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# The History of State Interposition Shows Federalism is a Deliberative Process, not a Set of Rules

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## by Christian G. Fritz

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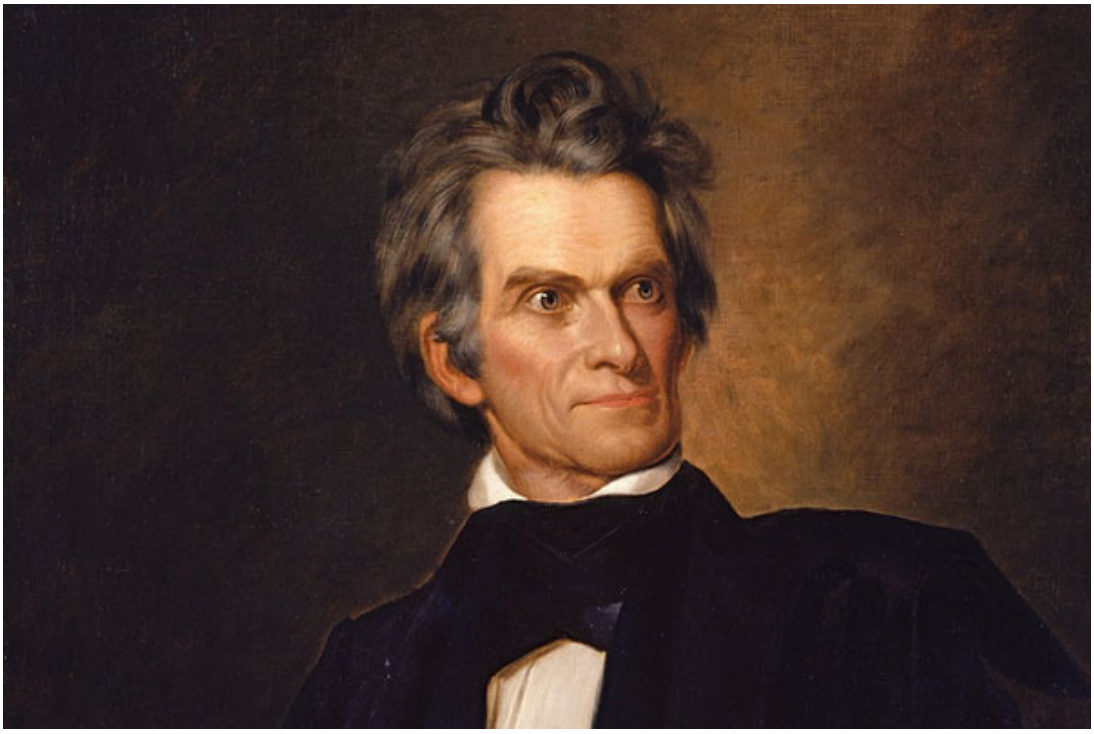

*John C. Calhoun misconstrued James Madison's original thinking about federalism to declare a right of state nullification of federal law, Christian Fritz contends.*

Every day, we see that our democracy is buffeted by forces that threaten its very existence. Thus, it is timely to ask what elements of our representative democracy can help us maintain an even keel with regard to the distribution and exercise of constitutional powers. Is the Supreme Court the best guardian of our liberties by its monitoring of federalism? Is Congress reflective of the people's will? Are the states and their legislatures more attuned than Washington to the needs of the people they represent? Or is some combination of voices the more desirable outcome to preserve the people's will?

The Constitution created what James Madison called a "compound republic"—neither a wholly national government nor one in which states retained their entire sovereignty. This

shared sovereignty inevitably tested the balance of powers between nation and states. Moreover, the absence of clear delineation between the two levels of government meant that a static equilibrium of powers would never be a fact and would always be a source of ongoing political debate and conflict.

Since 1776, Americans have resisted and at times rebelled against perceived tyrannies of government. In *Monitoring American Federalism: The History of State Legislative Resistance*, I focus on the untold story of how Americans have monitored our federal system through their state legislatures by using the tool of interposition to express opposition to government overreach. Properly understood at the time, 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. Interposition's justification surfaced in the *Federalist* essays of James Madison and Alexander Hamilton and helped states oppose the Alien and Sedition Acts of the 1790s. States sounded the alarm by passing legislative resolutions and communicated with other states to overturn these laws.

The Constitution's shared sovereignty between nation and states created a dynamic federalism that stimulated continuous debates over the balance of power, including debates over slavery and taxation. Thus, state interposition shaped the American political conversation about our constitutional rights and illustrated a strength, and not a weakness, of the framers' constitutional design, inviting each generation to consider what the appropriate constitutional balance should be.

The new Constitution had existed for a short time before Madison and others became concerned about constitutional interpretations that expanded national power. This early dialogue about federalism centered on what each side viewed as undesirable: either changes that would weaken the authority of

states or that would diminish national authority. The debate over federalism reflected fundamentally different constitutional views. For John Marshall and others, the Constitution had been established as the act of one national people, forming a national government with considerable powers. For states' rights advocates, the Constitution was a compact of sovereign states, leaving state sovereignty largely intact, except for limited and express grants of powers to the national government. Those competing views shaped how each side regarded the role and authority of the Supreme Court. Rhetoric became more extreme as nationalists feared disunion and states' rights advocates feared the disintegration of state authority, including over slavery.

The Virginia and Kentucky Resolutions of 1798 that Madison and Thomas Jefferson authored as a repudiation of the Alien and Sedition Acts are incorrectly viewed as originating the idea that John C. Calhoun would develop into his theory of nullification—the right of an individual state to veto federal law. The interstate circulation of the resolutions helped elect Jefferson as President in 1800.

Despite their political success, what Jefferson and Madison meant by the language they used in the resolutions burdened future efforts of states seeking to monitor the governmental balance of powers and resulted in a deeply troubling political legacy. In the resolutions, Madison failed to explain what he meant by the theoretical right of the sovereign people to interpose in the last resort and Jefferson's statements that unconstitutional laws were null and void seemingly foreshadowed Calhoun's remedy of nullification.

Ironically, Presidents Jefferson and Madison faced state legislative interposition resolutions that protested Jefferson's Embargo Acts, the Supreme Court's finality over constitutional issues, the re-charter of the Bank of the United States, and Madison's efforts to mobilize state militias before the War of

1812. Americans debated whether sounding the alarm resolutions and state legislative interposition were legitimate state actions—and some Americans asked if and when they would be justified in more forcefully resisting federal law, notably during the Hartford Convention of 1814 that called for constitutional amendments to reduce the power of Southern states by repealing the Three-Fifths Clause.

The dispute over the Tariff of 1828 marked a turning point for interposition. State legislatures passed resolutions declaring protective tariffs unconstitutional, using more threatening language that echoed the doctrine of nullification. Calhoun's arguments distorted Madison's views and transformed traditional "sounding the alarm" interposition into an option for each state to nullify acts of the national government that it considered unconstitutional. In the 1830 Webster-Hayne debate in the United States Senate, nullifiers quoted the Virginia and Kentucky Resolutions and Madison's Report of 1800 to justify their constitutional theory. Madison steadfastly rejected both nullification and secession and attempted to explain what he meant by a complex federalism based on divided sovereignty, though he ultimately failed to correct those misconceptions.

Increasingly, Americans failed to find common ground in their understanding of the Constitution. As Southern states sought to enforce the Constitution's Fugitive Slave Clause through federal legislation, such as the Fugitive Slave Act of 1850, Northern states responded by passing personal liberty laws to resist enforcement of federal laws that would extend the authority of enslavers beyond the South. Southern states considered these personal liberty laws a nullification of federal law that ultimately were intended to eradicate slavery.

The Civil War marked the high point of state interposition resistance. "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. Those who denied the outcome of the Civil War and who were advocates of white supremacy adopted the slogan of states' rights and not interposition. 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 reemergence in the twentieth century.

The explicit invocation of the term "interposition" resurfaced in the 1950s, once again by those who sought a constitutional basis for white supremacy and racial inequality, especially in opposition to school integration. After the Supreme Court repudiated nullification in *Cooper v. Aaron* (1958), a version of interposition termed "Judicial Federalism" emerged as a constraint on federal legislative power in *Printz v. United States* (1997) and use of interposition, "uncooperative federalism," and nullification-like efforts resurfaced in resistance to federal laws and policies including the Patriot Act of 2001 and the Affordable Care Act of 2010. 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.

While state legislative interposition, at various times in our history, has been misused and mangled into an unconstitutional doctrine of nullification, nonetheless, it has functioned as a powerful tool to express popular discontent and to help us reframe and affirm our democratic 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 with which they disagree.

The question is whether state legislative interposition still has a purpose in keeping American federalism in balance, as one critical expression of the people's involvement in their constitutional democracy. I believe that 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.