

# Book Review

***Monitoring American Federalism: The History of State Legislative Resistance***, by Christian G. Fritz. New York: Oxford University Press, 2023. xii + 412 pp. \$39.99.

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The U.S. Constitution outlined a federal system of government but it neither drew a clear boundary between state and federal powers nor indicated clearly how disputes over that boundary would be authoritatively resolved. As a result, episodes contesting those two areas have been regular and central features of American political development since its founding. State governments have used various means to push back against perceived federal encroachments on their powers, and various entities have asserted the right to offer authoritative interpretations of the U.S. Constitution.

In *Monitoring American Federalism*, Christian G. Fritz reminds readers of a misunderstood—and indeed nearly forgotten—mechanism by which state legislatures added their voices to national debates over constitutional federalism: interposition. During the ratification debates of 1787–1788, Anti-Federalists warned forcefully about the lack of a clear state–federal boundary and the apparent lack of mechanisms to enforce it. To tamp down those fears, the Constitution’s defenders needed to explain how American federalism would work and how states would avoid consolidation over time into a single national government. Fritz notes that, although the term interposition was not initially used by Alexander Hamilton or James Madison, eight of *The Federalist* essays they authored contain the details of its theory and practice. If the federal government attempted to exercise powers not granted to it by the Constitution, they argued, state officials would be sure to notice and would sound the alarm and communicate with other state governments and their representatives in Congress to spread awareness of the encroachment and to encourage them to enact countermeasures such as repealing the offending laws or even sponsoring amendments to add clarifying text to the Constitution.

Although the idea of interposition later came to be used interchangeably with the idea of state nullification of federal law, Fritz seeks to “recover[] the history of interposition and its practice before interposition was distorted and evolved into the device of nullification” (p. 4). In his view, “[w]hat 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” (p. 11).

Fritz defines what he calls “sounding the alarm interposition” as:

a formal state protest against actions of the national government designed to focus public attention and generate interstate political pressure in an effort to reverse the national government’s alleged constitutional overreach. Such resolutions identified the cause of the overreaching and alerted the national government to the state legislature’s views by sending the resolutions to members of the state’s congressional delegation. State legislatures also routinely requested the state’s governor share the resolutions with the legislatures of the other states in an effort to stimulate a coordinated and more effective response (pp. 5–6).

States thus asserted themselves as constitutional interpreters in debates about the uses and limits of federal power.

We naturally want to know whether interposition actually succeeded in protecting state prerogatives against perceived federal encroachments, and this is where Fritz shines, marshalling an impressive trove of historical evidence—much of it from primary sources like records of state legislative debates, personal correspondence, and contemporaneous newspaper coverage—to document whether and how uses of interposition from the first Congress onward worked. Fritz guides the reader through numerous early episodes of state–federal contestation and documents resolutions passed by state legislatures in response. These episodes include debates over the assumption of states’ Revolutionary War debts by the federal government, Supreme Court cases regarding states’ sovereign immunity, the Jay Treaty, the Alien and Sedition Acts, the rechartering of the Bank of the United States, debates over the use of state militias and embargoes during the War of 1812, and practices surrounding the recovery of fugitive enslaved persons in the north.

As successful uses of interposition, Fritz points to the passage of the Eleventh Amendment, which established states’ sovereign immunity and overturned the Supreme Court’s decision in *Chisholm v. Georgia*, a decision to which state legislatures had strenuously objected. He notes that “[t]he interposition directed at the Alien and Sedition Acts galvanized political support that helped elect Thomas Jefferson president. His election ushered in the so-called ‘Revolution of 1800’ that displaced Federalist control of the presidency with the first of several Republican administrations” (p. 129). And the effort to recharter the First Bank of the United States in 1810–1811 failed due to state objections raised through interposition.

Fritz’s concise explications of the constitutional and political issues of each of these case studies amount to an excellent primer on how constitutional meaning developed as the country gained experience with its new constitution. It is easy to forget that under a new constitution there are few settled doctrines, practices, or precedents to go by. In a recent article that Fritz references, law professor Heather Gerken outlines her view of today’s “Federalism 3.0” and how it succeeded Federalism 1.0 (the New Deal-era conception of sovereignty-based dual federalism) and Federalism 2.0 (the civil rights era’s view of states’ rights as intrinsically hostile to the civil liberties of racial minorities). Fritz transports us back to Federalism 0.0 and shows in fascinating detail how state officials participated in “the unfolding enterprise of balancing the newly minted federalism of the Constitution” (p. 37). For example, he writes that “[t]he debate over the Virginia and Kentucky Resolutions reveals significant differences in how Americans understood divided sovereignty ten years after the Constitution’s ratification” (p. 127). This history is particularly fascinating because key supporters and critics of the Constitution were still very much on the scene, participating in

these debates as commentators, state legislators, governors, executive branch officials, members of Congress, and presidents.

From his survey of the first few decades following ratification, Fritz draws a number of conclusions. First, interposition *did* work in some important cases, successfully rolling back federal encroachments on state prerogatives. Second, due to the complexity and subtlety of Madison's explications of interposition (most notably in the Third Virginia Resolution and in subsequent commentaries), the idea of interposition was frequently mischaracterized (sometimes innocently and sometimes not) and eventually transmuted by southern defenders of slavery like John C. Calhoun from a means by which states would collectively and *rhetorically* oppose federal overreach into an assertion that individual states could nullify federal laws with which they disagreed. Third, because of this association with nullification, interposition became discredited and fell into disuse after the Civil War, as federal power steadily grew and the "lawyerization" of constitutional interpretation further solidified the idea of the Supreme Court as the final, authoritative interpreter of the Constitution. After canvassing twentieth-century developments, Fritz concludes his account by noting how states today practice new versions of interposition (such as intergovernmental lobbying) and how the new judicial federalism has reasserted state powers vis-à-vis the federal government.

As he explicates the theory and practice of interposition by state legislatures, Fritz touches on all of the central conundrums of American federalism. In addition to the ones mentioned at the outset—where the state–federal boundary lies and who referees it—Fritz illuminates key questions such as what, metaphysically, we think happened when the Constitution was ratified. (Did sovereign state governments join a compact in which they surrendered some sovereignty to the federal government but retained most of it? Or did the American People, acting in their highest sovereign capacity, create a new constitutional order that could not be dissolved by states? Or something else?) What precisely are the interests of state governments vis-à-vis the federal government? (State legislatures defended their legal authority as well as economic interests in, e.g., embargo and tariff debates.) Who speaks for a state government and how? (He describes interesting cases in which one house of a state legislature adopted an interposition resolution while the other house did not.) Are assertions of state prerogative typically principled, constitutional arguments or fig leaves for partisan political or policy preferences? (If principled, why didn't all states come together more frequently and unanimously in disputes against the federal government?) Are states' rights claims generally antithetical to minority rights or can they also be asserted in defense of them? (He writes at length about how, before the Civil War, interposition was used with equal vigor for a time by southern defenders of slavery and by northern opponents of the Fugitive Slave Act.)

A few criticisms: The case studies can be a bit repetitive, as in each sounding-the-alarm episode we hear a similar litany of the state legislature passing a resolution, asking the governor to send it to other states, and instructing the state's congressional representatives to take ameliorative action on behalf of the state. (Certainly, though, his large number of examples signals that these were not isolated case involving just a few state legislatures.) Also, in some of his examples, the exercise of interposition did not seem to accomplish much in terms of reclaiming lost state authority over the long term. For example, despite states' success in blocking the rechartering of the First Bank of the United States in 1811, the Second Bank of the United States was established in 1816 and its constitutionality was upheld in *McCulloch v. Maryland* in 1819. The Virginia and Kentucky Resolutions, authored secretly by Madison and Thomas Jefferson, respectively, to protest the Alien and Sedition Acts contained some of the most thorough explications and assertions of interposition, but

they received support from just two other states and sparked heated opposition and condemnation of interposition from many other states. Fritz notes Anti-Federalists worried that interposition was “an essentially toothless constitutional tool” (p. 31), and some of his examples seem to bear this out.

We may also question the extent to which state legislators have in practice acted as thoughtful commentators on political and constitutional matters. In *Federalist* #28, Madison characterized state legislatures as “select bodies of men,” but even during the ratification debates, Fritz writes that Madison and Hamilton were “deeply disenchanted with the behavior of state legislatures” (p. 32) and had “strong reservations” about them (p. 33). As such, “it is unlikely that Madison’s and Hamilton’s elaboration of a mechanism of interposition came with their wholehearted endorsement” (p. 33).

Overall, however, the book succeeds in recovering the history of interposition and documenting its status as one of state governments’ key weapons in their skirmishes with the federal government in the early decades of the republic. Fritz’s prose is crisp and clear, and his voluminous references appear as endnotes in a way that does not slow the reader down but document his insights thoroughly. Readers will learn a tremendous amount about interposition in particular as well as about American political development as it relates to federalism. It should therefore be of interest to both scholars with specific interests in interposition and the early American republic as well as those with a more general interest in how American federalism works. In our current politically polarized era as we see more frequent examples of states questioning and resisting federal authority, Fritz offers a valuable reminder that interposition as originally conceived explicitly *rejected* state nullification of federal law while still insisting on a role for state officials in national political and constitutional debates.

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