and assuming the authority to decide in the last resort was not up to

individual state legislatures. Nonetheless, Federalist newspapers supporting the Hartford Convention's report also mistakenly claimed that Madison had endorsed resistance by individual states.

But it would be in the hands of Calhoun and other nullifiers in the 1830s, however, that the so-called "Principles of '98" were twisted into a doctrine of individual state veto and would forever cloud the original function of interposition. In Calhoun's draft of what became the "South Carolina Exposition" of 1828 he explicitly drew selectively and incorrectly upon Madison's authority in the Virginia Resolutions of 1798 and his Report of 1800 to assert that every state had a right to veto (what Calhoun called an interposition) when the national government acted unconstitutionally. Eventually, South Carolina would invoke Calhoun's doctrine in 1832, passing an ordinance that supposedly nullified national tariffs the state deemed unconstitutional.

Madison adamantly denied that he had provided any authority for nullification. From Calhoun's advancement of a theory of nullification in 1828 until Madison's death in 1836, Madison sought to distinguish interposition from nullification. Before he died, Madison called secession a "twin" to the "heresy" of nullification with both doctrines springing "from the same poisonous root." He rightly predicted that growth from this evil source would bring "disastrous consequences" such as when Southern states seceded from the Union. Despite Madison's prediction, interposition developed as a political practice regularly used by state legislatures from the ratification of the Constitution in 1788 until the 1870s. The Civil War marked the high point of state interposition resistance. During the war, sounding the alarm interposition occurred whenever states believed their national government—Union or Confederate—had exceeded its powers, particularly with the use of martial law, suspension of the writ of habeas corpus, and mandatory wartime conscription.

After the Civil War, Northern and Southern state legislatures opposed Reconstruction laws and policies, racial equality, and enhanced national power using the tool of sounding the alarm interposition. However, those who denied the outcome of the Civil War and who were advocates of white supremacy adopted the slogan of states' rights and did not embrace the brand of interposition explained in *The Federalist Papers*. Thus, use of interposition essentially died out, tainted with the Civil War and the discredited notions of nullification and secession, and lay dormant before its re-emergence in the twentieth century.

When the explicit re-invocation of the term "interposition" surfaced in the 1950s, it did so in the hands of those who sought a constitutional basis for white supremacy and racial inequality in opposing the Supreme Court's decision in *Brown v. Board of Education*. Although segregationists used the term interposition, their actions were clearly intended to defy the Supreme Court's ruling and invoked the discredited doctrine of nullification.

A RESOLUTION TO DECLARE THE UNITED STATES SUPREME COURT DECISIONS USURPING THE POWERS RESERVED TO THE STATES AND RELATING TO EDUCATION, LABOR, CRIMINAL PROCEDURE, TREASON AND SUBVERSION TO BE NULL, VOID AND OF NO EFFECT; TO DECLARE THAT A CONTEST OF POWERS HAS ARISEN BETWEEN THE STATE OF FLORIDA AND THE SUPREME COURT OF THE UNITED STATES; TO INVOKE THE DOCTRINE OF INTERPOSITION; AND FOR OTHER PURPOSES.

BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA, THE SENATE CONCURRING:

That the Legislature of Florida doth hereby unequivocally express a firm and determined resolution to maintain and defend the Constitution of the United States, and the Constitution of this State against every attempt, whether foreign or domestic, to undermine and destroy the fundamental principles, embodied in our basic law, by which the liberty of the people and the sovereignty of the States, in their proper spheres, have been long protected and assured;

That the Legislature of Florida doth explicitly and pre-emptorily declare that it views the powers of the Federal Government as resulting solely from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument creating that compact;

That the Legislature of Florida asserts that the powers of the Federal Government are valid only to the extent that these powers have been enumerated in the compact to which the various States assented originally and to which the States have assented in subsequent amendments validly adopted and ratified;

That the very nature of this basic compact, apparent upon its face, is that the ratifying States, parties thereto, have agreed voluntarily to surrender certain of their

Figure 8: Interposition Resolution by the Florida Legislature in Response to *Brown v. Board of Education*, 1957, *Library of Congress*.

As originally conceived, interposition rested on the idea that state legislatures were essential monitors of the equilibrium of federalism—and a state legislature’s declaration that acts of the federal government were misguided and even unconstitutional was a legitimate form of political resistance. Nullification, however, whether of a Supreme Court’s decision or an act of Congress was never contemplated by the framers as a power enjoyed by any single state.

At various times in our history state legislative interposition has been misused and mangled into the unconstitutional doctrine of nullification. Even so, interposition has functioned as a powerful tool to express popular discontent and to help us reframe and affirm our constitutional values.

Interposition’s use by states offers the important insight that the national government cannot do whatever it wants and ride roughshod over the states. And, at the same time, interposition reinforces the obligation that states and elected officials owe to the Constitution—and that states lack any legitimate power to nullify national laws. What remains a question is whether state legislative interposition continues to serve a useful purpose today.

Crucially, the history of interposition demonstrates that the preservation of constitutional democracy is a shared obligation among many parties and not merely the task of the Supreme



Court. The nation's history and practice of interposition illuminates how many constitutional settlements were achieved not by a Supreme Court decision, but by a broader discussion among non-judicial participants.

Every elected official—whether at the state or federal level—is obligated to uphold the Constitution. That obligation cannot be abdicated and demands an allegiance to maintain constitutional faith above loyalty to a political party or person.

Interposition offers the important reminder of the necessity of the people's involvement in America's constitutional democracy. Just as elected officials cannot abdicate their responsibility to uphold the Constitution, voters cannot abdicate their responsibility to scrutinize the operation of government acting under their authority. Widespread civic engagement of citizens in political issues is the only hope for the survival of the constitutional system that Americans took a chance on in 1787. After all, our republic was based on the idea of the sovereignty of the American people.

## FURTHER READING

This article is drawn from Christian G. Fritz, *Monitoring American Federalism: The History of State Legislative Resistance* (New York: Cambridge University Press, 2023).

This article originally appeared in June 2023.

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Christian G. Fritz is Emeritus Professor of Law at the University of New Mexico School of Law. He is also the author of *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (New York: Cambridge University Press, 2008).