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### The States' Duty to Defend Against Federal Excess: James Madison and the Methods of "Interposition"

By Robert G. Natelson\*

#### 1. Introduction

One of the greatest achievements of the Constitution's framers was, in Justice Anthony Kennedy's phrase, to "split the atom of sovereignty."<sup>1</sup> Previous writers often recognized that sovereignty came from the people, but they contended the people must always lodge it in a single level of government. For example, in England, sovereignty was in the King-in-Parliament, with the counties or shires exercising only subordinate authority. In the United States under the Articles of Confederation, sovereignty was located in each state: At that time, the word "confederation" was defined to mean merely an alliance or league rather than a government. In other words, Congress was an assembly comparable to NATO's North Atlantic Council.<sup>2</sup>

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<sup>1</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1996) (Kennedy, J., concurring).

<sup>2</sup> Robert G. Natelson, *The Original Constitution: What It Actually Said and Meant*, 3rd edition (Colorado Springs: Apis Books), 2014, p. 43.

The Constitution enabled the people to divide sovereignty. For certain enumerated powers, they conveyed sovereignty to the federal government. They left the remainder to the states.<sup>3</sup>

The people were to be represented by two sets of agents: federal officials for discharging the enumerated powers, and state officials for discharging the rest.

Thus the people were to be represented by two sets of agents: federal officials for discharging the enumerated powers, and state officials for discharging the rest. Each set had its own sphere of authority. As James Madison wrote in *The Federalist* No. 46, “The federal and State governments are in fact but different agents and trustees of the

people, constituted with different powers, and designed for different purposes.” Among other subjects, federal officials held primary responsibility for foreign affairs, defense, and the post office.<sup>4</sup> The states governed manufacturing, agriculture, land use, real estate titles, in-state commerce, social services, and the law of torts, families, inheritance, corporations, contracts, and most areas of criminal law.<sup>5</sup>

In addition, there were some fields subject to joint responsibility or “concurrent jurisdiction.”<sup>6</sup> Both state and federal governments enjoyed the power to tax, for example, and the states could exercise authority over foreign and interstate commerce, subject to federal supremacy in those fields.<sup>7</sup>

In the modern world, organizations frequently hire different agents for different purposes. For example, a business may hire a purchasing manager and a sales manager, each with responsibility in his or her own sphere. Similarly, a synagogue or church may employ a lawyer for its legal affairs and an accountant for its financial affairs, with the understanding that the two should cooperate where legal and financial matters overlap.

Agents are bound by a set of legal rules called *fiduciary duties*. These are obligations of trust. Agents must be loyal to their employers and act in good faith and with proper attention to their responsibilities. Among those responsibilities is the obligation to prevent others from interfering with one’s work, and, when appropriate, to inform the employer of misconduct by other agents. By way of illustration:

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<sup>3</sup> The exact division between governmental and private power in each state depended on that state’s constitution.

<sup>4</sup> U.S. Constitution, Article I, Section 8. Other enumerated powers are found throughout the Constitution. The federal government could choose not to exercise some of them. The bankruptcy power, for example, was not fully and permanently exercised until 1898.

<sup>5</sup> Natelson, *supra* note 2, p. 44; Robert G. Natelson, “The Enumerated Powers of States,” 3 *Nevada Law Journal* 469 (2003).

<sup>6</sup> Alexander Hamilton discussed this concurrent jurisdiction in *The Federalist* Nos. 32, 33, 34, 81, and 82.

<sup>7</sup> Natelson, *supra* note 2, p. 53.



A business has hired both an accountant named Alice and a lawyer named Larry. After some time, Alice notices that Larry has been regularly exceeding his authority by filing tax returns on behalf of the business, even though that is Alice's responsibility. Larry also is hiring clerks and telling them to regulate employee conduct, and he is entering unauthorized contracts on behalf of the business.

Alice knows the business owners are unaware of Larry's abuses because they have placed too much trust in their agents.

In this illustration, does Alice have a legal duty to inform the owners of Larry's misconduct? Is it her responsibility, if necessary, to push back when he tries to invade her designated areas of responsibility?

Absolutely. In fact, Alice would be violating her own fiduciary duty if she did not respond to Larry's misconduct.

This *Heartland Policy Brief* explains that the Founders similarly thought of government officials as bound by fiduciary duties. In fact, this was a key premise behind how they wrote the Constitution.<sup>8</sup> Federal officials in the executive, legislative, and judicial branches had an obligation to resist

Federal officials in the executive, legislative, and judicial branches had an obligation to resist encroachments by the other branches and by the states.

encroachments by the other branches and by the states. State officials had like responsibility with respect to the federal government. In *The Federalist* No. 85, Alexander Hamilton wrote, "We may safely rely on the disposition of the State legislatures to erect barriers against the encroachments of the national authority." John Dickinson asserted in his third "Fabius" letter supporting ratification of the Constitution,

... [T]he government of each state is, and is to be, sovereign and supreme in all matters that relate to each state only. It is to be subordinate barely in those matters that relate to the whole; and *it will be their own faults* if the several states suffer the federal sovereignty to interfere in things of their respective jurisdictions [emphasis added].

Madison was even more explicit in his 1798 *Virginia Resolution*:

*[T]he states ... have the right, and are in duty bound, to interpose* for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them [emphasis added].

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<sup>8</sup> Robert G. Natelson, "The Constitution and the Public Trust," 52 *Buffalo Law Review* 1077 (2004); Gary Lawson, Robert G. Natelson, and Guy Seidman, "The Fiduciary Foundations of Federal Equal Protection," 94 *Boston University Law Review* 415 (2014).

Part 2 describes the doctrine of “interposition,” the term James Madison used to describe the states’ duty to resist federal over-reach. Part 3 describes six methods of interposition explicitly authorized by the Constitution and two Madison identified as “extraconstitutional” – essentially mechanisms of last resort to be used only when all six constitutional methods had been exhausted.

Part 4 offers brief concluding remarks.

## 2. The Doctrine of Interposition

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand.

James Madison  
*The Federalist* No. 46

In writings published both before and after the Constitution’s ratification, James Madison listed ways for resisting federal overreaching and other forms of abuse.

Madison was the Founder who wrote most about the duty to “push back” when the federal government exceeded its authority. In writings published both before and after the Constitution’s ratification, he listed ways for resisting federal overreaching and other forms of abuse. Some entailed action by individuals or by groups outside of state government: (1)

electoral response (“throwing the bums out”)<sup>9</sup> (2) individual lobbying and disquiet<sup>10</sup> and (3) individual refusal to cooperate.<sup>11</sup> Other methods required state action.

As the language of the 1798 *Virginia Resolution* shows, Madison referred to the state duty to resist federal overreaching as the duty to “interpose.” A contemporaneous dictionary defined interpose as “To thrust in as an obstruction, interruption or inconvenience; to offer as a succour or relief; to place between, to make intervenient.”<sup>12</sup> Other dictionaries featured similar

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<sup>9</sup> *Public Letter from James Madison to Edward Everett* (August 28, 1830), in Gaillard Hunt, ed., *The Writings of James Madison* (New York, NY: J.P. Putnam’s Sons, 1910), pp. 229, 231–32: “When the Alien & Sedition laws were passed in contravention to the opinions and feelings of the community, the first elections that ensued put an end to them.”

<sup>10</sup> *The Federalist* No. 46 (“The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union ...”).

<sup>11</sup> *Ibid.*

<sup>12</sup> Thomas Sheridan, *A Complete Dictionary of the English Language*, 3rd edition (London), 1789 (unpaginated) (defining “interpose”).



definitions.<sup>13</sup> Thus, one interposed when one intervened, often to provide succor (help). The corresponding noun is interposition. Madison also used the noun in this context.<sup>14</sup>

Madison acknowledged that different forms of pushback were appropriate for different cases. His list forms a spectrum from the most moderate to the most severe. Madison also distinguished the methods the Constitution authorizes, expressly or by implication, from those that are extraconstitutional.<sup>15</sup> A measure is

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extraconstitutional if the Constitution does not authorize it. To justify it, one must resort to other sources of authority, such as natural law. Madison contended states should not use extraconstitutional methods unless constitutional methods had been exhausted.<sup>16</sup>

In increasing order of legal force, Madison's *constitutional* methods are as follows:

- state-coordinated campaigns of public and political education – that is, public relations;
- state lobbying efforts directed at Congress;
- state-led lawsuits;
- state legal provisions designed to hinder or fail to cooperate with federal actions;
- interstate coordination of all of the above; and
- the Article V convention process.

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<sup>13</sup> All of the following are unpaginated: Samuel Johnson, *A Dictionary of the English Language* (London, 8th ed.), 1786 (defining "interpose" as "mediate; to act between two parties ... To put in by way of interruption"); Nathan Bailey, *An Universal Etymological English Dictionary* (London, 25th ed.), 1783 (defining "interpose" as "to put in or between, to intermeddle in a business."); John Ash, *The New and Complete Dictionary of the English Language* (London), 1775 (defining "interpose" as "To place between, to thrust in an objection, to offer as succour"); William Perry, *The Royal Standard English Dictionary* (Worcester, MA), 1788 (defining "interpose" as "to thrust in as an obstruction; to mediate between").

<sup>14</sup> See, for example, *Public Letter from James Madison to Edward Everett*, *supra* note 9, p. 231.

<sup>15</sup> *Ibid.*, pp. 234–35 (mentioning the distinctions between "interpositions within the purview of the Constn & interpositions appealing from the Constn to the rights of nature paramount to all Constitutions"). See also James Madison, *Notes on Nullification* (1835) in Gaillard Hunt, ed., *The Writings of James Madison*, *supra* note 9, pp. 340, 353 (listing in order: checks by other government entities, presumably including interposition; constitutional amendment, and resistance, and, at p. 354 stating that constitutional remedies must be used before "ultra-constitutional interpositions").

<sup>16</sup> *Supra* note 9, p. 233 (stating that nullification, as an extraconstitutional remedy, must not be used before an Article V convention). See also *Notes on Nullification*, *ibid.*

The *extraconstitutional* methods are:

- state nullification of federal acts, and
- revolution.

At this point, we should clarify the term “nullification.” Some people employ it as a synonym for interposition. But in its historical usage, “nullification” refers specifically to a state declaration that a federal law is void within the state’s boundaries.

For several reasons, the term “nullification” should be confined to its historical use, not as a synonym for interposition.

The term should be confined to its historical use. One reason is that the historical use is more precise. Another is that the word “nullification” carries unpleasant historical and political baggage. Although states in all parts of the country have tried to nullify federal laws, public knowledge of the term

derives primarily from its use by slave states in the antebellum South. Employing the term to cover other forms of interposition unfairly prejudices them.

### 3. Eight Methods of Interposition

Let’s look more closely at Madison’s eight methods of interposition.

#### A. Public Relations

... the frowns of the executive magistracy of the State ...

James Madison  
*The Federalist* No. 46

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the “Alien and Sedition Acts” passed at the last session of Congress ...

James Madison  
*Virginia Resolution* (1798)

These quotations show Madison acknowledging that states could launch public relations campaigns against federal overreaching. In *The Federalist* No. 26, Hamilton observed:

Independent of parties in the national legislature itself, as often as the period of discussion arrived, the State legislatures, who will always be not only vigilant but suspicious and jealous guardians of the rights of the citizens against encroachments from



the federal government, will constantly have their attention awake to the conduct of the national rulers, and will be ready enough, if any thing improper appears, to sound the alarm to the people, and not only to be the voice, but, if necessary, the arm of their discontent.

Hamilton implied state legislators are better situated than most Americans to identify instances in which the central government has exceeded its power. This is true even in today's Internet Age. State lawmakers and officials often learn about costly federal mandates long before those mandates have penetrated the public consciousness. State lawmakers and officials learn quickly how much of the state budget consists of federal aid and how state policies are directed by federal priorities.

Authority of the states to inform and protest derives from the states' inherent sovereignty. The public relations activities of state officials are protected by the Constitution's First Amendment Speech, Press, Assembly, and Petition Clauses.<sup>17</sup>

State officials frequently have used this method of interposition. During the 1990s, for example, Ben Nelson, then the Democratic governor of Nebraska, told his constituents about the extent to which federal priorities were displacing those of their state: "Why don't they call me administrator?" he asked. "Nebraska seems to more a branch of the federal government than a freestanding sovereign state."<sup>18</sup> During the 1990s, many state legislatures followed Colorado's lead<sup>19</sup> by adopting nonbinding "Tenth Amendment Resolutions" (also called "State Sovereignty Resolutions") to protest against federal overreaching.<sup>20</sup>

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The ineffectiveness of those protests induced state officials to adopt more vigorous methods of interposition.

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<sup>17</sup> "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

<sup>18</sup> Ann LoLordo, "States looking for ways to reclaim lost powers," *Baltimore Sun*, June 12, 1995, [http://articles.baltimoresun.com/1995-06-12/news/1995163074\\_1\\_council-of-state-federal-mandates-state-governments](http://articles.baltimoresun.com/1995-06-12/news/1995163074_1_council-of-state-federal-mandates-state-governments).

<sup>19</sup> Charles Duke, "Implementing the Tenth Amendment: State Sovereignty Resolution," 1994, [http://www.sweetliberty.org/issues/staterights/tenth\\_amend.htm#.VuwoPeIrKUK](http://www.sweetliberty.org/issues/staterights/tenth_amend.htm#.VuwoPeIrKUK).

<sup>20</sup> Another form appears at <http://tenthamendmentcenter.com/10th-amendment-resolution/>.

## B. Lobbying Congress

It is no less certain, that other means might have been employed, which are strictly within the limits of the Constitution. The legislatures of the States might have made a direct representation to Congress, with a view to obtain a rescinding of the two offensive acts; or they might have represented to their respective senators in Congress, their wish, that two thirds thereof would propose an explanatory amendment to the Constitution ...

James Madison

*Resolutions for the Virginia Legislature (1799)*

State officials frequently testify before Congress. State legislatures frequently pass resolutions – often called “memorials” – recommending Congress adopt a course of action. Governors inform Congress of their views. As in the case of the first method of interposition, lobbying Congress and federal officials is an inherent prerogative of state sovereignty and protected by the First Amendment.

Most members of Congress listen respectfully to state officials expressing their concerns.

Before the Seventeenth Amendment was ratified, U.S. senators were elected by their respective state legislatures. Legislatures were not shy about communicating their concerns to the senators they had chosen.

Although senators now are popularly elected,

both senators and members of the House of Representatives know state politicians can affect their prospects for reelection. Most members of Congress, therefore, listen respectfully to state officials expressing their concerns. State legislatures may formally “invite” their congressional delegations to appear before one of their sessions for an exchange of views.

## C. Judicial Challenges

With respect to the Judicial power of the U.S. and the authority of the Supreme Court in relation to the boundary of jurisdiction between the Federal & the State Govts. I may be permitted to refer to the number of the “Federalist” for the light in which the subject was regarded by its writer, at the period when the Constitution was depending [i.e., under consideration] ...

*Public Letter from James Madison to Edward Everett (August 28, 1830)*

In this quotation, Madison was referring to Hamilton’s The Federalist Nos. 16 and 81. In those papers, Hamilton acknowledged that the courts would be able to void unconstitutional laws. Article III of the Constitution recognizes explicitly the authority of the states to participate in federal litigation:



The judicial Power shall extend to ... Controversies between two or more States; – between a State and Citizens of another State ... and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects... . In all Cases ... in which a State shall be Party, the supreme Court shall have original Jurisdiction.<sup>21</sup>

States often sue the federal government or its officials to prevent enforcement of laws or regulations they consider unconstitutional. Currently, 24 states are suing the Environmental Protection Agency over its coal plant emissions rule, the Clean Power Plan.<sup>22</sup> Just a few years ago, 27 states sought to void parts of the Patient Protection and Affordable Care Act (“Obamacare”).

States often sue the federal government or its officials to prevent enforcement of laws or regulations they consider unconstitutional.

State litigation is often successful. In February 2016, the U.S. Supreme Court issued a 5–4 ruling staying implementation of the Clean Power Plan as legal challenges move through lower courts.<sup>23</sup> Since the U.S. Supreme Court’s stay, at least 19 states have suspended efforts to plan for the plan’s implementation.<sup>24</sup> And in the Obamacare case, although the Supreme Court upheld the individual insurance mandate, the Court handed the states an important victory: By a 7–2 margin, the justices ruled Congress could not compel the states to expand Medicaid coverage by withholding all Medicaid money from states that refused to do so.<sup>25</sup> In his opinion for the Court, Chief Justice John Roberts emphasized, partially by quotations from earlier cases, the importance of federalism:

“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.” ... The Framers thus ensured that powers which “in the ordinary course of affairs, concern the lives, liberties, and properties of the people” were held by governments more local and more accountable than a distant federal bureaucracy. *The Federalist* No. 45, at 293 (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: “By denying any one government complete jurisdiction over all the

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<sup>21</sup> U.S. Constitution, Article III, Section 2.

<sup>22</sup> Timothy Cana, “Two dozen states sue Obama over coal plant emissions rule,” *The Hill*, October 23, 2015, <http://thehill.com/policy/energy-environment/257856-24-states-coal-company-sue-obama-over-climate-rule>.

<sup>23</sup> Lyle Denniston, “Carbon pollution controls put on hold,” *SCOTUSblog* (February 9, 2016), <http://www.scotusblog.com/2016/02/carbon-pollution-controls-put-on-hold/>.

<sup>24</sup> See the “Supreme Court Stay Response” map at E&E Publishing’s “Power Plan Hub,” [http://www.eenews.net/interactive/clean\\_power\\_plan](http://www.eenews.net/interactive/clean_power_plan).

<sup>25</sup> *Nat’l Fed. Of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012).

concerns of public life, federalism protects the liberty of the individual from arbitrary power.<sup>26</sup>

However, Roberts added an admonition: “The States are separate and independent sovereigns. Sometimes they have to act like it.”<sup>27</sup> This tells us the Court wants the states to be proactive in challenging federal overreaching.

States should not hesitate to present judicial challenges to federal actions they reasonably believe are unconstitutional.

States should not hesitate to present judicial challenges to federal actions they reasonably believe are unconstitutional. Although private parties also may do so, private parties usually do not have the resources to finance sustained lawsuits against taxpayer-funded federal lawyers. Moreover, private parties may not

have standing to sue, and if they win, the court usually tailors the relief to the plaintiffs’ private interests.

Thus, only the states have the wherewithal to represent in court the freedom and welfare of all their citizens.

#### **D. State Legislative Action**

[T]he embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments. ...

James Madison  
*The Federalist* No. 46

Even when states cannot control what federal officials do, they usually can control what their own officials do. “Legislative devices” regulate how state officials act.

A modern instance of this form of interposition is state refusal to cooperate in joint spending programs, usually by refusing to accept federal funds. Hamilton referred to state noncooperation in *The Federalist* No. 16: “If the interposition of the State legislatures be necessary to give effect to a measure of the Union, they have only not to act, or to act evasively, and the measure is defeated.”

State noncooperation was the precise context of Chief Justice Roberts’ admonition about states needing to act like separate and independent sovereigns:

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<sup>26</sup> *Ibid.*, 132 S.Ct. at 2578.

<sup>27</sup> *Ibid.*, 132 S.Ct. at 2603.



... Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds. In the typical case we look to the States to defend their prerogatives by adopting “the simple expedient of not yielding” to federal blandishments when they do not want to embrace the federal policies as their own... . The States are separate and independent sovereigns. Sometimes they have to act like it.<sup>28</sup>

Turning down federal money can be difficult. The funding source is (mostly) taxation imposed on citizens of the state, and state opinion leaders generally want to “get our money back.” An army of bureaucrats, lobbyists, and other apologists for bigger government frequently pushes state lawmakers to accede to federal allurements. Health care providers, for example, lobbied heavily for full state participation in Obamacare’s Medicaid expansion. That the expansion may compromise future state budgets and is of little demonstrated benefit<sup>29</sup> is of less importance to the lobbyists than their immediate self-interest.

History suggests it is very difficult for states to reject federal funds over the long term. But short-term refusal may force the federal government to change some objectionable aspects of a program. This occurred during the 1990s when several states initially balked at participating in the Clinton administration’s Goals 2000 program of federal aid to education.<sup>30</sup>

History suggests it is very difficult for states to reject federal funds over the long term. But short-term refusal may force the federal government to change some objectionable aspects of a program.

One way to buttress state determination to reject federal funding is by amending the state constitution to ban participation in programs with obnoxious features. A recent example is the 2010 Arizona Health Insurance Reform Amendment, which forbids state participation in programs that deny citizens certain rights over their own health care.<sup>31</sup>

There are “legislative devices” of interposition other than rejecting federal money. States are always free to repeal their own criminal laws, even if the conduct thereby legalized under state

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<sup>28</sup> *Supra* note 27.

<sup>29</sup> Katherine Baicker, *et al.*, “The Oregon Experiment – Effects of Medicaid on Clinical Outcomes,” 368 *New England Journal of Medicine* 1713 (2013), <http://www.nejm.org/doi/full/10.1056/NEJMsa1212321> (examining health effects). Other potentially negative effects include poor incentives, wasteful practices, the lack of patient control over prices and services, and higher rates of dependency. See also Scott W. Atlas, “How to Fix The Scandal Of Medicaid and the Poor,” *The Wall Street Journal*, March 16, 2016, p. A15 (“The truth is that Medicaid ... funnels low-income people into substandard coverage. ... Moreover, numerous studies have found that the quality of medical care is inferior under Medicaid, compared with private insurance.”).

<sup>30</sup> See, for example, Lonnie Harp, “Wilson To Accept Goals 2000 Funds,” *Education Week*, May 1, 1996, <http://www.edweek.org/ew/articles/1996/05/01/32goals.h15.html>.

<sup>31</sup> *Ballotpedia*, [https://ballotpedia.org/Arizona\\_Health\\_Insurance\\_Reform\\_Amendment,\\_Proposition\\_106\\_\(2010\)#cite\\_note-health-3](https://ballotpedia.org/Arizona_Health_Insurance_Reform_Amendment,_Proposition_106_(2010)#cite_note-health-3).

law remains prohibited under federal law. As a result, offenders can be charged only under federal law, and state and local enforcement authorities are unlikely to make enforcement a priority.

The U.S. Supreme Court has upheld the constitutionality of federal bans on medical marijuana,<sup>32</sup> but 23 states have repealed or loosened their own laws against it.<sup>33</sup> Four states have relaxed their laws against recreational marijuana as well.<sup>34</sup> The federal government has no power to force the states to reverse those decisions.

Despite occasional assertions to the contrary, the state has no power to obstruct federal law enforcement.

On the other hand, repealing a state law does not necessarily constrain what federal officials do. Despite occasional assertions to the contrary, the state has no power to obstruct federal law enforcement. For example, Colorado's marijuana reform goes

well beyond repealing criminal laws. It erects a new bureaucracy and provides for state licensing, taxation, and regulation.<sup>35</sup> This approach borders on nullification. It certainly suffers from some of nullification's weaknesses. Specifically, the federal government has no obligation to respect the Colorado scheme. Although the Obama administration has not interfered with it, a president more diligent about his obligation to "take Care that the [federal] Laws be faithfully executed"<sup>36</sup> could disassemble it quickly.

## E. Coordination Among States

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole. The same combinations, in short, would result from an apprehension of the federal, as was produced by the dread of a foreign, yoke. ...

James Madison  
*The Federalist* No. 46

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<sup>32</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005).

<sup>33</sup> "State Medical Marijuana Laws," National Conference of State Legislatures, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>34</sup> "State Marijuana Laws Map," *Governing*, June 19, 2015, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

<sup>35</sup> Colo. Const. art. XVIII, § 16.

<sup>36</sup> U.S. Const. art. II, § 3.



The resistance to Great Britain before the American Revolution was sustained largely by “committees of correspondence” and other forms of interstate cooperation. Madison and John Dickinson<sup>37</sup> also mentioned interstate cooperation as a way of resisting federal overreaching. Cooperation is authorized by the nature of the states as sovereigns, and it is protected by the Speech, Press, Assembly, and Petition Clauses of the First Amendment.

Strictly speaking, cooperation is not so much an additional form of interposition as a way of magnifying the power of the other forms. Unfunded mandates and Goals 2000 were resisted not just by one, but by several, states. Anti-Obamacare litigation was commenced by 27 states, and litigation to oppose new coal emission rules was commenced by 24. Obviously, interstate cooperation helps to reduce proportionate cost and raise the credibility of the resistance.

Strictly speaking, cooperation is not so much an additional form of interposition as a way of magnifying the power of the other forms.

Cooperation also is a requirement for the next method of interposition.

#### **F. The State Application and Convention Process of Article V.**

The Legislatures of the States have a right also to originate amendments to the Constitution, by a concurrence of two-thirds of the whole number, in applications to Congress for the purpose ... they ... might, by an application to Congress, have obtained a convention for the same object.

James Madison  
*Resolutions for the Virginia Legislature (1799)*

Should the provisions of the Constitution as here reviewed be found not to secure the Govt. & rights of the States agst. usurpations & abuses on the part of the U. S. the final resort within the purview of the Constn. lies in an amendment of the Constn. according to a process applicable by the States.

*Public Letter from James Madison to Edward Everett (August 28, 1830)*<sup>38</sup>

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<sup>37</sup> In the third Fabius letter, Dickinson wrote, “An instance of such interference with regard to any single state, will be a dangerous precedent as to all, and therefore will be guarded against by all, as the trustees or servants of the several states will not dare, if they retain their senses, so to violate the independent sovereignty of their respective states ...”

<sup>38</sup> See also Madison’s *Notes on Nullification*, *supra* note 9 (listing in order: checks and balances, constitutional amendment, and resistance).

Article V of the Constitution, the article providing for amendment, specifically authorizes the sixth form of interposition: the state application and convention process.<sup>39</sup> Article V reads:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.<sup>40</sup>

In the Founders' view, amendments could resolve constitutional disputes, correct drafting errors, and cure or prevent abuses.

Today we usually think of constitutional amendments as a response to changed conditions. In the Founders' view, however, amendments also could resolve constitutional disputes, correct drafting errors, and cure or prevent abuses. The founding generation adopted the Ninth (1791),<sup>41</sup> Tenth (1791),<sup>42</sup>

and Eleventh<sup>43</sup> (1795) Amendments to resolve constitutional disputes. They ratified the Twelfth

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<sup>39</sup> This discussion is based on my research publications on Article V. Some of the more important works include the legal treatise, Robert G. Natelson, *State Initiation of Constitutional Amendments: A Guide for Lawyers and Legislative Drafters*, Article V Information Center, 2014, <http://constitution.i2i.org/files/2014/11/Compendium-3.01.pdf>. Other examples include:

"Founding-Era Conventions and the Meaning of the Constitution's 'Convention for Proposing Amendments,'" 65 *Florida Law Review* 615 (2013).

*Proposing Constitutional Amendments By a Convention of the States: A Handbook for State Lawmakers* (2d ed., 2013).

"James Madison and the Constitution's 'Convention for Proposing Amendments,'" in Neil H. Cogan, editor, *Union and States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter* (Akron, OH: University of Akron Press, 2013).

"Proposing Constitutional Amendments by Convention: Rules Governing the Process," 78 *Tennessee Law Review* 693 (2011).

<sup>40</sup> U.S. Const. art. V.

<sup>41</sup> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

<sup>42</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

<sup>43</sup> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The amendment was adopted to overrule a disputed Supreme Court interpretation.



(1804)<sup>44</sup> in part to correct a drafting error: the Constitution's failure to prescribe qualifications for the vice president. The founding generation ratified the first eight amendments in the Bill of Rights (1791) to forestall federal abuse. After the Civil War, Americans enacted the Thirteenth,<sup>45</sup> Fourteenth,<sup>46</sup> and Fifteenth<sup>47</sup> Amendments to curb state abuses.

Article V requires that any amendment be ratified by three-fourths of the states (currently 38). But to be ratified, the amendment first must be proposed. The Constitution grants Congress authority to propose. The framers recognized, however, that if the process was to be effective as a response to federal abuse, the Constitution had to provide a way to bypass Congress. The framers' solution was what Article V calls a "Convention for proposing Amendments." When two-thirds of the states make "Application" for (demand) such a convention, Congress must issue the call.<sup>48</sup>

A convention of the states is a task force of state "commissioners" charged with finding solutions to one or more predesignated problems.

The Founding Era record (confirmed by a later Supreme Court observation)<sup>49</sup> clarifies that a "Convention for proposing Amendments" is an assembly of the general type then called a "convention of the states." A convention of the states is a task force of state "commissioners" charged with finding solutions to one or more predesignated problems. The Constitutional Convention was only one of more than 30 inter-colonial and interstate conventions held in the

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<sup>44</sup> This also reformed the presidential election system.

<sup>45</sup> Abolishing slavery.

<sup>46</sup> Primarily designed to protect citizens against certain state abuses.

<sup>47</sup> Protecting the right of racial minorities to vote.

<sup>48</sup> In the words of Tench Coxe, an influential promoter of ratification of the Constitution:

It has been asserted, that the new constitution, when ratified, would be fixed and permanent, and that no alterations or amendments, should those proposed appear on consideration ever so salutary, could afterwards be obtained. A candid consideration of the constitution will show this to be a groundless remark. It is provided, in the clearest words, that Congress shall be *obliged* to call a convention on the application of two thirds of the legislatures; and all amendments proposed by such convention, are to be *valid* when approved by the conventions or legislatures of three fourths of the states. It must therefore be evident to every candid man, that two thirds of the states can *always* procure a general convention for the purpose of amending the constitution, and that three fourths of them can introduce those amendments into the constitution, although the President, Senate and Federal House of Representatives, should be *unanimously* opposed to each and all of them. Congress therefore cannot hold *any power*, which three fourths of the states shall not approve, *on experience*. (emphasis added)

"A Friend of Society and Liberty," *Pennsylvania Gazette*, July 23, 1788, reprinted in *Documentary History of the Ratification of the Constitution*, v. 18, 1995, pp. 277, 283–84.

<sup>49</sup> *Smith v. Union Bank*, 30 U.S. 518, 528 (1831).

century prior to 1787. The convention of the states was a much-used and well-understood institution.

The state legislatures have never forced Congress to call a convention for proposing amendments. On several occasions before 1960, however, they used the threat to force Congress to propose amendments on its own. Congress passed the Bill of Rights in part because two important states, New York and Virginia, had applied for a convention. Congress proposed the Seventeenth Amendment because the number of state applications had risen to a level only one or two short of the number required to call a convention. Congress proposed the Twenty-Second Amendment after several states passed applications demanding an amendment limiting the president to two terms.

For several decades, the states' most powerful tool of interposition – Article V – was disabled. Since 2010, research by several legal scholars has corrected the record, and states have begun passing applications once again.

During the 1960s, a group of establishment liberal politicians, academics, and activists became upset at the prospect of a convention proposing an amendment requiring a balanced budget or reversing liberal Supreme Court decisions. The group began a disinformation campaign against this mode of interposition. In congressional testimony, in the media, and in academic publications, they

characterized the convention for proposing amendments as a “Constitutional Convention” that could run out of control and impose its will on the country. Alternatively, they suggested the then-liberal Congress could control the convention by, for example, determining how its members would be chosen, restricting its agenda, and dictating its voting rules.<sup>50</sup>

This propaganda campaign was strikingly successful. Even many uninformed conservatives were persuaded. For several decades, the states' most powerful tool of interposition was disabled.

Since 2010, research by several legal scholars (including this writer) has corrected the record. States have begun passing applications once again: There are now 26 valid applications for a balanced budget amendment. The “Convention of States” movement, which seeks a convention with a broader mandate to tackle federal excess, has garnered eight applications since beginning its efforts in 2014. One leading state, Florida, has adopted applications on four subjects. In sum, there is a significant chance a convention will be called within the next few years.<sup>51</sup>

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<sup>50</sup> Robert G. Natelson, “The Liberal Establishment’s Disinformation Campaign Against Article V – and How It Mised Conservatives,” Article V Information Center, 2015, <https://www.i2i.org/files/2015/03/Campaign-Against-Article-V.pdf>. See also Charles L. Black, Jr., “The Proposed Amendment of Article V: A Threatened Disaster,” 72 *Yale Law Journal* 957 (1963).

<sup>51</sup> David Guldenschuh, “The Article V Movement: A Comprehensive Assessment to Date and Suggested Approach for State Legislators and Advocacy Groups Moving Forward,” *Heartland Policy Brief*, The Heartland Institute, November 2015, <https://www.heartland.org/policy-documents/article-v-movement-comprehensive-assessment-date-and-suggested-approach-state-legis>.



## G. Extraconstitutional Interposition: Nullification and Revolution

... and unless the projected innovations should be voluntarily renounced, the same appeal to a trial of force would be made in the one case as was made in the other.

... Who would be the parties? A few representatives of the people would be opposed to the people themselves; or rather one set of representatives would be contending against thirteen sets of representatives, with the whole body of their common constituents on the side of the latter. ... Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the State governments, with the people on their side, would be able to repel the danger.

James Madison  
*The Federalist* No. 46

Nullification refers to a state law declaring one or more federal laws void within the boundaries of the state.<sup>52</sup> The state may or may not make the nullification ordinance conditional. It may or may not impose criminal or civil penalties on persons attempting to enforce the nullified law.

The doctrine of nullification was not recognized, directly or indirectly, either by the Constitution or by any of the state conventions that ratified it. The idea that nullification is a constitutional remedy originated in the Kentucky Resolutions. These were adopted in 1798, several years after the ratification. Their author was

Thomas Jefferson. Although Jefferson was certainly a leading Founder, his political and constitutional views were outside the American mainstream. In addition, he had not been involved personally in the ratification debates, because he was in France at the time. In any event, seven of the remaining 14 states passed responsive resolutions rejecting the notion that individual states could act as final authority on the constitutionality of federal laws.<sup>53</sup>

Nullification refers to a state law declaring one or more federal laws void within the boundaries of the state. It is the state-law analogue of revolution.

In contrast to Jefferson, Madison was within the political mainstream and had been a leading framer and ratifier of the Constitution. His *Virginia Resolution* promoted interposition rather than nullification. He later denied that nullification was a constitutional remedy,<sup>54</sup> and his view

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<sup>52</sup> For a discussion of the issues involved in nullification, see Robert G. Natelson, "Struggling With Nullification," Independence Institute, 2013, <https://www.i2i.org/struggling-with-nullification/>.

<sup>53</sup> They are collected by The Constitution Society, [http://www.constitution.org/rf/vr\\_04.htm](http://www.constitution.org/rf/vr_04.htm).

<sup>54</sup> *Public Letter from James Madison to Edward Everett*, *supra* note 9, p. 233: "this extra constl. course might well give way to that marked out by the Const., which authorizes 2/3 of the States to institute and 3/4 to effectuate, an amendment of the Constn."

has become accepted constitutional law.<sup>55</sup>

As *The Federalist* No. 46 makes clear, however, Madison did agree that under certain circumstances the people have the natural right to revolt against a government and establish another. As noted earlier, he believed such extraconstitutional steps should be reserved until all constitutional remedies had been exhausted.

State officials take an oath to preserve the U.S. Constitution. Interposition is not a mere option. It is a solemn duty.

Nullification is the state-law analogue of revolution. In the extreme conditions justifying revolution, resistance need not be conducted solely by private individuals or groups. States may participate officially, as the colonies/states did during the years

1775–83. This is the scenario Madison presented in *The Federalist* No. 46. Obviously, in these circumstances a state may declare federal law void within its boundaries.

Nullification ultimately depends on military power for its force. Like other revolutionary methods, it is effective only if federal authorities do not have the will or power to overcome state resistance.

## 4. Conclusion

The American Founders stressed the importance of state responses to federal excess, both on behalf of the states themselves and to protect the citizenry. James Madison suggested these efforts could be called “interposition.” He listed six forms of interposition expressly or implicitly authorized by the Constitution. He also mentioned the extraconstitutional remedies of revolution and its state concomitant, nullification. He cautioned against using the extraconstitutional remedies before the constitutional ones had been exhausted.

State officials take an oath to preserve the U.S. Constitution. Madison and other Founders further emphasized state officials’ obligation to interpose in a constitutional manner when the people are threatened by federal overreaching. Such interposition is not a mere option. It is a solemn duty.

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<sup>55</sup> The argument that nullification is a constitutional remedy depends for its force on the assumption that the Constitution, like the Articles of Convention, is merely a compact to which the states qua states are the only parties. The Supreme Court rejected that view nearly 200 years ago in *McCulloch v. Maryland*, 17 U.S. 316 (1819). The opinion was written Chief Justice John Marshall, who had been a spokesman for the Constitution at the Virginia ratifying convention. It was further repudiated by the results of the Civil War.



## About the Author

Robert G. Natelson is senior fellow in constitutional jurisprudence at The Heartland Institute. He has the same title at the Montana Policy Institute in Bozeman, Montana and at the Independence Institute in Denver, Colorado, where he heads the Article V Information Center. He was a professor of law for 25 years, serving at three universities. He taught constitutional law, advanced constitutional law, First Amendment, and constitutional history, among other courses.

Natelson is well-known as a leading scholar of the American founding era. He is the author of *The Original Constitution: What It Actually Said and Meant* (3rd ed. Apis Books, 2014), co-author of *The Origins of the Necessary and Proper Clause* (Cambridge Univ. Press, 2010), and author of numerous scholarly and popular articles. His research is regularly cited in the U.S. Supreme Court, both by parties and by the justices.

Natelson also has experience in the business, broadcasting, and political world. In 2000 he was runner-up among five candidates in the open party primary for governor of Montana.

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