

# Law & Humanities Blog

A blog about law, the humanities, and popular culture

March 17, 2023

## Guest Post: Christian Fritz On the Origins of His New Book, *Monitoring American Federalism* (Cambridge University Press, 2023) @UNM\_Law @CambridgeUP

Guest Post from Christian Fritz, Emeritus Professor, University of New Mexico School of Law: On the origins of his new book, *Monitoring American Federalism: The History of State Legislative Resistance* (Cambridge University Press, 2023). See news of the publication [here](#).

*Monitoring American Federalism: The History of State Legislative Resistance* is a digression from a

much broader study examining the practice of democracy in America. After the publication of my earlier book, *American Sovereigns: The People and America's Constitutional History Before the Civil War*, I was interested in exploring how the widespread acceptance of popular sovereignty affected the relationship of constituents to their representatives in the American context and how popular sovereignty emboldened the people to play a more active role in the political process. In other words, how did the constitutional premise of a sovereign people as the constituent authority alter the understanding of the nature of political representation after the American Revolution?

That inquiry led me to examine the multiple

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tools through which the people, as constituents, expressed their will beyond the mere fact of voting—including the mechanisms of initiative, referendum, recall, and the right of instruction. Research into the right of instruction opened the door to multiple different ways in which Americans sought to instruct their representatives.

One expression of this dynamic included so-called senatorial instruction, the practice of state legislatures to instruct or direct the actions of their state's representatives in the Senate. State legislatures believed they were entitled to issue instructions since state legislators selected U.S. Senators before the passage of the 17th Amendment.

Scholars had long been aware of the many resolutions state legislatures passed instructing their Senators on a host of substantive issues, especially during the struggles over the Bank of the United States during the Jacksonian period. Far less appreciated was the fact of a small sub-set of instructions that identified the legislature's conclusion that the federal government was acting beyond its rightful authority as the basis of their senatorial instruction. In effect, state legislatures were "sounding the alarm" (a phrase they often employed) about perceived constitutional overreaching by the federal government, initiating a process seeking to redress the equilibrium of federalism between nation and states by using the tool of interposition that is a centerpiece of *Monitoring American Federalism*.

The search for the genesis of such a role for state legislatures led back to none other than James Madison's and Alexander Hamilton's contributions in

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their *Federalist* essays. Despite the barrels of ink spent over the years in examining the writings of *Publius*, the monitoring role for state legislature has largely been overlooked. This is but one new finding of the book.

*Monitoring American Federalism* demonstrates how states played a crucial role from the beginning of the republic in assessing the equilibrium of federalism within the American constitutional order. Unlike judicial review, interposition did not have immediate constitutional effect, but was designed to work through political pressure in attempting to maintain an equilibrium between the national and state governments by enabling state legislatures to express and coordinate their discontent over federal laws and measures.

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

Interposition emerged as a response by critics worried that the Constitution's grant of national powers would obliterate state authority. This early interposition formed an institutional way to acknowledge the divided sovereignty and to preserve the equilibrium of federalism. Properly understood at the time, interposition was **not** a claim that state sovereignty could or should displace national authority, but a claim

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that American federalism needed to preserve some balance between state and national authority.

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

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

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slogan of states' rights was embraced after the war by those who resisted Reconstruction and the efforts to implement the Civil War Amendments.

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

Interposition only resurfaced in the 1950s as some Americans sought a constitutional basis for white supremacy and racial inequality, particularly in opposition to integration. Later, a version of interposition termed "Judicial Federalism" emerged as a constraint on federal legislative power in *Printz v. United States* (1997) and use of interposition, "uncooperative federalism," and nullification-like efforts resumed in resistance to federal laws including the Patriot Act of 2001, the Real ID Act of 2005, and the Affordable Care Act of 2010.

What remains is whether interposition as a sounding the alarm function of the states serves any useful purpose today as an expression of the people's sovereignty.

Posted by [Christine Corcos](#) Posted on [3/17/2023 10:08:00 AM](#)

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