H-FedHist Roundtable on Fritz, Monitoring American Federalism

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H-FedHist Roundtable on Fritz, *Monitoring American Federalism: The History of State Legislative Resistance*

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Christian G. Fritz, *Monitoring American Federalism: The History of State Legislative Resistance.* Cambridge: Cambridge University Press, 2023. ISBN 9781009325578

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Introduction by John Dinan, Wake Forest University

A leading challenge in forming a federal system is determining which powers will be exercised by the federal government and which powers are reserved to state governments. The next

challenge is determining how to superintend the balance of federal and state authority. The current expectation in the United States is that collisions between federal and state governments and disputes about the extent of their authority will be adjudicated by the U.S. Supreme Court.

In his impressive book, *Monitoring American Federalism*, Christian G. Fritz highlights another approach that figured prominently in the late-18th and early-19th centuries, when state legislators monitored federal government actions; alerted other state officials and the public when federal officials exceeded their constitutional authority; and worked through electoral, political, and constitutional processes to change federal policies deemed problematic. Among his various important contributions, Fritz traces the origin of what he calls "sounding-the-alarm" interposition to *The Federalist*, showing that eight essays, half of them authored by James Madison and the other half authored by Alexander Hamilton, described some element and expectation of state monitoring of federal actions.

Fritz demonstrates that states began adopting interposition resolutions sounding the alarm about federal overreaching shortly after ratification of the Constitution and continued to do so until several years after the Civil War. As he makes clear in a comprehensive review of sometimes familiar but often unfamiliar episodes of state resistance to federal authority, states from all regions took part in issuing these resolutions, which often targeted congressional statutes, but also responded to Supreme Court decisions and presidential actions. Additionally, and this is a key insight, Fritz shows that state interposition resolutions were in various instances effective in helping reverse federal actions, whether overturning the Supreme Court's *Chisholm v. Georgia* (1793) ruling regarding state sovereign immunity, or leading to a change in presidential administrations in the 1800 election after passage of the Alien and Sedition Acts during John Adams's presidency, or bringing an end to various embargo acts near the

end of Thomas Jefferson's presidency.

Fritz is intent in this book on recovering the constitutional history of state interposition, which he argues has been misunderstood, largely because it has over time been lumped together with nullification. Madison, among others, viewed interposition as distinct from nullification and argued that interposition, in the form it took in the 1798 Virginia Resolutions and various other state resolutions, was a legitimate and valuable mechanism for keeping federal officials within constitutional limits. The purpose of passing interposition resolutions, according to Madison, was not to nullify federal acts and declare them unenforceable, but rather to rally the public and other governing officials and vote out the officials responsible for enacting them or put pressure on Congress and the president to repeal them or pass a constitutional amendment returning the federal-state balance to equilibrium.

A number of officials in the early republic disagreed with Madison and argued that the task of interpreting the U.S. Constitution and preventing federal overreaching was properly—and in fact, exclusively—entrusted to the Supreme Court rather than state officials. In some cases, however, some state legislatures that initially decried state interposition and viewed the Supreme Court as the sole interpreter of the Constitution later issued their own interposition resolutions. In fact, as Fritz shows, some state legislatures came around to embracing interposition only a few years after originally opposing the doctrine as illegitimate.

In their reviews of *Monitoring American Federalism*, Todd Estes, G. Alan Tarr, and Bradley D. Hays highlight these and other elements of Fritz's argument about the development of interposition and discuss its relation to nullification as well as the motivations underlying interposition resolutions. They also pose questions about the connection between state interposition in the early republic and state resistance to federal policies in the contemporary

era.

The reviewers, particularly Estes and Tarr, focus on the way arguments supporting interposition, most prominently claims advanced in the Virginia Resolutions, were later drawn on by John Calhoun and others to defend nullification. Interposition and nullification came to be connected, and in a way that prompted Fritz to write this book and disentangle them, partly because Madison was not as clear as he could have been in crafting various sections of the Virginia Resolutions, especially the third resolution, which viewed “the powers of the federal government as resulting from the compact to which the states are parties” and declared that “in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states who are parties there-to 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.” As Estes stresses, however, another factor contributing to the challenge of cabining the meaning and exercise of interposition stems from something Madison anticipated in *Federalist* No. 37, when he discussed in a sustained fashion the “unavoidable inaccuracy” of language used to express ideas.

Reviewers, especially Tarr and Hays, also raise questions about the degree to which state officials who adopted interposition resolutions were concerned with maintaining a balance between federal and state authority or rather were seeking to advance particular policy goals. Certainly, as Fritz shows, state officials were far from consistent in embracing interposition. State legislators issued interposition resolutions in response to congressional statutes, presidential actions, and judicial rulings that ran counter to their preferred policies, but they declined to support and sometimes condemned interposition resolutions issued by other states regarding other policies. The questions raised by these mixed motives and the inconsistency of the embrace of interposition are

similar to questions posed by reliance in political and legal debates on other federalism-based arguments, as well as separation-of-powers arguments.

The opportunistic embrace of interposition and federalism arguments more generally could be seen as casting doubt on the value of this doctrine and related claims. Nevertheless, as Martha Derthick has argued, the willingness of a wide range of officials to embrace federalism arguments, even in an expedient fashion, might also be understood as attesting to the importance of maintaining a balance between the federal and state governments. After noting that public officials “have not defended federalism consistently and on principle,” Derthick argued that “Expediency sooner or later teaches political actors that having access to many governments—and also to the many tools and tactics of influence that characterize governmental relations in the United States —makes for a more richly representative array of institutions and a more flexible, responsive politics than would likely be had with a unitary form.”[1]

Finally, the reviewers, especially Tarr and Hays, focus on the contemporary implications of Fritz’s recovery of the constitutional history of interposition and its extensive use in the late-18th and 19th centuries and temporary resurgence in the mid-20th century in response to the Supreme Court’s school desegregation rulings. In a brief section at the end of the concluding chapter, Fritz takes note of several occasions in recent years when state officials have resisted federal policies, employing various strategies to express their opposition. On a few occasions, state officials have gone so far as to pass laws purporting to declare federal policies null and void, as for instance when Missouri enacted a Second Amendment Preservation Act that a federal district judge subsequently invalidated.

For the most part, state legislatures in recent years have relied on

other approaches when opposing federal policies. At times, state officials have declined to help implement or enforce federal policies when doing so is optional, as in the case of marijuana and immigration laws. At other times, state officials have passed laws inconsistent with federal policies, with the goal of creating conflicts between state and federal law and thereby generating justiciable cases presenting the Supreme Court with an opportunity to invalidate federal policies. This is the route some states took in challenging the Affordable Care Act. It is also a strategy New Jersey pursued successfully in challenging the Professional and Amateur Sports Protection Act, a congressional law that barred states from authorizing sports betting. Fritz argues that contemporary state actions of these kinds "are consistent with the theory and history of interposition" and that recovering the early constitutional history of interposition, his main purpose in the book, can "influence how we think about and practice federalism today," by serving as a reminder of the limits of federal authority and opportunities for states to monitor federal actions (306).

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1 Martha Derthick, "Federalism" in Peter H. Schuck and James Q. Wilson, eds., *Understanding America: The Anatomy of an Exceptional Nation* (Public Affairs, 2008), 145.

Participants

John Dinan is professor and chair of the department of politics and international affairs at Wake Forest University. He earned his Ph.D. at the University of Virginia. He has served since 2014 as editor of *Publius: The Journal of Federalism*, and he also served as chair of the Federalism and Intergovernmental Relations section of the American Political Science Association. He is the author of *The American State Constitutional Tradition* (2006) and *State Constitutional Politics: Governing by Amendment in the American States* (2018), among other books. He is the editor of *Federalism:*

Core Documents (2023).

Todd Estes is a professor of History at Oakland University in Rochester, Michigan. He is the author of *The Jay Treaty Debate, Public Opinion, and the Evolution of Early American Political Culture* (2006) and the editor of *Founding Visions: The Ideas, Individuals, and Intersections That Created America* (2014). His most recent publications on the 1787–88 ratification debate will appear in *American Political Thought* and *Journal of the Early Republic.* He is completing a book manuscript, *Campaign for the Constitution: Timing, Persuasion, and the Politics of Moderation in the Stages of the Ratification Debate.*

Bradley D. Hays is an associate professor of political science at Union College. He researches and teaches constitutional development with particular attention to the areas of federalism, presidential pardoning power, and the administrative wing of the federal judiciary. He is the author of *States in American Constitutionalism: Interpretation, Authority, and Politics* (Routledge, 2019), numerous journal articles, and political commentary in outlets like *The Washington Post*.

G. Alan Tarr was founder and director of the Center for State Constitutional Studies and is now Board of Governors Professor Emeritus of Political Science at Rutgers University-Camden. He served as editor of *State Constitutions of the United States* (Oxford University Press) and as co-editor of the three-volume *State Constitutions for the Twenty-first Century* (State University of New York Press), of *Constitutional Origins, Structure, and Change in Federal Countries* (McGill-Queen's University Press), and of *Federalism, Subnational Constitutions, and Minority Rights* (Praeger). He has authored *Without Fear or Favor* (Stanford University Press), *Understanding State Constitutions* (Princeton University Press), and *Judicial Process and Judicial Policymaking* (Rutledge), among other works. He is the recipient of fellowships

from the National Endowment for the Humanities, and is more recently a Fulbright Fellow at the University of Ottawa.

Christian G. Fritz is an Emeritus Professor of Law at the University of New Mexico School of Law and holds a Ph.D. in History from UC Berkeley. For many years he taught courses in Legal and Constitutional History as well in the field of Property Law. In addition to *Monitoring American Federalism: The History of State Legislative Resistance*, Fritz is the author of *American Sovereigns: The People and America's Constitutional Tradition before the Civil War* (2008) and *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (1991), as well as numerous articles and book chapters in legal and constitutional history. He is currently working on a broader study of American constitutional development dealing with democracy.

Review by Todd Estes, Oakland University

Christian Fritz has given us a very good, thoroughly researched history that explores the rise and development of "interposition" —conceived as a means for state legislatures to "sound the alarm" if the national government was overreaching its constitutional authorities. But the limitations of language in those alarms led to initial misunderstandings of the concept, repeated over time. Later, mistaken or perhaps deliberate mis-readings led to misapplications of interposition. James Madison's third Virginia Resolution of 1798 proved especially problematic. It became transformed in later hands and was used to justify nullification and secession—despite Madison's own frequent attempts to correct the misinterpretations and set the record straight.

Fritz, who is Emeritus Professor of Law at the University of New Mexico Law School, gives readers much to think about and analyze in this thoughtful, almost encyclopedic treatment of the meandering history of interposition across two centuries. There is the complex composition of the concept of interposition itself, the

misunderstandings of the doctrine after its early applications, followed by the increasingly duplicitous interpretation of interposition and the political chicanery that later accompanied it. And finally, there is the way that this concept emerged and morphed over time to the point that it lost nearly all dimensions of its initial goal of monitoring the role of the national government *vis a vis* the states and became, instead, an instrument of obstructionism and hostility—much of it racially tinged—in the hands of nullifiers, secessionists, and segregationists.

Fritz unfolds and unpacks this whole story in a book that is a model of historical inquiry and argumentation and that has important things to say to both political and legal historians, among others. In short, this is a book about James Madison's political theorizations; more precisely, it is a book about what happened to Madison's concept of interposition and how he lost control of the doctrine's meaning and intended application over time.

Expecting that other roundtable reviewers will focus on several of the aforementioned aspects of Fritz's book, I want to explore what I see as two crucial points: the initial development of the concept of interposition in *The Federalist* by both Madison and Hamilton, and second, the myriad and vexing problems caused by imprecise language in both the presentation and the reception of interposition. Language can obfuscate as well as clarify. It both helps and hinders attempts to pinpoint the precise meaning and intention of words and the way that different emphases and shadings led Americans of good faith and sincere intentions—not to mention some of bad faith and insincerity—to read (or read into) seemingly straightforward language and come away with diametrically different meanings. It was a problem that Madison, as we shall see, grasped immediately and intuitively.

Among the several significant historical recoveries Fritz makes is his observation that *The Federalist* includes eight essays—four

each by Madison and Hamilton—that dealt with the concept of interposition. These essays (26, 28, 84, 85 by Hamilton and 44, 46, 52, 55 by Madison) “offered the most thoroughgoing description of what became the practice of interposition” and “identified all of the features that interposition would later assume.” However, these passages have seldom been studied by scholars examining interposition “partly because neither Madison nor Hamilton used the term ‘interposition’” itself (25). Accordingly, Fritz argues, most students of the topic “assume that interposition was born of a post-ratification doctrine of states’ rights. That assumption,” he notes succinctly, “is incorrect and is the primary reason that the roots of interposition in *The Federalist* have been overlooked” (25).

This observation is crucial to Fritz’s argument since the start of his helpful typology of interposition that drives the book comes from Publius (essays by Hamilton and Madison) and establishes the foundation for what follows. In sum, Fritz sees three elements to interposition to be practiced by state legislatures: monitoring the aspects of federalism as practiced between the national and state governments, thus serving as sentinels or guardians of the equilibrium prescribed constitutionally; serving as guardians to identify any encroachments they saw on state authority or popular rights and then notifying the public of this in a step that Madison and Hamilton both described as “sounding the alarm” (26); and finally, as Publius envisioned, communicating their concerns to other state legislatures to bring these perceived overreaches to fuller public attention. “Hamilton’s and Madison’s descriptions of interposition in *The Federalist* rightly makes them co-authors of the concept,” Fritz comments. “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” (32).

Both parts of that statement are significant. Although Madison

became identified with the concept and, as Fritz establishes in convincing detail, drew heavily on these ideas in his 1798 Virginia Resolutions, Hamilton was just as responsible for the intellectual origins. Knowing how Madison and Hamilton had long since gone separate ways by the 1790s, readers may be surprised by Fritz's point. But he notes astutely that the logic 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" (37). Besides, the explanation for such an unexpected point can be found in his second, equally critical observation that this formulation was developed in late 1787 and early 1788 as Federalists were engaged in an attempt to persuade, or at least assuage, Anti-Federalist critics of the Constitution in the midst of a ratification debate that raged in the newspapers as well as the state ratifying conventions. Publius struggled to demonstrate to critics that the proposed Constitution was not as dangerous an instrument as some thought. The monitoring role of the state legislatures and the opportunity for sounding the alarm if intrusions appeared were vital parts of that effort to alleviate fears.

In a debate in which both written and spoken words loomed so large, contributing to meaning and understanding, and to building support or opposition, the role of language in the debate over the Constitution was enormous. Not surprisingly, the ambiguities of language are at the center of Fritz's book, and he is a sensitive reader and interpreter of its often-elusive nature in the long battle over interposition. In fact, the story of interposition is deeply entwined with the problem of language.

As Fritz shrewdly notes, once words move from author to reader, they take on a life of their own. Authorial intent cannot prescribe a singular meaning to an audience. This is part of the linguistic challenge of interpreting interposition. But in this case the problem was exacerbated in the 1798 Virginia Resolutions by Madison

himself, who as Fritz analyzes in his book's crucial fourth chapter, confused the issue by enunciating not the "sounding the alarm" notion but a seemingly expanded—yet not clearly articulated—doctrine by which the "people of the states" had a theoretical power to act in "their highest sovereign capacity" to interpose in the event of national government overreach. But his meaning lay in the eye of the beholder. Later figures such as John C. Calhoun made much mischief of these words, although Fritz argues that Madison "neither described what became the theory of nullification nor did he allude to the natural law right of revolution" (93). Still, Madison's own inconsistencies opened the door to both innocent misunderstandings as well as deliberate misreadings.

From these origins, interposition developed a life of its own. The bulk of Fritz's book is a patient, careful, fully documented summary and analysis of the various invocations of interposition up to and through the Civil War and then, after languishing dormant for a while, its reemergence in 20th-century opposition to civil rights. Fritz takes the story down to the very recent past and shows the "everything old is new again" quality to the resurgence of interposition in the realm of national politics.

If anyone could have predicted these developments, it was none other than James Madison. In his brilliant *Federalist 37* essay, published in January 1788, Madison recounted the myriad difficulties faced by the Constitutional Convention in its need to balance multiple, cross-cutting interests and goals. He wrote about the competing desires of large and small states, northern and southern interests, the national and state governments, and the constant battle to balance energy with stability in designing and putting into practice a framework of government. Fritz cites this essay twice in his book: once in discussing the "certain degree of obscurity" pertaining to federalism as outlined in the Constitution (15); and then later on the same theme of marking the proper division between state and national governments but at greater

length (186).

But even beyond those helpful discussions of Madison's essay by Fritz, *Federalist 37* contains other salient points that bear directly on the larger themes with which *Monitoring American Federalism* is concerned. One of the many striking passages in #37 is Madison's discussion of the ways language obscures even as it purports to clarify. While this part is a gloss of John Locke's famous discussion, Madison offers the insight as a capstone to the challenges he articulates between the competing, multivalent interests and desires the Convention had to weigh. "The use of words is to express ideas . . . But no language is so copious as to supply words and phrases for every complex idea . . . Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered. And this unavoidable inaccuracy must be greater or less," Madison noted, "according to the complexity and novelty of the objects defined. When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated." Put in terms of Fritz's book, even if all the actors in the various contests over interposition were operating from a stance of sincere good faith, the natural process of seeking meaning and understanding through the "cloudy medium" of language unavoidably would mitigate against clarity and definition.

These challenges posed by language strike me as being at the root of the debates and disputes over interposition. Fritz's work is a fitting complement to Jonathan Gienapp's *The Second Creation: Fixing the American Constitution in the Founding Era*, a book Fritz draws on for its points about the absence of fixed constitutional meaning (about, for example, the removal power, the necessary and proper clause, and the textual placement of amendments in the

document) at the time of drafting or ratification, thus requiring the need for a “second creation” in the 1790s to establish meaning that, while presumed, was absent at the outset. I think *Monitoring American Federalism* also has things to say about “the James Madison problem,” the scholarly efforts to explain—or explain away—the seeming evolution of Madison’s thinking from the 1780s nationalist to the 1790s states’ rightist. Fritz’s sustained focus on the differences between the 1788 conception of interposition that Madison spelled out in *The Federalist* and his changed 1798 conception (or his expression of it) in the Virginia Resolutions speaks directly to that controversy and provide more insights into the complex history of federalism. In all these ways, for all these reasons, Christian Fritz has produced a work of meticulous research that reveals a senior scholar’s command of the material, one that deserves a wide audience and that repays a close reading.

Review by Bradley D. Hays, Union College

A vibrant literature has developed in political science analyzing how subnational units influence constitutional meaning, authority, and politics. John Dinan exhaustively details how the state constitutional conventions throughout American history have addressed issues of governmental structure and self-governance that were central to the U.S. Constitution.[1] Emily Zackin demonstrates how the American positive rights tradition has primarily been located in the state constitutional experience in which states have debated, considered, and adopted constitutional protections that have defined the scope of fundamental rights in America.[2] Paul Herron provides an account of how Southern state constitutional conventions served as a means of solidifying and institutionalizing (white) Southern identity during the multiple constitutional conventions that occurred between 1860 and 1902.[3] Sean Beienberg observes that the 18th Amendment altered American federalism and that, in realizing Prohibition, it was states that debated, defined, and implemented the scope of change to the

federal structure.[4] Robinson Woodward-Burns explores how pressures for national constitutional change are regularly channeled to states that typically have easier amendment procedures, which, in turn, helps stabilize the national constitutional order by finding a vehicle for needed constitutional reforms.[5] My contribution to this literature concerns state interposition; its effects on the dimensions of constitutional interpretation, politics, and authority; and how interposition-type practices have changed over time, reflecting broader trends in constitutional development.[6]

Christian Fritz's *Monitoring American Federalism: The History of State Legislative Resistance*, also an exploration of state interposition, joins this conversation and, as a self-conscious work on constitutional history rather than constitutional development, provides a richer history of interposition than previously offered. The accounts of Antebellum interposition are well sourced, and Fritz successfully captures the fullness of each political episode such that the reader appreciates how intentional and aware state legislators were in passing interposition resolutions. And, *Monitoring* clearly shows that interposition is far from a practice that ended in Antebellum America but one that continued following the Civil War and that still continues to play an important role in influencing American constitutionalism. Unfortunately, *Monitoring* is too often not in dialogue with the political science literature on federalism and constitutional development, noting previous works only in buried footnotes. One consequence of this failure is that the precise value added by the book on federalism and constitutional politics is unclear, and questions that the past literature raises remain unanswered.

In Fritz's previous book, he notes his interest in constitutional dinosaurs: "ideas seriously discussed, considered, and acted upon, but which are foreign to our present constitutional understanding."[7] Interposition, the concept and practice at the center of *Monitoring*, is one such dinosaur. As Fritz details, states in

Antebellum America regularly “sounded the alarm” when the federal government enacted a policy that jeopardized the equilibrium of the federal system created under the Constitution of 1787. This was not by accident. Framers, including James Madison and Alexander Hamilton, believed this role for state legislatures was essential for maintaining the balance of power between the national and state governments struck in the new constitutional order (30–37). Fritz carefully details the many instances when states performed this function. And Fritz is sufficiently thorough to include post–Civil War examples with which constitutionalists may be less familiar but demonstrate the vitality and utility of interposition, even after nullification (an altogether different state-based process) and secession had been repudiated through civil war.

As good histories do, *Monitoring* helps the reader better understand what problems practitioners of interposition were trying to solve. Most clearly, Fritz notes the desire to protect the balance of power between the federal and state governments. In this sense, interposition created a vehicle for resisting centralization. While the process of post-interposition resistance is not systematically examined, the case studies suggest that states helped generate (or channel) political pressure against offending federal policies. State legislatures could seek amendments, the people could express their opposition electorally, parties could cite interposing resolutions to legitimate their positions, etc; all of which created pressure to alter or abolish the policy. The case studies make clear the motivation for interposition, its forms, and its short-run consequences.

If *Monitoring* makes clear how interposition was employed against certain federal policies, it does not explore as much as it could the tensions and consequences of interposition with its anti-centralization capacities being employed to give meaning to a national constitution. Madison expressed concerns that frequent recurrence to the people was likely to undermine foundational rules

of law and incentivize demagoguery.[8] But Madison also acknowledged that popular support for the Constitution was essential to maintaining the new political order. Interposition is intriguing in the ways it may have balanced these two concerns. Robert Cover argued that political communities are bound together by their shared interpretive commitments.[9] *Monitoring*'s historical case studies reveal how American state legislatures attempted to create meaning and craft interpretations that could realize interpretive visions that were widely shared within its political community. Interposition appears to be a means by which constitutionalism was located closer to the people while still being mitigated by political elites in elected state offices. The tension between the resistance function of states and their constitutive capabilities is something of interest to scholars of constitutional development, and the case studies in *Monitoring* will provide insights into this tension should future students be inclined to explore them.

The history in *Monitoring* raises questions about other problems practitioners were attempting to solve. Each incident of interposition plays out on a unique policy dimension. Many of these policies, of course, touch upon federal authority, but it is nearly impossible to divorce the constitutional objection—often obliquely referenced in the state resolution—from hostility to the policy itself. Fritz provides plenty of context to understand the policy and constitutional dimensions, but considering the multi-dimensionality of the conflict invites the reader to think through the objectives of interposition as a practice. For example, realists/attitudinalists in law and political science ascribe policy motivations to judicial decision-making on constitutional issues. *Monitoring* can be read to ascribe policy motivations to state legislators when passing resolutions of interposition that claim to protect a balanced distribution of constitutional authority. In these episodes of interposition, to what extent can we differentiate between constitutional politics and

ordinary/normal politics? How can we understand the benefits and drawbacks of making constitutional claims rather than relying on policy objections alone? How do these tensions change over time in light of broader changes to political parties, ideological commitments, powerholding, etc. Fritz does not weigh in heavily on these claims, but future students will find interesting questions to pursue when further exploring the dynamics between constitutional claims and policy claims in state-driven constitutional practices.

Future students of *Monitoring* may also ask questions about the sort of problems the book is either motivated by or attempts to address. As noted above, *Monitoring* suggests that some prominent framers, including Madison and Hamilton, believed interposition would serve an important constitutional balancing function. Other scholarship locates interposition-type practices in the American constitutional experience in response to British policies that governed internal domestic affairs.[10] In other words, at the time of the Framing, state interpretive assertions were practiced, familiar, and expected to continue. Constitutionalists can debate how much this history matters for sanctioning contemporary understandings of constitutional authority. Does interposition gain greater legitimacy if certain practices existed and certain framers and/or the public perceived interposition as a constitutionally sanctioned practice when the document was ratified? This may be important to originalists. Perhaps it is important, too, to constitutionalists seeking alternatives to judicial supremacy, but future students will need to explore why and how it matters. *Monitoring* can provide useful insights into contemporary debates on originalism and alternatives to judicial dominance over constitutional meaning.

Contemporary constitutionalists may also wish to carefully explore how interpretations emerging out of state legislatures differ from interpretations coming from the courts. Legislatures and courts are different institutions with different rule structures that produce different behaviors from the actors who work within them. And, yet,

while interpretations of the 19th century occurred when judicial review was less established, modern and contemporary interposition occurred in environments where the Supreme Court claimed itself supreme as to the exposition of the laws.[11] Interpretations coming from state legislatures of the recent past may do as much to affirm Supreme Court doctrine as displace it. In other words, constitutionalists seeking vehicles to broaden and democratize constitutional dialogues on federalism or any number of other issues will need to assess the capacity of states to produce unique substantive constitutional arguments and produce political coalitions to back them. An optimistic reading of *Monitoring* suggests states continue to have this capacity. However, other scholarship provides a less sanguine perspective. National interest groups have advocated for state legislatures to pass resolutions declaring various federal policies unconstitutional.[12] This suggests that some state resolutions may be less about state-level movements and more about national organizations using ideologically aligned states to legitimate their constitutional visions. The constitutional vision emerging out of state legislatures today may be less about state-based majorities pushing to change the national constitutional understanding and more about national activists pushing to have states endorse their objectives. Exploring how nationalizing tendencies affect state-based practices like interposition will provide even greater insight into the role of state legislatures in constitutional politics.

As to the questions of contemporary constitutional scholarship, future scholars may wish to further explore the effects of state interposition on federalism itself. Readers of H-FedHist know well that federalism is dynamic. In the American context, federalism began to change as soon as it was created. The idea that states “monitored” federalism suggests that states were attempting to maintain the political system. But while the monitoring function can be preservationist, it can also be constructive. When states “sound

the alarm," they are attempting to form and/or mobilize a political coalition committed to a particular construction of constitutional federalism. Successful interpositions do not result in a return to what came before the offending national policy (even if the policy is abandoned or abrogated). More often, one understanding of federalism layers on another, producing a kind of disordered federalism. *Monitoring* contains a variety of these vignettes such as Jefferson's vision of federalism in the Kentucky Resolution versus Jefferson's vision of federalism during the Embargo Crisis (131–39). Jefferson claimed consistency, yet his expansive use of federal authority to enforce the embargo reflected Federalist understandings of national authority even as the Federalist legislature in New England passed resolutions of interposition condemning the embargo and its enforcement. Jeffersonian Republicans did not displace the inherited Federalist regime on federalism nor did the Federalists supplant the Jeffersonian understanding of state engagement in national political affairs. One can find this in Fritz's excellent histories, but future scholars can do more to explore its meaning and consequences to constitutional development.

Monitoring makes an important contribution to constitutional history by providing a thorough accounting of interposition and how it has influenced constitutional meaning over time. The book affirms that states are important, if too often underappreciated, actors in the larger national constitutional project. It, too, provides many pathways for future students of federalism and constitutionalism to further explore state-based practices and further elucidate how states and state officials influence the U.S. Constitution of both past and present. Future scholarship will also benefit from broadly engaging with the existing literature to create a more comprehensive understanding of the myriad ways states affect constitutionalism and its implications.

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2 Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* (Princeton: Princeton University Press, 2013).

3 Paul E. Herron, *Framing the Solid South: The State Constitutional Conventions of Secession, Reconstruction, and Redemption, 1860–1902* (Lawrence: University Press of Kansas, 2017).

4 Sean Beienburg, *Prohibition, the Constitution, and States' Rights* (Chicago: University of Chicago Press, 2019).

5 Robinson Woodward-Burns, *Hidden Laws: How State Constitutions Stabilize American Politics* (New Haven: Yale University Press, 2021).

6 Bradley D. Hays, *States in American Constitutionalism: Interpretation, Authority, and Politics* (New York: Routledge, 2019).

7 Christian G. Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York: Cambridge University Press, 2008), 398.

8 James Madison, "Federalist 49," *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1999), 281–85.

9 Robert M. Cover, "The Supreme Court 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97:7.

10 Hays, *States in American Constitutionalism*, 11–14.

11 Mark A. Graber, "The Problematic Establishment of Judicial Review," in *The Supreme Court in American Politics: New Institutionalist Approaches*, eds. Howard Gillman and Cornell Clayton (Lawrence: The University Press of Kansas, 1999), 28–42.

12 Hays, *States in American Constitutionalism*, 87–89.

Review by G. Alan Tarr, **Rutgers University-Camden**

In *The Federalist* #37 James Madison acknowledged the challenge of "marking the proper line of partition, between the authority of the general, and that of the State Governments," recognizing that the division of authority would remain "obscure and equivocal" until it could be "ascertained by a series of particular discussions and adjudications." Madison's expectation of conflict was quickly confirmed, though he may have been optimistic about the resolution of such conflicts. Three decades after the Constitution's ratification, Chief Justice John Marshall observed that "the question respecting the extent of the powers actually granted [to the federal government] is perpetually arising, and will probably continue to arise, as long as our system shall exist."[1] A century later Woodrow Wilson concurred, noting that "the question of the relation of the States to the federal government cannot be settled by one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."[2] Current events confirm that this conflict has not abated because, as Justice Sandra Day O'Connor observed, "the States as States have legitimate interests which the National Government is bound to respect, and state officials have acted to safeguard those interests."[3]

Professor Fritz's volume makes an impressive contribution to our understanding of how state officials have acted to combat threats to the federal balance, exploring how state legislatures have over time raised the alarm about perceived usurpations by the federal government. More specifically, Fritz highlights "interposition," that is, the process by which a state legislature—acting as a "constitutional sentinel"—identifies a threat to the federal balance, sounds the alarm to alert other states to the danger, and enlists their aid in counteracting it. As he shows, state legislative interposition has

been controversial throughout American history. The controversy reflects in part contested understandings of the federal system created by the Constitution and, as a result, debate about when such interposition is warranted. Unsurprisingly, these competing views of American federalism are often entwined with policy judgments about the wisdom of the policies Congress is pursuing. Likewise controversial, at least in the nation's early decades, was the claim that state legislatures should identify and combat constitutional violations. For example, in the 1790s Federalists criticized state legislatures taking a position on the federal excise tax on liquor, characterizing it as an intrusion on the sphere of the federal government and beyond the scope of their responsibilities. Similarly, in *United States v. Peters* (1809) the U.S. Supreme Court—dominated by Federalist appointees—rejected interposition and claimed a judicial monopoly on constitutional interpretation. However, during the Jefferson and Madison administrations, Federalists adopted the very arguments that they had criticized when they were in power, with Federalist-controlled state legislatures passing interposition resolutions attacking the embargoes imposed by Thomas Jefferson and James Madison, as well as other national policies. Thus, one might conclude from Professor Fritz's detailed analysis of these conflicts that they were not primarily about the division of responsibility and authority between nation and state. Rather, political parties regularly used arguments about federalism for tactical purposes, so that "most debates over federalism [were] only lightly camouflaged debates over policy."[4]

Of particular importance in the debate over interposition has been the issue of what actions a state might legitimately take in response to federal usurpations. Professor Fritz rightly highlights James Madison as the key figure in this debate. During the campaign for ratification of the Constitution, Madison (together with Alexander Hamilton) insisted that state legislatures would be well situated to

detect if the new government exceeded its powers, because such overreaching would likely invade the powers of those state legislatures. He argued that a state legislature detecting such an infringement could communicate its concern to other state legislatures, as well as to those representing the state in Congress, and seek to restore the federal balance enshrined in the Constitution. However, in the Virginia and Kentucky Resolutions (1798 and 1799), drafted in response to the Alien and Sedition Acts, Madison (in conjunction with Thomas Jefferson) seemed to go further, maintaining that the states were parties to the constitutional compact and that congressional enactments contrary to that compact were null and void. Madison's formulations were more careful and precise than Jefferson's, but these "Principles of '98" lent themselves to misinterpretation and misuse, most notably in John Calhoun's later argument for state nullification of federal enactments.

Calhoun insisted that because every state was a party to the constitutional compact, each state had the authority to judge for itself whether the federal government had exceeded its authority and to nullify enactments that exceeded the powers granted to it. Calhoun and his fellow nullificationists claimed the "Principles of '98" for their authority, much to Madison's chagrin. Fritz convincingly demonstrates that their argument for nullification misinterpreted Madison's nuanced view of federalism (216–225) —Madison himself charged that nullification put "powder under the Constitution and Union, and a match in the hand of every party to blow them up at pleasure" (224). Nonetheless, since Calhoun's time the concepts of interposition and nullification have been closely linked. As Fritz observes: "Interposition's routine association with nullification in the aftermath of the Nullification crisis soon placed a stigma on interposition from which it never fully recovered" (195).

Because Professor Fritz's book focuses on the contested meaning of interposition and its use in controversies over the scope of

federal power, it largely concentrates on developments from the Founding to the end of the Civil War. This is hardly surprising, for as he notes, “Americans had largely forgotten the history of the constitutional tool of interposition by the late nineteenth century” (287). A single chapter of his book addresses interposition in the 20th and 21st centuries, noting the regrettable tendency to treat the term as simply synonymous with state nullification of federal enactments. But he acknowledges that his focus on interposition means that he does not address many contemporary efforts by states to oppose federal initiatives that do not fit comfortably into the traditional definition of interposition. Whereas interposition addresses the constitutional division of power between Congress and state legislatures, the Constitution also recognizes a considerable overlap of federal and state authority. Interposition’s emphasis on jurisdictional separation thus does not address the development of a political practice that entails a great deal of power sharing and state-federal bargaining that is not focused on jurisdictional issues. In addition, the locus of federal policymaking has over time shifted from Congress to the executive branch, which has redirected the efforts of states in safeguarding their authority. This usually does not entail opposition to federal involvement in policy areas, but instead involves states seeking to ensure they retain input in the formulation and administration of policy. In addition, “state officials are keenly interested in the levels of federal funding that their governments receive and the conditions placed on the receipt and expenditure of those funds.”[5] They also are concerned to avoid unfunded mandates, which impose federal priorities but require state expenditures, and they seek flexibility to carry out federal programs in ways that accord with their own states’ circumstances.

Finally, contemporary state efforts to safeguard their powers do not typically rely on state legislatures as constitutional sentinels or on collaborative action by those legislatures. States individually may

use their powers or their ability to withhold their cooperation—what some scholars describe as “uncooperative federalism”—to combat federal initiatives with which they disagree.[6] For example, 10 states have refused to expand eligibility for Medicaid despite the incentives provided by the Affordable Care Act of 2010 (Obamacare). State officials have also formed permanent governmental interest groups, such as the National Governors Association and the National Conference of State Legislatures, to safeguard state interests. Finally, state governments increasingly challenge federal initiatives in federal court. Usually, this litigation involves state governments controlled by one political party challenging the initiatives of a federal government controlled by the opposing political party, a political conflict dominated by partisan differences rather than a concern for state prerogatives.[7]

Yet if the mechanisms that states use to challenge federal enactments have changed over time, the concern to safeguard state interests has not. By exploring an important avenue that states have used to protect those interests, Professor Fritz’s book makes a significant contribution to the literature on American federalism. I enjoyed reading it, and as usual, learned a great deal from his research.

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1 *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

2 Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 173.

3 *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985).

4 Thomas R. Dye, *American Federalism: Competition among Governments* (Lexington, MA: Lexington Books, 1990), 184.

5 John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (Norman: University of

Oklahoma Press, 2009), 41.

6 See generally Benjamin Merriman, *Conservative Innovators: How States Are Challenging Federal Power* (Chicago: University of Chicago Press, 2019).

7 See generally Daniel J. Hopkins, *The Increasingly United States: How and Why American Political Behavior Nationalized* (Chicago: University of Chicago Press, 2018).

Response by Christian G. Fritz, University of New Mexico School of Law

I want to thank Benjamin Guterman for organizing this Roundtable on *Monitoring American Federalism: The History of State Legislative Resistance,* John Dinan for writing the Introduction, and the three reviewers, Todd Estes, G. Alan Tarr, and Bradley D. Hays, for their thoughtful engagement with the book.

As its subtitle indicates, *Monitoring American Federalism* explores the complex history of how state legislatures sought to weigh in on the balance of federalism created by the Constitution. State legislatures assumed a role as guardians to identify any encroachments on state authority or the people's rights as described in *The Federalist*. The implementation of interposition as a means for state legislatures to sound the alarm about perceived constitutional overreaching by the federal government was attended with controversy, confusion, and ultimately manipulation, but nonetheless provides one distinct throughline of America's constitutional development from the post-ratification period to the 21st century.

Todd Estes focuses on two critical aspects of that story: the initial development of interposition as a concept and constitutional tool described in *The Federalist* and the problems caused by "imprecise language" in how interposition was presented and received. Estes appreciates the book's argument that Hamilton's and Madison's

description of what became the practice of “sounding the alarm” interposition was a *rhetorical* argument directed at critics who worried that the Constitution gave too much power to the national government at the expense of the states. That fact, he observes, helps account for the irony of the collaboration of Madison and Hamilton in advancing the idea of interposition and in addition sheds light on the so-called “Madison problem,” namely, reconciling Madison’s views in the 1780s with his attitudes in the 1790s.

When they wrote their *Federalist* essays, both Hamilton and Madison harbored deep skepticism about state legislators and believed that one danger of the constitution drafted by the Philadelphia convention was that the states would intrude into the rightful realm of the national government. Hamilton and Madison eventually, and dramatically, went their separate ways in terms of constitutional thinking by the 1790s. But in 1787, when both of them offered a description of what later became the practice of interposition, neither one of them wanted state legislatures to assume such a powerful role. Relatively soon after their joint effort in securing the Constitution’s ratification, the two began to drift apart—with Madison’s perceptions of what posed the greater danger to the Constitution gradually shifting toward views once harbored by early critics of the Constitution. Expansive assertions and interpretations of federal power championed by Hamilton increasingly worried Madison. Madison eventually embraced interposition—most famously in his Virginia Resolutions of 1798 as the Alien and Sedition Acts threatened freedom of speech and the press throughout the new nation as part of a partisan attack by Federalists on the Jeffersonian-Republicans. Madison thus sincerely believed in by the late 1790s what he only gave lip service to in 1787. Hamilton, however, remained a vocal critic of interposition from the moment of its first appearance after the Constitution’s ratification, despite having advanced the idea of interposition in *The Federalist*.

Estes reminds us that Madison anticipated the convoluted and contested life of the idea of interposition by focusing, in *Federalist 37*, on the problematic and ultimately imprecise nature of language. The competing interpretations surrounding interposition were predictable given the need to seek meaning and understanding through the "cloudy medium" of language, which eluded clear definitions and understandings. Estes rightly concludes that challenges posed by language lay "at the root of the debates and disputes over interposition."

Like Estes, Alan Tarr also stresses Madison's anticipation of jurisdictional disputes over "the proper line" between state and national authority, a conflict that remains a feature of our constitutional politics. For Tarr, *Monitoring American Federalism* demonstrates that state legislative interposition "has been controversial throughout American history." That controversy arose not merely from a contested understanding of the Constitution's federalism, but from the question of whether state legislatures were entitled "to identify and combat" perceived constitutional violations by the national government. Tarr identifies criticism directed at state legislatures for weighing in on issues that were supposedly beyond the scope of their responsibilities, such as protesting the federal excise tax on liquor, and notes the Supreme Court's rejection of interposition in *United States v. Peters* (1809). In addition, *Monitoring American Federalism* documents that Federalist-dominated state legislatures responding to the Virginia and Kentucky Resolutions of 1798 rejected the idea of state legislators expressing their views about the constitutionality of actions of the national government, asserting that such opinions, much less judgments, were the *exclusive* province of the courts.

When Tarr describes "interposition" as addressing "the constitutional division of power between Congress and state legislatures," he correctly points out that the struggle over the equilibrium of federalism has shifted in modern times away from

state legislatures passing interposition resolutions to different state actors and the use of other mechanisms and strategies to push back against federal authority. Still, it is worth noting that the early practice of interposition was not confined to state legislative actions challenging Congress. States seeking to monitor federalism identified perceived overreaching by both the federal judiciary and the executive branch as well as Congress, which the interposition efforts following the decision in *Chisholm v. Georgia* (1793) and presidential policies of Jefferson and Madison preceding the War of 1812 demonstrated. Moreover, beginning with the earliest uses of interposition, the executive as well as judicial branches of state government resisted what they perceived to be unconstitutional federal actions. For example, interposition resolutions were passed by state legislatures, but implemented by state governors, who very often were the first to "sound the alarm" about perceived federal overreaching in addresses preceding legislative sessions and who communicated with other states.

Still, Tarr rightly emphasizes how "the mechanisms" that states use to challenge federal enactments have continued to utilize state executive and judicial power—as well as legislative action—to resist what states, or a single state, consider objectionable federal funding decisions, policies, and initiatives. Chapter 10 of *Monitoring American Federalism* describes this multipronged state resistance to federal challenges, including the use of "uncooperative federalism." But Tarr aptly highlights the modern emergence of "permanent governmental interest groups" for states, such as the National Conference of State Legislatures and the National Governors Association.

Bradley Hays' review begins by noting a vibrant literature in political science, including by scholars such as himself who have investigated how "subnational units influence constitutional meaning, authority, and politics." Hays describes *Monitoring American Federalism* as joining "this conversation," but faults the

book for failing to engage “with the political science literature on federalism and constitutional development” such that the “value” of the book for understanding federalism and constitutional politics is “unclear.”

Indeed, the questions he raises about the nature of constitutional development, dimensions of constitutional interpretation, politics, and authority *are* important. But meaningful exploration of those questions *requires* historical context. Crucially, *Monitoring America Federalism* provides that historical context because it is the only work to date that identifies the genesis of interposition and provides a history of its practice from the time of the Constitution to the late 19th century, as well as some discussion of how it has resurfaced in modern times. Indeed, Hays makes many suggestions about how future political scientists, “scholars of constitutional development,” “constitutionalists,” “contemporary constitutionalists,” and “future students of federalism and constitutionalism” might usefully build upon and extrapolate from the historical account in *Monitoring American Federalism.*

Hays describes how the history of interposition presented in *Monitoring American Federalism* might inform different questions, including insight into “the tension between the resistance function of states and their constitutive capabilities.” In addition, the book encourages the exploration of the “dynamics between constitutional claims and policy claims in state-driven constitutional practices.” Moreover, the history presented in *Monitoring American Federalism*, according to Hays, “can provide useful insights into contemporary debates on originalism and alternatives to judicial dominance over constitutional meaning.” The book might induce “future scholars . . . to further explore the effects of state interposition on federalism itself.” Hays observes that state-level movements may sometimes be “more about national organizations using ideologically aligned states to legitimate their constitutional visions.” Intriguingly, Hays describes how successful interpositions

layer upon one another “producing a kind of disordered federalism.” As Hays and I would agree, those multiple, often discordant layers create a reconstructed federalism that is worth every citizen’s scrutiny—and serious scholarly investigation.

Hays is disappointed that I did not pursue such questions, but I am pleased that he considers *Monitoring American Federalism* “an important contribution to constitutional history.” Moreover, I appreciate that he thinks that *Monitoring American Federalism* “provides many pathways for future students of federalism and constitutionalism to further explore state-based practices and further elucidate how states and state officials influence the U.S. Constitution of both past and present.” Indeed, Hays offers the highest compliment any author could receive: that their work serves to open up new and exciting avenues of scholarly investigation and political discourse.

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