

The Unfinished Symphony of American Federalism

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Date : August 28, 2023

Christian G. Fritz, [Monitoring American Federalism: The History of State Legislative Resistance](#) (2023).

For months I have been carrying, wherever I take my briefcase, a captivating new book of American constitutional history and analysis which offers a brilliant lens for examining American federalism. That is because whenever time permits, I want to read, reread, and think about the book's meticulous, original, deep research and the illuminating insights that the author has packed neatly within his single volume. My near constant companion has been Christian Fritz's fascinating and exquisitely timely *Monitoring American Federalism: The History of State Legislative Resistance*. His book addresses in a fresh and comprehensive way the great unsolved conundrum of the founding of our republic: how America's unprecedented theory of a federal system of dual sovereigns, involving national and state governments which are both empowered by the citizens of overlapping geographies, can and should work in practice.

Monitoring American Federalism is a rich source that likely will become an essential text about the distribution and exercise of constitutional powers for scholars and educators who are experts in the subject matter. Yet it also is accessible to a broader audience of readers, including those who wish to be better informed while navigating real contemporary questions about balancing federal and state power. This latest book by Professor Fritz, in my opinion, is a must-read for those interested in examining, questioning, teaching, judging, upholding, and more fully grasping the constantly evolving complexity of our brilliantly conceived but flawed, cantilevered, self-correcting constitutional democratic form of limited representative government, a model of government which depends upon the informed consent of the governed.

Caveat liber lector. *Monitoring American Federalism* is a serious book. It is no beach read. But it is both readable and compelling. Like the work involved in picking the delicious meat from steamed crabs, which inevitably prompts lively conversation in good company, as the Fritz book surely will do, it's well worth the effort to read and be able to discuss this seminal work.

Fritz's impressive book begins with the ratification process and the early days of the new nation, focusing on conceptual debates about how state legislatures might monitor and resist constitutional overreach by the national government. Fritz then traces in great detail several early examples of state resistance, moving forward in time from the founding through the antebellum period and the cataclysm of the Civil War. This in-depth analysis foreshadows his narrative about the major federal-state battles of the reconstruction era and the twentieth century, and it is also the foundation of his concluding thoughts about how our democracy might be maintained amidst the all too familiar existential threats it faces today.

Fritz's unique contribution is to tell the largely untold story of the idea of using state "interposition" to "monitor" and when deemed necessary "sound the alarm" to challenge, within constitutional bounds, the law and policies of the national government. He defines interposition as a formal state protest designed to focus public attention and generate interstate political pressure to reverse the national government's unconstitutional action. The author's exposition of this idea is based upon a painstaking reading of mostly overlooked passages by Madison and Hamilton in the Federalist Papers, as well as

post-ratification state resolutions and related correspondence between Madison and Jefferson. His historical analysis traces the lineage of interposition and vigorously rebuts the concept's eventual bastardization by John C. Calhoun and others into justifications for state nullification and secession.

Three of the many richly illustrated perspectives afforded to this reader by Professor Fritz's historical tour de force are:

-American federalism is an unfinished symphony. If it endures its final pages will never be written; at least not until or unless the beautiful but often dissonant clanging of our democracy expires under the weight of the existential challenges of our times. Fritz convincingly demonstrates that the precise balance of power between the national and state sovereigns was not decided by the founders, much less mapped out with clear boundaries, before, during, or immediately after ratification of the Constitution. Instead, it has always been and has remained to this day a fluid, evolving system. Properly understood, then, the essence of American federalism is not static but a dynamic process. This necessarily intentional ambiguous and flexible constitutional design is a strength, not a weakness, of our system of government.

— State legislative resistance, including “interposition,” has often, perhaps mainly, been associated with America's original sin of slavery, and the history of unconstitutional misuses of state resistance represented by state nullification and secession from the union. Professor Fritz acknowledges and emphasizes this tragic history throughout his book.

However, Fritz also demonstrates that historically there have been many other instances of state legislative resistance, such as the ratification of the Eleventh Amendment to include state sovereign immunity in the Constitution; the ultimately successful effort to allow the Alien and Sedition Acts to expire; and both successful and unsuccessful acts of state opposition to taxes and tariffs. Such political initiatives have arisen from both Southern and Northern states, and more recently from both “red” and “blue” states. Cases such as state opposition to the Fugitive Slave Act demonstrate that interposition is not presumptively bad, contrary to Hamilton's overwrought description of interposition to the National Bank as “the first symptom of a spirit which must either be killed or will kill the constitution of the United States.”

From the original form of legislative interposition as revealed and described by Fritz, to the various shapes it has morphed into over two hundred years, serious disputes have been resolved within constitutional parameters, without relying by default on a Supreme Court decision or on the use of force. Multistate driven conversations about contentious issues have led to political consensus by elected federal and state representatives of the people. This more nuanced understanding of state resistance comports with Justice Louis Brandeis' famous observation that “states are the laboratories of democracy.” It also calls to mind the prodigious work of the late New York State Chief Judge Judith Kaye, who recognized that the federal system provides a dual source of protection for the rights of our citizens. Judge Kaye was a leading advocate for upholding individual rights and liberties through state constitutions.

— Finally, *Monitoring American Federalism* offers ample reasons for being earnestly hopeful and committed to the hard work of sustaining our democracy. Our present political disagreements may appear unresolvable amidst seemingly unbridgeable partisan divides and institutional dysfunction that seemingly precludes solving the currently cascading threats to democracy, justice, the rule of law, equality, and the peaceful well-being of people and the natural world we share.

Nevertheless, the book reminds us that fraught political disagreements are nothing new. Another is that the history of interstate interposition and thinking about the memory of times past and recent, times

when state and federal government officials including military leaders did their best to execute their duties and successfully upheld their oath of office to preserve, protect, and defend the Constitution of the United States, remind us that our complex, evolving federal system provides for appropriate avenues for political discourse and even resistance that comply with the Constitution. Unilateral state vetoes, nullification, and insurrection are not among them. Patience and time are required. America's long-standing experiment with federalism by trial and sometimes error, rests on the acceptance of the sovereignty of the people. That constitutional premise in turn depends on the willingness and engagement of citizens to take their responsibilities seriously with respect to keeping abreast of what their government officials are doing and to exercise their right and duty to vote.

Professor Fritz's book hardly will have the last word on the important path-clearing conversation he has initiated looking back and looking forward at American federalism. That is because, if for no other reason, his provocative constitutional history suggests multiple new lines of research and scholarly discourse about the origin, legitimate uses, relevance, and practical feasibility of what he calls "sounding the alarm state interposition."

His work also suggests new possibilities for lawyers and legal educators as they engage in civic legal education and outreach to the public about the Constitution. After all, the people are empowered to interpose their views about government action by the protections afforded in the First Amendment. These rights are, like Professor Fritz's understanding of interposition, avenues for advocating values, opposing illegal and corrupt exercises of power, and holding the government accountable. If the federal and state branches of government are the large instrumental sections in our constitutional orchestra, there are many others, thanks to the Constitution and the Bill of Rights, who can play key parts in the unfinished symphony of American federalism. Each performance of the Founders' magnum opus ultimately relies on "we the people" to know the score, keep time, and conduct the players.

Cite as: Nick Allard, *The Unfinished Symphony of American Federalism*, JOTWELL (August 28, 2023) (reviewing Christian G. Fritz, **Monitoring American Federalism: The History of State Legislative Resistance** (2023)), <https://legalhist.jotwell.com/the-unfinished-symphony-of-american-federalism/>.