

Constitutional History

“Is there anything more to learn from *The Federalist Papers*?” April 04, 2023

As every student of American constitutional history and political theory knows, the literature on *The Federalist Papers* is enormous. Given the dozens of editions with scholarly introductions, countless collections of essays on the meaning of *Publius*, and the ubiquitous citations to *Federalist* essays by the courts and researchers, it would seem likely that the answer to the question posed in the title would be no.

Despite their exhaustive treatment, something crucial has been overlooked in the famous essays: an articulation of a constitutional tool that would emerge in practice in the hands of state legislatures after the ratification of the Constitution and one that has played an important part in thinking about the proper balance of authority between the federal government and those of the states.

In [*Monitoring American Federalism: The History of State Legislative Resistance*](#) (Cambridge University Press, 2023), I trace the genesis of that constitutional tool to several essays by both James Madison and Alexander Hamilton in which they described—without using the term interposition—a mechanism that state legislatures might employ in their role as monitors of the federalism created by the Constitution to ensure that the new national government would not overreach its constitutional authority and intrude upon the powers retained by the states. What began as a debate-like response to opponents of ratification, eventually took on a life of its own, producing a tradition of monitoring federalism that had a vibrant life in American constitutional history until and during the Civil War and even for a time thereafter, before suffering a demise.

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 was fundamental in shaping 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.

Monitoring American Federalism demonstrates how states played a crucial role from the beginning of the republic in assessing the equilibrium of federalism within the American constitutional order. 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. State legislatures would sound the alarm about a perceived constitutional overreach, pass interposition resolutions, and share the resolutions with other states to exert maximum political pressure on whatever branch of the federal government was responsible for the overreach.

In its use before the Civil War, interposition by states involved the conviction that elected officials, especially state legislators, but also individual citizens, juries, and the press, could properly scrutinize any expansive assertions by the federal government, not simply the Supreme Court. Indeed, state interposition would be used to oppose many perceived threats, including the Alien and Sedition Acts, the War of 1812, federal tariffs, internal improvements, and pro-slavery laws.

Interposition emerged as a response to critics worried that the Constitution's grant of national powers would obliterate state authority. This early interposition formed an institutional and intentional way to acknowledge divided sovereignty under the Constitution and to preserve the equilibrium of federalism. 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. Moreover, interposition was not a claim for the constitutional independence of state legislatures.

Interposition as a constitutional tool became distorted with the rise of South Carolinian John C. Calhoun's claims during the Nullification crisis of the 1830s. Historians today describe interposition as inherent in the states' rights political tradition of defending slavery, which inexorably led to Southern secession and Civil War. This narrative ignores the practice of interposition before its appropriation by nullifiers and those invested in slavery who claimed the right of individual states to defy national laws and decisions of the Supreme Court. Nonetheless, there was a great divide between those who advocated for the rights of state legislatures to question the federal government on any constitutional issue through interposition—and those who supported nullification. The gulf between the two invocations of state interposition was underscored in the 1830s, when many of those who embraced interposition rejected nullification.

The decline of interposition after the Civil War can be traced to the growth of powers that the federal government assumed during the war. Inevitably, the Civil War Amendments placed additional power in the hands of the national government. Thus, as the enhancement of national authority altered the balance of federalism, states were left with their reserved rights, now subject to the constraints imposed on them by the new powers granted to the national government. Concerned that the balance of federalism had shifted dramatically, it is no wonder that the slogan of states' rights was embraced after the war by those who resisted Reconstruction and the efforts to implement the Civil War Amendments.

By the 1870s, enhanced federal authority and the growing assumption that the Supreme Court was the natural arbiter of the constitutional relationship between the federal and state governments largely eclipsed the basic function of interposition to protest perceived imbalance in the equilibrium of federalism.

Interposition only resurfaced in the 1950s as some Americans sought a constitutional basis for white supremacy and racial inequality, particularly in opposition to integration. Later, 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 resumed in resistance to federal laws including the Patriot Act of 2001, the Real ID Act of 2005, and the Affordable Care Act of 2010.

What remains is whether interposition as a sounding the alarm function of the states serves any useful purpose today as a peaceful, but powerful expression of the people's sovereignty. I would argue that since the dialogue between political parties and individuals has become more fraught with demagoguery and disinformation, people in every state need their state legislature to be a focal point to express their values, including majority rule and minority rights. Otherwise, individuals will doubt whether their government and elected officials have any relevance and increasingly ask themselves if the nation is doomed.

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