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The Riddle of Federalism and the Genesis of Interposition

One key feature of the Constitution – the concept of federalism – was unclear when it was introduced, and that lack of clarity threatened the Constitution's ratification by those who feared the new government would undermine state sovereignty. In proposing an arrangement for two levels of government, the framers not only broke new ground, but were criticized for endangering the existence of the state governments. Proponents of the new governmental framework were questioned about the underlying theory of the Constitution as well as how it would operate in practice, and their explanations produced intense and extended debate over how to monitor federalism.

In their famous defense of the Constitution in *The Federalist*, Alexander Hamilton and James Madison described a monitoring role for state legislatures that anticipated the practice of interposition. Although never using the term "interposition," Hamilton and Madison responded to opponents of the Constitution by arguing that state legislatures were uniquely situated to be the voice of the people who would sound the alarm if the general government exceeded its rightful authority. What originated as a debate-like response to opponents of ratification eventually took on a life of its own, producing a settled tradition of monitoring federalism that has largely been overlooked and which laid the groundwork for future conversations about constitutional meaning and federalism's balancing of powers.

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In a series of essays written under the pen name "Publius" in 1787 and 1788, Hamilton and Madison detailed the essential features of what became the constitutional tool of interposition later used by state legislatures to monitor the actions of the national government. In responding to critics of the Constitution, Hamilton and Madison described the government that would be created and addressed fears about the balance between national and state authority.[1]

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The Framing of the Federal Constitution

The principle of federalism entails a deceptively simple idea that most Americans take for granted today – the division of powers between the national and state governments, each exercising a degree of constitutional authority with direct impact on individuals. This basic description of federalism, however, obscures the intellectual uncertainty that surrounded the concept during the framing of the Constitution and fails to highlight the elusive nature of federalism, both as implemented in the Constitution and as it subsequently operated after ratification. Indeed, allocating power between nation and state remains, according to Gerald Gunther, "the pervasive problem" of American federalism, although some of the arguments that were advanced in favor of ratification contained the idea that state governments might help monitor the federalism established by the Constitution.[2]

The initial confusion over federalism stemmed from its unfamiliarity in 1787. Political theory in the eighteenth century lacked a conceptual category to identify what became the defining characteristic of the Constitution – a division of sovereignty between two different levels of government. At the time, the governmental structure embodied in the Constitution seemed unprecedented and appeared to violate the accepted wisdom that sovereignty was by nature indivisible, necessarily unified and located at one level only. The concept of dividing sovereignty, creating what contemporaries called an "imperium in imperio" (sovereignty within sovereignty) was considered impossible under conventional political theory.[3]

Americans of the founders' generation, including the framers of the Constitution, did not share our modern concept of federalism. While

they employed the word "federal," it did not mean then what we attribute to the term today. For them, "federalism" was synonymous with the well-understood concept of "confederalism" – one of two possible types of governmental structure. For the framers, as Martin Diamond has indicated, there were essentially two options: confederal or national. Confederal preserved "the primacy and autonomy of the states," while national provided "unimpeded primacy to the government of the whole society." Thus, the choices for governmental structure entailed either a confederate arrangement in which states each retained all of their sovereign power or a national government that retained the sovereign power "with the localities entirely dependent legally upon the will of the nation."[4]

Given what many Americans considered was the principal defect of the Articles of Confederation – the grant of primary authority to state governments while leaving the national government relatively weak – the framers tried to redress that balance. They sought to grant sufficient authority to the national government without creating a consolidated government while avoiding the problems associated with the Articles that had left the states with their sovereignty intact. The answer proposed by the Philadelphia convention was what Akhil Amar has described as a "third model that balanced centripetal and centrifugal political forces – a harmonious Newtonian solar system in which individual states were preserved as distinct spheres, each with its own mass and pull, maintained in their proper orbit by the gravitational force of a common central body." While some ratification convention delegates invoked astronomical metaphors, most frequently the Constitution was referred to as a "system" with the goal of preserving "harmony" or maintaining "equilibrium" – both of which, like the planetary imagery, entailed striking a balance.[5]

Such a middle ground between the two acknowledged forms of government was unknown at the time and only belatedly became associated with the government proposed by the Constitution. During the constitutional convention, the challenge of vertically distributing power between the two levels of government was readily acknowledged. In the letter transmitting the proposed Constitution to the Confederation Congress, George Washington noted that the convention had found it "difficult to draw with Precision the Lines

between those Rights which must be surrendered and those which may be reserved."[6]

Nevertheless, the Constitution incorporated aspects of each of the established modes of government. As Martin Diamond has observed, "We now give the single word federal to the system the framers regarded as possessing both federal and national features." Madison and other framers were hardly as self-conscious, as we are today, that they had succeeded in dividing sovereignty. Nonetheless, as Gordon Wood has noted, by achieving "the remarkable division of power between central and provincial governments" in the Constitution, "Americans offered the world a new way of organizing government." This novelty has also been recognized by Allison LaCroix who credits eighteenth-century Americans with developing a "new federal ideology" resting on "a belief that multiple independent levels of government could legitimately exist within a single polity, and that such an arrangement was not a defect to be lamented but a virtue to be celebrated."[7]

Americans before the Civil War were more likely to refer to what we call the "federal government" as the "general government" or "national government." Indeed, calling the central government established under the Constitution the federal government was a misnomer in eighteenth-century terms. For clarity, what we now consider the federal government will often be referred to in this book as the national government.[8]

While historians have traced the intellectual and institutional precursors of the concept of federalism introduced in the Constitution, many of the framers struggled to describe and understand federalism. For those debating the Constitution, the idea of a confederal as well as a national government was familiar. They were far less comfortable, however, with the idea of a government structured somewhere in between the two familiar models.[9]

The compound nature of the government proposed was fully acknowledged by one of the Constitution's principal architects and defenders: James Madison. During the ratification debates, Madison explained that the convention faced the challenge of establishing a national government with sufficient "stability and energy" while still preserving republicanism, or as Madison also put it, "marking the proper line of partition, between the authority of the general, and

that of the State Governments." Madison cautioned Americans not to assume that federalism could be reduced to a bright line of divided authority between the two levels of government. As LaCroix describes it: "the belief in multiplicity, in overlap and concurrence, became a foundational principle of the entire American political enterprise." Apart from the difficulty of conceptualizing federalism and determining jurisdictional boundaries, there were limitations presented by the existing political vocabulary. Collectively, these factors prevented the convention from offering a precise account of federalism. This combination, Madison noted in *Federalist* 37, produced "a certain degree of obscurity" in the balance between the two levels of government created by the Constitution. In the end, Madison mused, the wonder was not that the convention failed to develop an unambiguous theory of federalism with "regular symmetry," but that the delegates came up with something at all.[10]

Madison's warning about the conceptual difficulties and uncertainties inherent in the federalism created by the Constitution was borne out when he tried to describe that system in *Federalist* 39. In analyzing the Constitution, Madison carefully parsed its unique nature – explaining the ways in which the proposed government was "partly federal" and "partly national." In assessing the Constitution's characteristics, Madison lamented that in embarking on their novel enterprise, convention delegates only possessed negative precedents. That is, the Articles of Confederation and similar arrangements rested on incorrect principles. As such, the experience of those confederacies furnishes "no other light than that of beacons, which give warning of the course to be shunned, without pointing out that which ought to be pursued." During and after the ratification debates, Madison reiterated that the government proposed by the Constitution was a unique "compound." Moreover, he reminded observers that the absence of "technical terms or phrases" made it difficult to describe the form of government advanced by the delegates.[11]

In *Federalist* 39 Madison identified the "evident" truth that the government established by the Constitution had to be "strictly republican" to honor "the people of America" and "the fundamental principles of the revolution." In addressing the charge that delegates had created a consolidated national government, Madison responded that the proposed Constitution was neither national nor federal, but "a

composition of both." Namely, the Constitution was neither national in the sense of consolidating the states nor was it federal in the sense of establishing a confederacy of sovereign states. Implicit in Madison's description of the mixed federal and national features of the Constitution was his appreciation of an inevitable and ongoing tension in the equilibrium of federalism.[12]

Because the Constitution drew from both traditional models of government, its defense by proponents of the Constitution was complicated and invited criticism from those who viewed the proposal through the lens of the traditional binary choice between confederal or national government. Proponents of the Constitution called themselves Federalists, thus labeling their opponents Anti-Federalists, a designation the latter protested since they viewed themselves as the true supporters of federalism. Indeed, one Anti-Federalist, Luther Martin, opposed ratification on the grounds that the Constitution was not sufficiently confederal. He recognized the mixture of federal and national elements, but thought the Constitution contained enough federal features to allow its proponents to pass it off as such upon "the unsuspecting multitude" while allowing its advocates, after ratification, "to strike out every part that has the appearance of being federal, and to render it wholly and entirely a national government." Martin clearly understood that the Constitution did not leave the states entirely sovereign. Moreover, many Anti-Federalists were concerned that the proposed Constitution also included open-ended phrases, such as "all means necessary and proper" that invited an expansion of national power, perhaps without limit.[13]

Other Anti-Federalists, while conceding deficiencies experienced with the confederal model embodied in the Articles of Confederation, were also concerned about features of national power in the Constitution. Herbert Storing described such Anti-Federalists as embracing a form of "new federalism." This distinguished them from advocates of traditional or pure federalism by being receptive to a combination of a federal and a national system. Storing noted yet another important shift during the ratification debates after the legitimacy of the new federalism was accepted. The Federalists began emphasizing "the primacy of the national component in the mixture, while the Anti-Federalists urged the importance of a strict division of

power and even something like a divided sovereignty, the possibility of which their earlier, strictly federal argument had denied."[14]

The Constitution's division of powers between a national government and state governments produced a dynamic equilibrium in the newly established system. As Bernard Bailyn has noted, the Constitution was for its proponents "a great web of tensions, a system poised in tense equilibrium like the physical systems Newtonian mechanics had revealed." For Samuel Beer, the Constitution "established two sets of governments which would watch and control one another" with neither having unlimited authority. The importance of maintaining the constitutional equilibrium of federalism was readily acknowledged by its proponents during the ratification debates. But how that balance would be monitored was less clear, even though Madison and Hamilton would address some of the possibilities in *The Federalist*.[15]

In an ideal world, according to James Monroe, one should "mark the precise point at which the powers of the general government shall cease" and where "those of the states shall commence." Others, however, pointed out the impossibility of such precision since the "inaccuracy of language" precluded that objective. Proponents of the Constitution conceded it did not and could not provide crystal clarity in dividing authority and power between the national government and those of the states.[16]

For Alison LaCroix, sovereignty gave way to jurisdiction "as the central organizing principle – and battlefield – of American federalism." Yet, as this study will show, questions of sovereignty *and* jurisdiction were both areas of contention for American federalism. Furthermore, as Gerald Leonard and Saul Cornell have pointed out, "The distribution of power between the states and the new powerful central government created by the Constitution meant that defining and policing the boundaries of federalism would become a central problem in American law."[17]

Fear of Consolidation by Opponents of the Constitution

How Hamilton and Madison became the architects of interposition is linked to the debate over ratification in New York, which precipitated the appearance of *The Federalist*. Scholars have long agreed that

a central contention of Anti-Federalists was that the proposed frame of government threatened the existence of the states. As expressed by Jackson Turner Main, Anti-Federalists believed that the Constitution had consolidated "previously independent states" into a national government, reducing sovereign states to "a shadow of their former power."[18]

That conviction represented an essential divide between supporters and opponents of the Constitution. In Jack Rakove's words, Federalists wanted to identify "a middle ground between confederation and consolidation" but Anti-Federalists denied "that such a middle ground could ever be discovered or any equilibrium long maintained" and warned that ratification of the Constitution would inevitably lead "to the 'annihilation' of the states." Opponents of the Constitution saw signs of consolidation from the moment the convention completed its work. One purportedly damning piece of evidence was the cover letter to Congress that accompanied the proposed Constitution. Written by Gouverneur Morris but signed by Washington, the letter described "the Consolidation of our Union" as the guiding principle of the convention's delegates. When Samuel Adams read the opening words, 'We, the people,' he immediately identified consolidation. As he put it, "as I enter the Building I stumble at the Threshold." If the Constitution intended the creation of a truly federal government, it should have proclaimed "a Federal Union of Sovereign States." As it was, the words 'We, the people,' signaled the intent, according to a member of Massachusetts's ratifying convention, for "an actual consolidation of the states" with the necessary consequence of "a dissolution of the state governments."[19]

Fears about consolidation and the extinction of the states were particularly acute in New York and shaped the response and argument of *The Federalist*. The issue of consolidation surfaced even before the debate over ratification. After attending the convention for six weeks, two of the three New York delegates, Robert Yates and John Lansing, Jr., left Philadelphia in disgust. They believed the convention had disregarded its instructions to revise the Articles of Confederation and was bent on establishing a "consolidated government." Nonetheless, Yates and Lansing stayed long enough to hear Hamilton advocate for a far more centralized government – one that would overshadow the states – than the proposed form of government

he later celebrated in *The Federalist*. In a dramatic confrontation in the New York ratifying convention, Yates and Lansing accused Hamilton of duplicity and threw his words back at him in defiance of the informal agreement not to breach the secrecy of the constitutional convention.[20]

Before those fireworks erupted in the state's ratifying convention, Hamilton and Madison as the principal authors of "Publius" responded to a New York critic who focused on the supposedly consolidating effects of the Constitution. Nine days before Hamilton's initial *Federalist* essay appeared, the *New York Journal* published the first of a series of essays by "Brutus." James Madison, then in New York City, read the piece and took notice, writing a fellow Virginian about a "new Combatant" in the ratification debate. "Brutus" speculated if "a confederated government" was "best for the United States," but concluded that consolidation was inevitable under the proposed Constitution given the distribution of power between the two levels of government. For Brutus, the reserved powers of the states would soon dwindle "except so far as they are barely necessary to the organization of the general government." Such "power retained by individual states, small as it is, will be a clog upon the wheels of the government of the United States," encouraging that government to move it "out of the way." Although the Constitution might not have achieved complete consolidation, that prospect would become clear enough once the national government began exercising its broad grants of power.[21]

Both Madison and Hamilton denied an intent to create a consolidated government even as they conceded that the Constitution departed from a purely confederate model. Nonetheless, Hamilton's disavowal of any inclination towards consolidation was clearly a form of what Garry Wills has called "sweet talk," arguments designed to disarm and sway critics of the Constitution. The scenario of the aggrandizement of the authority and power in the national government at the expense of state governments described by "Brutus" was not an unpleasant picture for Hamilton. Indeed, during the formation of the Constitution and in the early years of its operation, Hamilton retained a national vision consistent with what "Brutus" predicted. As Jack Rakove has described, Hamilton even as he was writing essays for *The Federalist* "was already looking beyond ratification to consider what other measures and policies would be

required to convert the ambiguous promise of the Constitution into the nation-state whose most ambitious architect he was intent on becoming." For Madison, the case was otherwise. On the eve of the convention, Madison shared his hopes with Washington for "a new system" that would "reform" the existing governmental structure. Madison thought that "a consolidation of the whole into one simple republic would be as inexpedient as it is unattainable." Instead, he sought a "middle ground" that could support both "a due supremacy of the national authority" and the utility of "the local authorities."[22]

Given the task at hand – securing ratification – more was needed from Madison and Hamilton than simply denying an intent to create a consolidated government or describing the Constitution as partly federal, partly national. The fact remained that two levels of government were created under the Constitution. Madison and Hamilton were forced to address what critics of the Constitution – and "Brutus" in particular – wanted to know: how the equilibrium of federalism would operate as a practical matter. Although expressed in different ways by Anti-Federalists, their central concern came down to one basic question: What assurance did those who might ratify the Constitution have that the national government under that Constitution would not exceed its rightful authority and encroach upon the rights of the state governments or the liberties of the people?

Madison and Hamilton responded by suggesting that multiple monitors of federalism existed to ensure that such potential overreaching by the national government would not occur. The first obvious and practical check against encroachment involved the courts. Both Madison and Hamilton assigned a primary role for judges, and particularly the Supreme Court, to serve as arbiters of the proper operation of federalism. Madison described the Supreme Court's function in the course of analyzing the federal as opposed to national traits of the Constitution in *Federalist* 39. The division of sovereignty between the two levels of government under the Constitution meant that in "controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide, is to be established under the general Government." The Supreme Court was "clearly essential to prevent an appeal to the sword, and a dissolution of the compact." But it was left to Hamilton to offer a more complete

explanation of how the judiciary might operate to monitor federalism.[23]

Like Madison, Hamilton asserted that the national government "must judge ... the proper exercise of its powers." Judicial independence was crucial for judges to fulfill their duty as "faithful guardians of the constitution." For Hamilton, legislatures could not be "the constitutional judges of their own powers." Instead, the courts were "designed to be an intermediate body between the people and the legislature, in order ... to keep the latter within the limits assigned to their authority."[24]

In *Federalist* 80, Hamilton considered the "proper extent" of federal judicial authority. He thought that federal jurisdiction extended to issues arising "out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation." Although legislative encroachment exceeding constitutional powers might come from either Congress or the state legislatures, Hamilton highlighted the Supreme Court's role by emphasizing the court as a counterweight to state legislatures. Of necessity, "an authority in the federal courts" with effective power was needed "to over-rule" state laws that might be in "manifest contravention" of the Constitution. But such judicial monitoring hardly addressed the concerns of Anti-Federalists who were focused on possible intrusions from the opposite direction. What assurance existed that the national government would not, as "Brutus" predicted, seek to move "out of the way" the powers left to the states.[25]

Initial Responses to Charges of Consolidation

A more fundamental answer to the charge that the Constitution implied consolidation was the response by Madison and Hamilton in *The Federalist,* as well as by other Federalists during the ratification debates: that the federal structure of the Constitution rested on the ultimate sovereignty of the people. This foundation ensured that states possessed greater means and legitimacy to resist encroachments by the national government than that government possessed to vindicate its own authority. They argued that the outwardly directed centrifugal forces sustaining state interests were more powerful than the inwardly directed centripetal forces supporting the national government. Thus,

the federal balance under the Constitution was tipped in favor of the state governments and not towards the national government. The people, who were the basis of all authority, would naturally have greater and deeper ties, attachments, and loyalties to their local and state governments than they would to the national government. The people's vigilance of government would be accompanied by a supportive attitude towards their state governments and a wariness of the national government. In addition, the large number of state and local representatives and officials dwarfed the comparatively few federal office-holders and provided an abundance of watchful eyes on the operation of the national government. Such scrutiny coupled with the means of effecting political change and exerting pressure on wayward federal representatives formed a powerful check to keep the actions of the national government within proper constitutional bounds. And in the final resort, the existence of state militias and the natural law right of revolution gave the people in the states a clear advantage in any ultimate standoff between the two levels of government.

As Madison expressed it in *Federalist* 45, "the balance" between the two levels of government was "much more likely" to be influenced by the weight of the state governments. In addition, in *Federalist* 46, Madison argued that state governments possessed unique advantages in protecting their rights and those of the people of their states. State governments had both greater means and heightened disposition to "resist and frustrate" measures of the national government.[26]

Madison compared the influence of state as opposed to national laws. A popular state law that impinged on the national government would likely be "executed immediately," while an unpopular measure of the national government that exceeded its authority would face powerful and readily available state opposition. Such opposition might include the "refusal to co-operate with the officers of the Union" as well as the passage of legislative measures. Resistance from a large state presented "very serious impediments" which if supported by many other states would erect "obstructions" the national government would seek to avoid.[27]

Hamilton similarly suggested that in the unlikely event federal officers attempted to "usurp" their rightful powers under the Constitution, Congress, which represented the people in the states,

"would controul" such a misuse of authority. Hamilton echoed Madison's reasoning: that human nature gave people deeper attachments to governmental institutions closer and more familiar to them than those at a distance. Consequently, it was clear to Hamilton that in any "contest" between the national and state governments the people would take the side of their "local government."[28]

Federalists had argued that state governments possessed an advantage over the national government even before its expression in *The Federalist*, and Federalists continued to make that argument in ratification conventions even as "Publius" began to appear. For example, in early December 1787 James Wilson in the Pennsylvania ratifying convention dismissed the idea that under the Constitution the states would be unable to defend their prerogatives. Instead, he thought that the national government "will not be able to maintain the powers given it against the encroachments and combined attacks of the state governments." In mid-January 1788 Charles Pinckney reached a similar conclusion in the South Carolina ratifying convention. An "infringement" or "invasion" of the rights of the state governments by the national government appeared to him "the most remote of all our public dangers." Instead, he feared the proposed national government would not be "sufficiently energetic" and that the state governments will "naturally slide into an opposition against the general one." Ultimately, it was argued that state governments could easily protect their rights because they derived their power from the sovereignty of the people.[29]

Both Hamilton and Madison also referred to the ultimate authority of the people to monitor the constitutional order – at least as a matter of constitutional theory. In *Federalist* 16 and 31, Hamilton suggested that overreaching by state governments under the Constitution "would always be hazardous" since "strength is always on the side of the people" in republics. In the end, the balance of federalism "must be left to the prudence and firmness of the people; who, as they will hold the scales in their own hands, it is to be hoped, will always take care to preserve the constitutional equilibrium between the General and the State Governments." Hamilton was even more explicit in *Federalist* 33 where he identified the specific role of the Supreme Court to ascertain the "proper exercise" of the national government's powers. Nonetheless, "If the Federal Government should overpass the just bounds of its authority … the people … must appeal … and take

such measures to redress the injury done to the constitution, as the exigency may suggest and prudence justify."[30]

Madison also devoted attention to the vital role that the people played in maintaining the equilibrium of federalism. In discussing the relationship between the national and state governments, Madison in *Federalist* 46 admonished critics of the Constitution for ignoring a crucial fact. They have "lost sight of the people altogether." He offered the reminder that the people were "the ultimate authority" that could act if either the federal or state government attempted "to enlarge its sphere of jurisdiction at the expense of the other." Because the people were the Constitution's "only legitimate fountain of power," it was consistent with republican theory to recur to the people's authority "whenever any one of the departments may commit encroachments on the chartered authorities of the others." The plenary authority of the people gave them the right "in the last resort" to decide if the national government exceeded its constitutional authority. Ultimately, the Constitution – founded on a sovereign people – made them "the primary controul on the government."[31]

Thus, in *The Federalist*, Madison and Hamilton both defined the scope of enhanced national power and deflected the charge of consolidation. In *Federalist* 39, Madison argued that the power of the national government "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects." In *Federalist* 40 Madison asserted that the Constitution regarded states as "distinct and independent sovereigns." In *Federalist* 9 Hamilton dismissed concerns about consolidation by insisting that instead of "implying an abolition of the State Governments," the Constitution "leaves in their possession certain exclusive and very important portions of sovereign power." And in *Federalist* 32 Hamilton maintained that the state governments "would clearly retain all the rights of sovereignty" that they previously possessed and that the Constitution had not "*exclusively* delegated to the United States."[32]

Hamilton's and Madison's Elaboration of Interposition

It was one thing to identify the theoretical role that the people might play in matters of the last resort. But "Brutus" had challenged Federalists to prove how in practice an equilibrium might be

maintained between the two levels of government before matters became dire. In *The Federalist*, Hamilton and Madison described how the state legislatures in particular could and would operate as effective watchdogs of the governmental structure through the constitutional tool of interposition and thereby help maintain federalism's proper balance.

Scholars have noticed that *The Federalist* had minimal impact on the broader ratification debate because the essays received little attention outside of New York. Despite that fact and its origin as campaign rhetoric, the work importantly shaped early American constitutional thinking and behavior. The *Federalist* essays written by Hamilton and Madison deeply resonated with Americans when the essays described how state legislatures – on behalf of the people – would be able to oppose oppressive and unconstitutional measures of a national government. A few writers had speculated about the importance of state legislatures during the ratification debate, but the *Federalist* essays offered the most thoroughgoing description of what became the practice of interposition. In four essays written by Hamilton (*Federalist* 26, 28, 84, and 85) and four by Madison (*Federalist* 44, 46, 52, and 55) they identified all of the features that interposition would later assume in the hands of state legislatures that challenged actions of the national government for unduly expanding its constitutional authority.[33]

The interposition-related essays of *The Federalist* have rarely been examined collectively and without attention to the passages setting out the tool of interposition partly because neither Madison nor Hamilton used the term "interposition." Although the elements of interposition as it would be practiced were described in *The Federalist* essays, scholars assume that interposition was born of a post-ratification doctrine of states' rights. That assumption is incorrect and is the primary reason that the roots of interposition in *The Federalist* have been overlooked.

Three Principal Elements of State Legislative Interposition: Monitoring, Sounding the Alarm, and Interstate Communication

There were three principal elements of the tool of interposition that can be gleaned from the eight interposition-related *Federalist* essays. First, they identified the state legislatures as one of the monitors of the

constitutional equilibrium of federalism, often described as "sentinels" or "guardians." Second, as guardians of that equilibrium, it was the function of state legislators to identify and then declare their perception of potential encroachments by the national government on the authority of the state governments or the rights of the people. Both Madison and Hamilton described that step as sounding the alarm. Third, they envisioned state legislatures launching interstate efforts to bring widespread attention to the alleged enlargement of powers by the national government.

Sounding the alarm was not simply a matter for individual states, but a means of stimulating a nationwide conversation and debate that might result in a correction or reversal of such overreaching by focusing scrutiny on the questionable action and generating political pressure. Both Madison and Hamilton described initiating correspondence with other state legislatures and formulating plans to respond to the encroachments. Neither of them suggested that sounding the alarm amounted to a nullification of the acts taken by the national government. Instead, the "alarm" was the considered judgment of a legislative body acting as a monitor of the constitutional equilibrium.

In every particular, these three elements emerged in the practice initiated by state legislatures after the Constitution's ratification when they passed instructing and requesting resolutions directed at their congressional delegations. In those resolutions, the state legislatures specified what they believed to be the unconstitutional acts of the national government and requested the state's governor to share the resolutions with other state legislatures.

Two months after the first "Brutus" essay appeared, Hamilton in *Federalist* 26 and 28 described several elements of interposition in addressing concerns raised by Anti-Federalists about standing armies as a result of the Constitution's grant of congressional authority over military appropriations. In *Federalist* 26 Hamilton analyzed the requirement (in Art. I, Sec. 8, Clause 12) that no military appropriations would exceed two years. He pointed out that even if Congress tried to "exceed the proper limits" of the Constitution, the public would learn of the danger and have "an opportunity of taking measures to guard against it." This awareness, Hamilton explained, did not rely on political parties because state legislatures

would be monitoring the national government. During congressional debates over military appropriations, state legislatures would "always be not only vigilant but suspicious and jealous guardians of the rights of the citizens, against incroachments from the Federal government."[34]

Hamilton predicted that state legislatures would "constantly have their attention awake to the conduct of the national rulers and will be ready enough, if anything improper appears, to sound the alarm to the people." Hamilton's alarm imagery of the role of state legislatures to bring attention to potentially unconstitutional encroachments by the national government and thereby invite discussion and renewed consideration was echoed by Madison.[35]

In *Federalist* 28 Hamilton expanded his argument that state legislatures as "select bodies of men" would provide "complete security" against overreaching by the national government since they would see though the pretenses of unwarranted national authority that might escape the people's attention. They could then exercise their role to: "discover the danger," "adopt a regular plan of opposition," "readily communicate with each other in the different states; and unite their common forces for the protection of their common liberty." In stressing the ability of state legislatures to develop political opposition through interstate communication in order to respond to instances where the national government overstepped its authority, Hamilton advanced an idea that Madison further developed.[36]

Madison's contributions to developing the idea of interposition began in *Federalist* 44 and 46. In *Federalist* 44 Madison addressed a fierce point of contention advanced by Anti-Federalists: the supposed danger of granting Congress authority to enact all laws 'necessary and proper' in exercising the national government's delegated powers. Few other clauses of the Constitution, he correctly noted, had received more critical attention. Opponents of the Constitution worried that the clause might result in widespread, dangerous, and unchecked powers that would overawe the state governments. Madison asked: "[W]hat is to be the consequence, in case the Congress shall misconstrue this part of the Constitution, and exercise powers not warranted by its true meaning?"[37]

Madison responded that such "usurpation" was unlikely since it required connivance between the judicial and executive branches.

But should those branches of the national government collude in grabbing unauthorized power, "in the last resort, a remedy must be obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers." The people possessed this same political check if their state governments exceeded the authority granted them under state constitutions, but this "ultimate redress" would be far more effective in the context of the federal government because the state legislatures exercised an interposing role between the national government and the people.[38]

As Madison explained, unconstitutional acts of Congress would inevitably invade the rights of the state legislatures, and thus those bodies "will be ever ready to mark the innovation, to sound the alarm to the people, and to exert their local influence in effecting a change of federal representatives." The existence and function of state legislative interposition meant that unconstitutional acts of the national government would be more likely noticed and redressed than would violations of the state constitutions. That was because, Madison explained, there was no similar "intermediate body between the State Legislatures and the people" in the event that state legislators exceeded their powers under their state constitutions whereas the state legislatures would react to constitutional overreaching by any branch of the national government. Obviously, the state's judiciary might play an intervening role between the state government and the people of a given state. But here Madison stressed the absence of a body in the state context that might assume the role of interposition like state legislatures who would always be "watching the conduct" of the national government.[39]

In *Federalist* 46, Madison described the dynamics of state legislative reaction that foreshadowed the practice of interposition. Madison predicted that "ambitious encroachments of the Federal Government, on the authority of the State governments" would not merely "excite" one or a few states, but would be "signals of general alarm." "Every Government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted."[40]

Madison's description of interstate efforts to coordinate a response to actions of national government overreaching was prescient. Such

interstate action through correspondence was exactly what happened after ratification when state legislatures passed instructing and requesting resolutions on issues of allegedly unconstitutional activity of the national government. Directing that such resolutions be shared with other state legislatures became the means of coordinating the "Plans of resistance" that Madison spoke of in *Federalist* 46. Moreover, legislative resolutions instructing and requesting the state's congressional delegation about national encroachments on the authority of the state governments served to bring the tool of interposition to the attention of Congress.

Madison's words not only echoed Hamilton's language in *Federalist* 26 but provided justification for those who employed interposition after ratification. In *Federalist* 46 Madison reiterated the monitoring function of the state legislatures and in *Federalist* 52 he reminded his readers that Congress would not only be "restrained" by the people but would also be "watched and controuled" by state legislatures. And in *Federalist* 55 Madison revisited the theme that it was unlikely that the state legislatures "would fail either to detect or to defeat a conspiracy" by Congress "against the liberties of their common constituents."[41]

Even as *The Federalist* advanced the case for ratification, Hamilton returned to the idea that state legislatures would serve as key sentinels to detect and respond to federal government overreaching. In *Federalist* 84, Hamilton addressed critics worried about giving "large powers" to a distant national government. He conceded that the distance between where most state inhabitants lived and the nation's capital meant that they could not monitor the activity of the national government in person. Yet "the vigilance of the state governments" and in particular the state legislatures would perform that monitoring function. Hamilton described the practical operation of interposition in much the same way as had Madison: "The executive and legislative bodies of each state will be so many centinels over . . . the national administration"; and they "can readily communicate the same knowledge to the people." Thus, both governors and state legislators, as well as citizens, would be able to "sound the alarm when necessary."[42]

Significantly, the last essay in *The Federalist* echoed the theme of state legislatures as protectors of the people's liberties and as an

interposing body responding to impending encroachments by the national government. In *Federalist* 85 Hamilton addressed the concern of some Anti-Federalists about securing the supermajority requirements of state legislatures for constitutional amendments and for holding future constitutional conventions. Whatever challenges that might exist in meeting those requirements for changes affecting only "local interests," Hamilton identified no such "difficulty" when issues involved "the general liberty or security of the people." He confidently concluded with words that captured the idea of interposition that both he and Madison had formulated: "We may safely rely on the disposition of the state legislatures to erect barriers against the encroachments of the national authority."[43]

The Federalist's denial that the Constitution created or was intended to produce a single consolidated national government was coupled with the assertion that instead it called for a balance of authority between the two levels of governments and *some* measure of divided sovereignty between them. Working out the dimensions of that division and the proper equilibrium of federalism provided the context for interposition as a mechanism for monitoring the balance between the two levels of government. It also left the state legislatures – as Madison and Hamilton described in *The Federalist* – free to sound the alarm if they believed the national government overreached its constitutional bounds.

One impediment in appreciating the tool of interposition as elaborated by Madison and Hamilton is that they also alluded to a wide range of actions that state legislatures might take – some of which went well beyond the sounding the alarm function of interposition. For example, in *Federalist* 26 Hamilton wrote that state legislatures might not only give voice to perceived encroachment by the national government but potentially serve as "the ARM" of the people's discontent while Madison in *Federalist* 46 referred to the possibility of an "appeal to a trial of force" in the event of "ambitious encroachments" by the government on the authority of state governments. Both statements apparently referred to the well-known and widely accepted right of revolution. Grounded in natural law, the right of revolution always remained an option of an oppressed people as a matter of final resort.[44]

Indeed, when Madison and Hamilton wrote about state legislatures formulating plans of "opposition" and "resistance," many scholars have assumed they were talking about a resort to arms through the use of state militias or by invoking the natural law right of revolution. Madison also made a vague reference to state "legislative devices" should the federal government pass "unwarrantable" measures. If state legislative "devices" were intended to invalidate national laws or policies, such responses – along with the invocation of the right of armed resistance or other forceful opposition to the national government – definitely went well beyond the sounding the alarm function of interposition. Such language meant that the concept of interposition was somewhat muddied and potentially dangerous from the beginning.[45]

Some of those to whom Madison and Hamilton directed their argument about the benefits of interposition were openly dismissive of this supposed check against overreaching by the national government. One Anti-Federalist, who took the name the "Federal Farmer," writing after Hamilton's *Federalist* 26 and 28 but before Madison's *Federalist* 44, 46, and 52, regarded the idea of interposition as an essentially toothless constitutional tool. He had been told by Federalists that state governments "will stand between the arbitrary exercise of power and the people." The "Federal Farmer" conceded that if Congress expanded its powers, state governments could petition Congress and protest such measures. At the end of the day, however, this was "no more than individuals may do." He complained that the Constitution failed to provide the means "by which the state governments can constitutionally and regularly check the arbitrary measures of congress." In a subsequent letter, the "Federal Farmer" dismissed the value of state governments serving as the "ready advocates" and "guardians of the people" if they possessed "no kind of power" provided by the Constitution "to stop, in their passage, the laws of congress injurious to the people."[46]

A more direct challenge to the idea of interposition was directed at Hamilton in New York's ratifying convention by John Lansing, Jr. Hamilton repeated the argument that both he and Madison made in *The Federalist* that state governments possessed "natural strength and resources" that "will ever give them an important superiority over the general government." After enumerating the ways such attachments and

support flowed to the state governments, Hamilton concluded that it would be "shocking to common sense" to think that the people would ever allow their state legislatures "to be reduced to a shadow and a name." Lansing dismissed Hamilton's argument, saying it "only proved that the people would be under some advantages to discern the encroachments of Congress, and to take the alarm." But, so what? What "other resource" did the people have, he asked – other than "rebellion" – which he was not encouraging. He then proceeded to answer his own question: "None but to wait patiently till the long terms of their senators were expired, and then elect other men. All the boasted advantages enjoyed by the states were finally reduced to this." Beyond the political pressure of interposition, Lansing wanted – along with the "Federal Farmer" – a check provided in the Constitution, such as a provision vesting the power of senatorial recall in the state legislatures.[47]

The Rhetorical Dimensions of Hamilton's and Madison's Discussion of Interposition

Hamilton's and Madison's description of interposition in *The Federalist* rightly makes them co-authors of the concept. However, their advocacy of a special role for state legislatures as monitors of the equilibrium of the two levels of government was in the end a rhetorical argument designed to address the objections of Anti-Federalists in general and "Brutus" in particular.[48]

During the ratification debates, Hamilton and Madison were deeply disenchanted with the behavior of state legislatures. Madison's own service as a state legislator in the Virginia assembly from 1784 to 1787 had convinced him, as Gordon Wood has put it, that "the real problem of American politics lay in the state legislatures." Madison objected to both the substance and the process by which a bewildering array of state legislative measures were passed and then as quickly altered or repealed. Even before the federal constitutional convention met, Madison cataloged his concerns in a well-known memorandum in 1787 entitled *Vices of the Political System of the United States*. After the convention adjourned, Madison assured Jefferson that the "mutability" and "injustice" of state legislation had widely been considered "a serious evil" and served as a catalyst for the constitutional convention. During

the convention, Hamilton explained that his suggestion that states should be abolished rested on the fact that since "no boundary could be drawn between the National & State Legislatures; … the former must therefore have indefinite authority." While more circumspect in public, Hamilton still criticized state legislators in *Federalist* 71 for thinking they were "the people themselves" and for not tolerating opposition from either their own states' executive branch or judiciary. Given their strong reservations about state legislatures, it is unlikely that Madison's and Hamilton's elaboration of a mechanism of interposition came with their wholehearted endorsement. After all, the power of interposition depended on the initiative, reliability, and judgment of state legislators.[49]

Despite their concerns about state legislatures, Madison and Hamilton accepted the underlying premise of interposition that state governments were more than a match for the authority of the new national government. During the ratification debate, each believed the proposed Constitution made it more likely that states would encroach on the national government instead of the other way around. Madison's and Hamilton's misgivings about the Constitution reflected their disappointment that the convention had not granted the national government greater powers. As Jack Rakove has put it, "in dispelling the specter of consolidation, Madison and Hamilton could be entirely sincere because they still doubted that the Convention had in fact solved the dilemma of divided sovereignty in a way that would give the Union the decided advantage over the states."[50]

While delegates labored to produce a draft Constitution, Hamilton wrote to Washington sharing the consensus among "thinking men" that the convention would "not go far enough" to produce an "energetic" and "efficient constitution." After the convention adjourned and before beginning work on *The Federalist*, Hamilton offered some "Conjectures about the New Constitution." Even if as expected Washington became the first President, the only hope Hamilton had for the Constitution was that over time a "good administration" might garner "the confidence and affection of the people" and eventually "triumph altogether over the state governments and reduce them to an [entire] subordination, dividing the larger states into smaller districts." In addition, "the general

government may also acquire additional strength." Without this, he predicted that in a few years' time "contests" over "the boundaries of power between the particular governments and the general government" would "produce a dissolution of the Union."[51]

Madison shared Hamilton's belief that the Constitution provided insufficient power to the national government and that it lacked adequate means to control the state governments. During the convention Madison proposed and strenuously argued for a congressional veto over state legislation. Madison wanted to ensure that state legislatures could not enact laws disapproved of by the national legislature. Giving Congress such power was indispensable to "controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits." If anything, Madison was even more concerned about the states and the need for a veto than his notes of the convention debate indicated. He was bitterly disappointed when the convention did not incorporate the veto into the Constitution. Shortly before the convention's adjournment, Madison wrote Jefferson predicting that the proposed Constitution would "neither effectually *answer* its *national object* nor prevent the local *mischiefs* which every where *excite disgusts* agst the *state governments*." Soon after the convention disbanded, Madison, who became one of the most indefatigable advocates for ratification, wrote a long letter to Jefferson explaining his profound disappointment with the Constitution. In Madison's view the Constitution lacked a crucial ingredient to ensure the supremacy of the national government and the protection of individual rights: "A constitutional negative on the laws of the States." Madison doubted that the judiciary alone provided an adequate check against state legislatures and he anticipated the need for "a recurrence to force" in the event states disobeyed judicial opinions supporting "the Legislative rights of the Union."[52]

During the convention Madison also supported proportional representation in both houses of Congress that provided "constitutional protections for slaveholders." However, convention delegates would not support this and agreed that only the House should reflect proportional state representation. With the three-fifths clause approved, "southern delegates coalesced around slavery" and northern delegates were willing to "compromise over slavery." Madison remained opposed to the compromise.[53]

How Americans perceived the balance of national and state power under the Constitution varied and shifted over time. Indeed, Madison's views about the equilibrium of federalism soon underwent a change from the attitudes he held in the wake of the drafting of the Constitution. But during the ratification debates, the potential effectiveness of interposition due to the great influence attributed to state legislatures did not seem farfetched to many Federalists, including Madison and Hamilton. By describing a role for state legislatures to sound the alarm about unconstitutional actions of the federal government, they expressed an idea and provided a justification for steps that some state legislatures began to take.

As much as Hamilton wished to disown his support for the tool of interposition in *The Federalist* after the ratification debate, the fact remained that he had articulated an active role for state legislatures as monitors of the constitutional order that foretold the actions later taken by legislators and governors. Once words are reduced to print, authors lose control over how their expressions and ideas are used. Thus, the language used by Hamilton and Madison in the course of the ratification debate took on a life of its own. The controversy over interposition could not be put to rest by claiming that ideas expressed in *The Federalist* no longer meant in later periods what they clearly seemed to suggest at the time. Prominent Federalists had indeed asserted that state legislatures would play an important role as sentinels to help ensure that the national government would not encroach on the authority of state governments and that they would thus serve as a vital part of the system of government contemplated by the Constitution.[54]

Misconceptions Surrounding Interposition

When the sounding the alarm function of interposition was invoked by state legislatures after ratification, some criticized that step as utterly impractical for resolving questions of constitutional overreaching by the national government or identifying an imbalance in the equilibrium of federalism. Multiple states rendering their judgments on those issues would only create confusion since a definitive resolution required a single decision-maker such as the Supreme Court. But the idea of interposition advanced as a rhetorical argument in *The Federalist* was not a challenge to the Supreme Court's *authority* to interpret the

Constitution and render judicial decisions about the boundaries of federalism.

When state legislatures sounded the alarm by highlighting potential unconstitutional overreaching by the federal government, they were not wresting away from the Supreme Court its authority to render judicial decisions. Those alarms were only designed to stimulate a wider, interstate awareness and concern about the action in question, a heightened interest that might ultimately result in a shift in public opinion helping to facilitate a reversal of the purported constitutional encroachments by the national government. Potentially, interposition could prompt a change of political representation, or stimulate Congress to enact new laws, or create a movement for constitutional amendment that might revisit the constitutional issue.

The consequence of describing state legislatures as sentinels and guardians introduced a broader vision of constitutional discourse in which other parties and groups – and not the Supreme Court alone – had a role in ensuring that the federal government stayed within its proper bounds. The Constitution called for all federal *and* state officials, including state legislators, to support the Constitution "by oath or affirmation." Many state legislators viewed that requirement as not only commanding them to obey constitutional acts of the national government, but also obligating them to identify and resist unconstitutional acts of that government.[55]

While multiple eyes might keep watch on the operation of the federal government to identify when it might be overreaching, state legislatures were best positioned for interposition. Unlike other sources of critique, such as those coming from individual citizens or the press, a legislature could claim to speak for an entire state. Resolutions passed by state legislators could legitimately be considered an expression of "the people." Moreover, that popular "voice" came in the form of a resolution capable of being shared with other state legislatures and a state's congressional delegation. Passage of a state legislative resolution gave that constitutional opinion a tangible means of transmission not enjoyed by other actors weighing in on instances of allegedly unwarranted acts of the national government. State legislatures not only possessed the logistical means for expressing concerns about constitutional boundaries, but were better suited for watching the national government. With the advantage of acquiring information

through direct communication with the state's congressional delegation and with the expectation that one of their duties was to keep an eye on the operation of the national government, state legislators were arguably better informed than average citizens.

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Viewing interposition with historical hindsight tends to associate it with a sovereign states' rights theory linked to the defense and preservation of slavery and the doctrines of nullification and secession that led to the Civil War. Moreover, interposition bears the burden of its association with White supremacist resistance to the Civil Rights movement of the twentieth century. Viewing interposition from the opposite direction and within the context of the immediate aftermath of the Constitution offers a different picture.

Considering its roots, interposition emerges as a practice of state legislatures playing a more benign and logical role within the unfolding enterprise of balancing the newly minted federalism of the Constitution. As Madison and other Federalists repeatedly assured their opponents during the ratification debate, the Constitution did not create a consolidated government. According to Federalists, the Constitution was neither designed nor did it have the tendency to swallow up all of the authority of state governments. On the other hand, as Madison frequently pointed out, the Constitution did not create a confederated government that left the states with their state sovereignty fully intact. Instead, the Constitution created a government that was partly national and partly federal – and this key characteristic involved a continuing search for a divided, but balanced, sovereignty.[56]

From that perspective, the early concept of interposition was but one of the means to monitor the appropriate operation of the national government. Ultimately, interposition was justified if it defended the authority and power that Federalists insisted was left to the states by the Constitution and helped preserve the rights and liberties of the citizens of those states. If and when the federal government exceeded its appropriate constitutional powers or undermined the legitimate rights of the state governments or citizens of the states, the use of interposition could hardly be considered subversive. Instead, the early practice of interposition could be portrayed as protective of the constitutional order established by the Constitution.

Such views and arguments were not universally shared. From the moment the practice of interposition began, it faced criticism and condemnation from some quarters. During its initial use, Republicans justified their invocation of interposition because Hamilton's economic policies seemed to threaten the proper equilibrium of the Constitution by greatly increasing national power. On the other hand, for Hamilton and other Federalists of the 1790s, the danger to the proper equilibrium of the Constitution came from the opposite direction: the lack of sufficient national power in the face of local and state-oriented tendencies. Perceiving danger from unreasonable and parochial claims by the states, Hamilton and like-minded Federalists developed a hearty aversion to interposition resolutions issued by state legislatures. The criticism heaped on interposition when it first surfaced after ratification, coupled with additional burdens that would denigrate the word "interposition" both before and after the Civil War, complicate the recovery of the concept of interposition as a legitimate tool of American constitutionalism.[57]