Introduction

Americans have monitored federalism from the beginning of the republic, questioning whether the newly established government was more attuned to a Jeffersonian vision of sovereign states resting on the sovereignty of the people of each state – or a Hamiltonian vision of a consolidated nation resting on the sovereignty of one national people. The answer was that it was both, but it took considerable time and effort to determine the consequences for American life and government. 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. The absence of a clear delineation between the two levels of government meant that a static equilibrium had always been an ideal, but never a fact.[1]

Instead, the Constitution's tensions generated a dynamic federalism that led to continuous struggles over the balance of power. Americans expected government officials and elected representatives to act as guardians of their rights by taking appropriate constitutional action to maintain a proper balance of federalism. At times, the constant uncertainty and debate undermined the Union, most dramatically with the Civil War and in the aftermath of the postwar Constitution during Reconstruction.

From the beginning, Americans disagreed about what the equilibrium of federalism meant. Some believed the national government only

possessed those powers expressly granted in the Constitution – with states *permanently* retaining all other powers. Others believed the national government's powers could expand to accomplish what was necessary and proper to sustain the nation – and that states had already surrendered sovereignty to achieve that purpose. Finally, Madison and his allies argued that there was no bright line between national and state sovereignty. Instead, the question of divided sovereignty would be forged incrementally – in a case-by-case and collaborative nation-state process.

Most debates over divided sovereignty involved the protection of slavery. Slavery and racism have played a key role in much of American political and legal history. Americans with entrenched interests in the system of human bondage constantly calculated how shifts in national versus state powers might affect their interests. Ironically, these slaveholder interests were sometimes protected and even promoted by national power and policies – and the Constitution itself. Undoubtedly, the issue of divided sovereignty played out in sustained debates and conflicts at both state and national levels. Other policies and interests – including debt and taxation, banking, internal improvements and police powers – also helped shape American federalism, even though slavery was often the most fought-over and consequential focus of disagreement after 1830.

Monitoring American Federalism focuses on some of the most significant political controversies of the nation's history where the disequilibrium of federalism was most keenly felt. It explores the ways that states framed their dissent from actions of the national government. Some have blamed the opponents of the Constitution, who became known as Anti-Federalists, for creating a constitutional legacy characterized by a local perspective that resisted change and was rooted in paranoia about anything that challenged states' rights and slavery. Yet, this book shows that for much of the time the constitutional dialogue was more nuanced. "Tension and conflict" were central to the evolving American political tradition, as Saul Cornell has pointed out – and "dissenting voices" helped shape the broader conversation about constitutional rights and authority.[2]

Ideally, public debate over political issues should not become dissent that would frustrate and undermine the government. However, political opponents routinely accused one another of overreaching, tyrannical

behavior, and unwarranted deviation from the Constitution. By examining the contours of state resistance, we can better understand the issues that fueled the rhetoric surrounding the Constitution and American government. This debate reflected the "inherent elasticity and dynamism" of federalism, arguably a strength and not a weakness of the constitutional design. Such insights invite each generation to identify constitutional issues and consider what the appropriate constitutional balance should be.[3]

Monitoring American Federalism shows that state resistance to policies and actions of the national government frequently invoked interposition. Interposition was a *constitutional* tool that, unlike judicial review, did not have an immediate constitutional effect. Designed to work through political pressure, interposition sought to maintain constitutional balance between the two levels of government. Even though the achievement of a perfect equipoise was for all intents and purposes impossible, interposition was valuable. By participating in the debate about the equilibrium between the national and state governments, state legislatures developed a tradition of using interposition to sound the alarm about overreaching. This crucial method of monitoring federalism has generally been overlooked and misunderstood.

Historians often associate interposition only with South Carolina's John C. Calhoun and the Nullification crisis of the 1830s. That is, they paint interposition as part of a sovereign states' rights tradition defending slavery that inexorably led to Southern secession and the Civil War. However, 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, interposition emerged in the 1790s as a response to critics who worried that the Constitution's grant of national powers would obliterate state authority. In acknowledging some degree of divided sovereignty between the national government and state governments, early uses of interposition expressed a means of preserving the equilibrium of federalism, rather than a claim for state sovereignty that could displace national authority.

A crucial difference existed between the earlier and the later invocation of interposition. Those who identified states' rights that could legitimately be defended through sounding the alarm were not following the same ideology as the later sovereign states' rights

theorists who embraced nullification. The gulf between the two was underscored in the 1830s, when those who had embraced interposition rejected nullification. This study recovers the history of interposition and its practice before interposition was distorted and evolved into the device of nullification. To be sure, there was an intellectual lineage and trajectory between the earliest uses of interposition and what would become nullification. 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.[4]

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This book explores three interrelated themes: (1) the thoughts of James Madison pertaining to American federalism; (2) the ways in which states exercised a role as constitutional sentinels resisting what they perceived as constitutional overreaching by the national government through interposition; and (3) the useful purpose that state resistance has played in constitutional politics. In tracing the practice of interposition, this study does not assess whether particular actions of Congress, the executive branch, or the judiciary were unconstitutional or impermissibly altered the balance of federalism.

This focus on interposition does not include many dramatic instances of aggressive assertions of state sovereignty, particularly in the context of Native peoples, because these state responses to their Native populations were often an outright defiance of national authority far closer to nullification than interposition. Nor does this book focus on James Madison, except as his thinking is pertinent to the larger discussion of the theory and uses of the constitutional tool of interposition. Instead, the intent is to explore how and why state legislators believed they were legitimately exercising a role as one of the monitors of federalism and had a right to bring attention to potential examples of the national government acting beyond its constitutional authority. Thus, interposition is helpful in understanding how legislators insisted on their right to participate in shaping the meaning and understanding of the American Constitution.[5]

This book is not an extension of my prior work on popular sovereignty. In an earlier work, *American Sovereigns: The People*

and America's Constitutional Tradition before the Civil War, I explored the profound impact that the principle of the people's sovereignty had on the course of American constitutionalism. *American Sovereigns* described how the emerging understanding of the fundamental role for the sovereignty of the people also implied a right and duty of the people to scrutinize and comment on the workings of their governments, whether at the state or national level. Contemplating what might be meant by the people's sovereignty soon led to multiple depictions of 'the people' on whose authority the national government rested. These depictions ranged from envisioning a single national American people or the sovereign people of each state or the collective people of all the states acting in their highest sovereign capacity. In short, *American Sovereigns* explored how identifying the sovereign authority represented by 'We the People' was not self-evident and produced more than one possible answer. Indeed, my research indicates a clear divide between expressions of popular sovereignty and state sovereignty.

Instead of being a continuation of my focus on popular sovereignty in *American Sovereigns*, this work deals with how state legislatures, as guardians of the people's rights, sought to play a special role in monitoring the distribution of the powers under the Constitution. Thus, this book focuses on states' rights more than on state sovereignty. The thousands of resolutions passed by state legislatures and sent to their congressional representatives beginning in 1789 displayed an early and persistent determination of the legislatures to shape national laws and policies to reflect the interests of the people they represented.[6]

A crucial subset of those "instructing and requesting" resolutions of state legislatures were resolutions protesting perceived constitutional overreaching by the national government. In declaring a state's detection of constitutional disequilibrium, those resolutions were an "interposition": *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*. Such resolutions identified the cause of the overreaching and alerted the national government to the state legislature's views by sending the resolutions to members of the state's congressional delegation. State legislatures also routinely requested the

state's governor share the resolutions with the legislatures of the other states in an effort to stimulate a coordinated and more effective response.[7]

While interposition was initially described in *The Federalist*, soon after ratification it became a regular practice that was frequently used by state legislatures throughout the country, persisting into the 1870s – even if encumbered with misconceptions. A key development in this political process occurred in 1798 when James Madison authored a series of resolutions for Virginia's legislature that explicitly endorsed and invoked sounding the alarm interposition by declaring the Alien and Sedition Acts unconstitutional. In the Virginia resolutions, Madison described some of the means available to the people when they believed the national government had overstepped its constitutional bounds. These steps included interposition – along with electing different political representatives and seeking constitutional amendments.[8]

But in those resolutions Madison did something else – largely unappreciated at the time and long misunderstood thereafter – that had fateful consequences for American history. In the Third Virginia Resolution, Madison described an even broader theoretical right "to interpose in the final resort" if the federal government overreached its authority in "a deliberate, palpable and dangerous" manner. That vague and troubling statement suggested that a majority of the collective people might be entitled to invoke their authority if the national government exceeded its powers in extraordinary ways. Although Madison described that right as extra-constitutional, that is, existing outside the purview of the Constitution, he insisted that right was constitutionally justified because the right rested on the people of the states "in their highest sovereign capacity" as parties to the constitutional compact. Madison's distinction sowed enormous confusion.

Identifying a constitutional right – albeit a theoretical one – *outside* of the Constitution rested on Madison's view of the hierarchy of governmental authority in America: that while governments rested on constitutions, those constitutions rested on the sovereign power of the people. If the national government overreached in extraordinary ways, the sovereign behind the Constitution retained the right "to interpose" in the final resort.[9]

Thus, Madison's words led his contemporaries and later generations to invoke and misconstrue what they called the 'Principles of '98'. Despite this, Madison maintained his consistent adherence to the distinctions that underlay his formulation of the Virginia Resolutions. For Madison, the Third resolution's authority rested on the constitutional legitimacy of a sovereign people's *theoretical* right to take action when faced with dire circumstances. For others, Madison's words seemed to legitimate extra-constitutional means that included nullification and secession. As Madison would discover, once his own, complex ideas were in the intellectual and political marketplace, those concepts were subject to conflation and distortion. Yet, upon close examination, Madison's reiterations and elaborations of the meaning of the Virginia Resolutions toward the end of his life in the 1830s reveal how well they mirrored the carefully crafted, but complex distinctions of constitutional theory he advanced in 1798 and explained in 1800.

Nonetheless, Madison's language in the Third Virginia resolution effectively narrowed the distance between sounding the alarm interposition and nullification and encouraged the leap from interposition as originally conceived to nullification by those unconcerned with Madison's careful constitutional distinctions. Madison's incautious language might have implied an intellectual pedigree and logical connection between interposition as previously practiced and the new doctrine of nullification. But as a legal and constitutional matter, there was a huge divide between the legitimacy of states to weigh in on the equilibrium of federalism and the assumption that individual states could decide, independent of the Supreme Court, what the Constitution meant. Importantly, participating in the process of examining the balance of power between the federal and state levels of government and expressing an opinion about how that balance was struck was a far cry from states supplanting the decision-making authority of the Supreme Court.

Integral to interposition before the Civil War was the belief that scrutinizing whether governments were operating within the limits of their constitutional authority included the people's elected representatives and was not the monopoly of the Supreme Court. This monitoring was understood to involve many different eyes

beyond judicial ones – including those of individual citizens, juries, the press, and most importantly, state legislatures.[10]

Moreover, long before judicial review became an established feature of American government, a concept of so-called "departmental" review held considerable sway. That view assumed each of the three federal branches possessed an equal responsibility for keeping governmental operations within constitutional bounds. Acting as separate sentinels overseeing the operation of government, these various parties and branches of government collectively participated in ensuring the Constitution operated as intended to preserve and protect the liberties and rights of the people who formed the sovereign basis of the Constitution.[11]

The prospect of others besides judges laying claim to a significant role in developing an understanding of the Constitution and helping maintain an appropriate equilibrium of federalism would be challenged by what Jefferson Powell has called "the 'lawyerizing'" of the Constitution. Led by lawyers and prominently by Chief Justice John Marshall, the movement towards 'lawyerization' declared a preeminent and exclusive role for the Supreme Court as the arbiter of disputes over the boundary that separated national from state authority. One aspect of this "legalist" conception of the Constitution believed that "the Constitution had entrusted only the federal judiciary, not the elected branches and not the sovereign people, with the final authority to determine the meaning of the Constitution."[12]

Narrowing the range of those entitled to interpret the Constitution and monitor federalism eventually led to more widespread assertions that the federal judiciary should enjoy a monopoly over the question of whether acts of the national government were within constitutional bounds. The future Chief Justice of the Supreme Court, Charles Evans Hughes, epitomized this position by remarking in 1907 that "the Constitution is what the judges say it is." Such a claim for judicial monopoly discounted an earlier tradition – as well as constitutional design – involving a much wider universe of constitutional interpreters, including state legislatures employing interposition. As interposition competed with judicial interpretation, 'lawyerization' increasingly took hold and eclipsed legislative interposition as the preferred theory and practice – at least in the minds of members of the judiciary and lawyers.[13]

The theory of interposition is part of a constitutional world that featured a role for states that we have largely forgotten, but which is reappearing in efforts today to resist federal authority – whether by blue or red states. In the beginning, America's political leaders were uncertain about what to make of the Constitution while it was being drafted, ratified, and initially debated in Congress. They wrestled over multiple and conflicting "imaginings" about the essence of the document in an effort to "fix" a meaning to the Constitution. The indeterminacy of the Constitution was predicted by James Madison, who, along with others, pointed out the inherent limits of language. For him, a written constitution inevitably introduced doubts until the meaning of the text could be clarified after a sufficient and perhaps a never-ending number of "discussions and adjudications."[14]

If Congress was one obvious place for those ongoing and necessary discussions, state legislatures – invoking the tool of interposition – served as an additional and important venue to provide constitutional meaning and an assessment of the equilibrium of federalism. The fact that state legislatures selected who would serve in the U.S. Senate was an important aspect of that world. The resultant stream of 'instructions' that state legislatures sent to their Senators, as well as 'requests' to their members of Congress, assumed the national councils should not act independently of the wishes and input of the states. Such instructions became a primary means for states to influence the behavior of U.S. Senators until the Seventeenth Amendment transferred the direct election of Senators to the people.

The early history of interposition occurred during a period when a form of state-centric governance held sway against a vision of national dominance. Despite Hamilton's hopes for a consolidated government, Jefferson's vision of a smaller national footprint prevailed for half a century after the Constitution's ratification. Before the Civil War, the national government played a minor part in the lives of most Americans. Only with the war would the national government begin to acquire more sweeping powers and a greater presence relative to the local and state influences that had traditionally bound communities.

Before the Civil War, Southern states used sounding the alarm interposition to proactively invoke states' rights as a sword to protect slavery interests while non-slave states invoked states' rights to protect

the rights and liberties of their citizens from the operation of the federal Fugitive Slave Acts. After the Civil War, and particularly during and after Reconstruction, Southern states invoked states' rights as a shield to resist the implementation of the Civil War Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments that abolished slavery and protected the legal and political rights of freed Blacks. Yet often missing in much scholarship is an appreciation that invocations of states' rights could involve more than simply defending slavery and justifying secession.

In part, the declining practice of interposition can be traced to the growth of powers the federal government assumed during the war. The Civil War Amendments placed even more power in the hands of the national government. Thus, as the enhancement of national authority and power shifted the balance of federalism, what remained in the hands of the states were 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, it is no wonder that the mantra of states' rights became a common refrain after the war by those who resisted Reconstruction and the efforts to implement the Civil War Amendments. Enhanced federal authority carried with it a renewed insistence that the Supreme Court was the rightful and final constitutional arbiter, lending further support for the 'lawyerization' of the Constitution.

As the process of lawyerization of the Constitution increasingly took hold, the practice of interposition gradually faded from view and ultimately from memory. By the 1870s, 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. The question that remains is whether interposition as a sounding the alarm function of the states serves any useful purpose today.