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Circle the wagons, blue states

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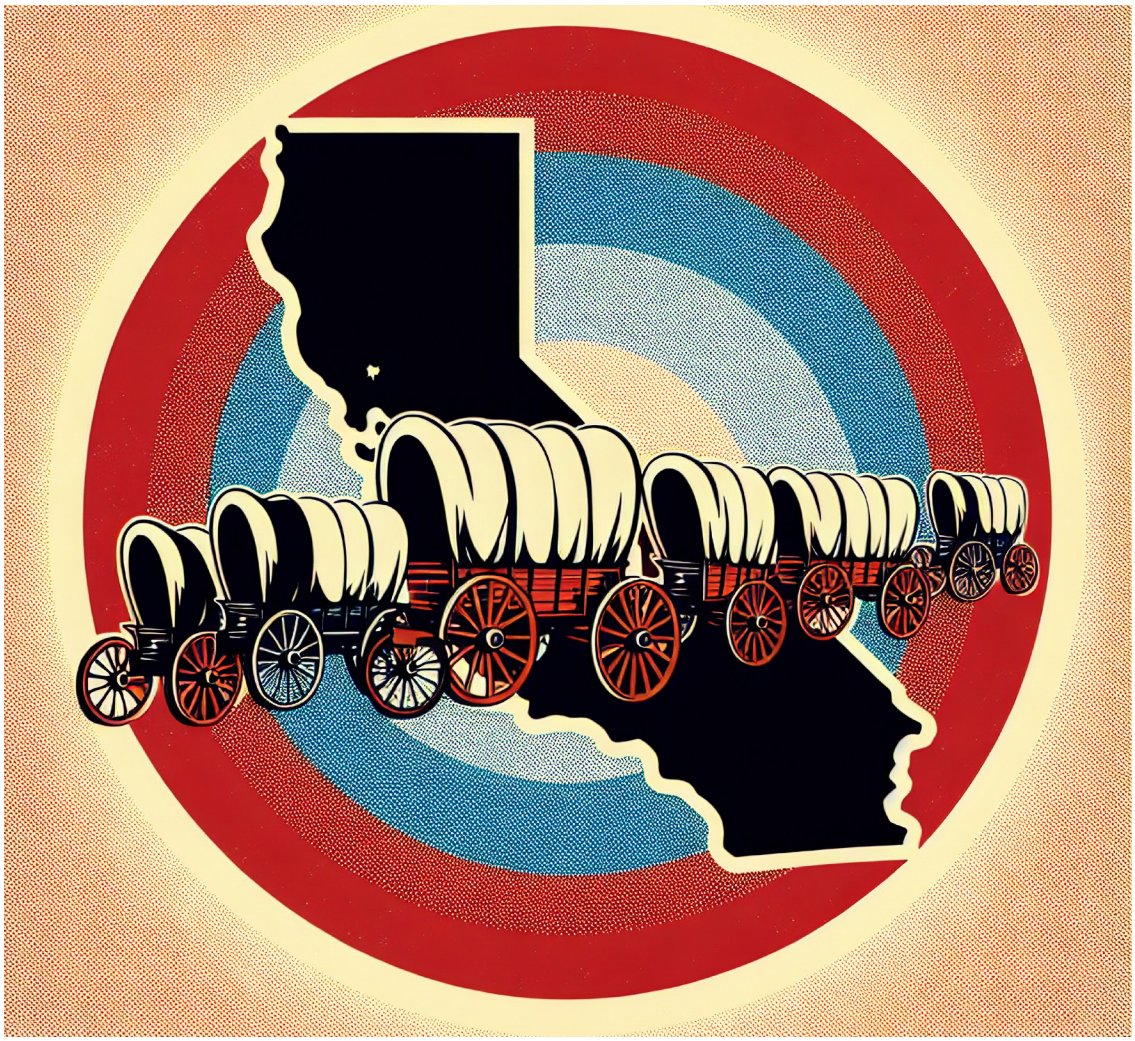

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This month's presidential election results have left blue states uncertain about the path forward, with many questioning what, if anything, can be done. Yet we see an opportunity to reinvigorate our state constitutions. For those asking "What's next?": circle the wagons, marshal some legal arguments, and go on offense. Here's your roadmap for action.

The obvious first barrier to wielding state law is the federal constitution's Supremacy Clause. As Justice Barrett said, federal law is supreme where it applies — "End of story." Attacking that unyielding rule head-on is futile, so flank or evade it by arguing that federal law exceeds the limited-and-enumerated federal powers, that federal law doesn't apply, or that avoidance canons prefer finding no conflict between federal and state law. Then counterattack with federalism principles: state sovereignty and plenary power, the complementary concept that the federal government has only defined powers, and the Tenth Amendment's anti-commandeering rule.

Start with the fundamental federalism principle that the states retained "a residuary and inviolable sovereignty" when they joined the Union and hold all powers not delegated to the federal government. As Justice Alito said, the federal constitution grants Congress only certain enumerated powers. "Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms." That makes the first question whether the states granted a power to the federal government at all. Remember: while the federal constitution grants only specific powers, state constitutions are limits on a state's otherwise broad police power, and courts will presume that federal law does not preempt state law.

The other key federalism principle here is that, as Chief Justice Marshall said, the federal government "is acknowledged by all to be one of enumerated powers." In Federalist No. 45 Madison described the federal government's powers as "few and defined," while the states' powers would be "numerous and indefinite." That means it's always the federal government's burden to show that it has power to act. Denying Congress the police power to enact general welfare legislation leaves the states with general jurisdiction over everything outside federal power. So, for example, the Posse Comitatus Act bars using federal forces for domestic law enforcement. Absent an armed rebellion, federal armed forces have no domestic role.

The Tenth Amendment enshrines this vertical division of power and state sovereignty by precluding an expansive reading of federal powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That bars the federal government from claiming any unenumerated powers, such as an unwritten power to direct state policy or resources. Although Congress can directly regulate matters within its constitutional powers, it cannot issue orders to the states or direct state agents. That's why the anti-commandeering doctrine bars the federal government from conscripting states to implement federal policy — which means

states cannot be forced to participate in, for example, immigration roundups.

The U.S. Supreme Court recently opened some new attack angles for the states. Despite its poor outcome for federal reproductive rights, Dobbs amounts to a free pass for states to grant all the reproductive liberty they want. So use your state's direct democracy tools to amend your state constitution — many states already have. Loper Bright is an open invitation for states to challenge federal administrative agency rules and have courts decide whether laws that the agency enforces are ambiguous. You can even challenge Commerce Clause powers now, after the high court in *United States v. Lopez* and *United States v. Morrison* limited a previously broad view of congressional power to enact laws relating to "interstate commerce," refusing to convert the Commerce Clause into "a general police power of the sort retained by the States."

Even if all those arguments fail, states generally can refuse to assist or participate in a federal program. States cannot impede federal agents in lawful activities, but states have no obligation to help. In Federalist No. 46 Madison encouraged states to resist federal overreach through "refusal to cooperate with the officers of the Union." That's why Congress often dangles funds as the carrot to entice voluntary state compliance with federal programs, and anti-commandeering means there's really no stick other than withholding those and other funds. Refusal does mean forgoing the money; even so, there are constitutional limits on cutting off state funding. As Chief Justice Roberts explained, threatening to withhold federal funding totaling 10% of a state's budget is an unconstitutional "gun to the head" under the Spending Clause. Otherwise, there's no sanction for declining to assist. If federal agents want to enforce federal law, that's their prerogative (and problem).

As you employ these arguments, remember that any state (red or blue) and the federal government itself can use them. Confederate states used them before the Civil War. Republican-controlled states deployed these arguments against the Biden administration, just as Democrat-controlled states did during the first Trump administration. Federalism always cuts both ways, across political lines to help all states, and it can aid the federal government against the states. Never a fan of partisan impulses, Madison's vision of dual sovereigns intended federalism to protect individual liberty by making the national and state governments compete for power and allowing citizens to pit them against each other. The federal constitution divides authority between federal and state governments to protect individuals because a healthy balance of power between the states and the federal government reduces the risk of tyranny and abuse from both. The winner should be the entity that best protects liberty.

When oppressed by one government, turn to the other for protection. Use your state constitution to grant greater individual rights protection than the federal minimum guarantee, use state law to direct resources to local policy preferences, and ask your state courts to preserve those grants against federal power using independent state law grounds. Form local alliances that don't violate the Interstate Compact Clause by striking handshake agreements with like-minded states to cooperate on regional policy priorities. Forge international bonds that benefit your state's commerce with contracts that don't violate the Treaty Clause. Remind federal courts of their obligation to uphold federalism principles, enforce state sovereignty, and respect independent state constitutions. Protect your state.

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