Substack

The Constitutional Architecture of State Opposition to Electoral Autocratic Takeover

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Today I submitted a formal academic working paper on the constitutional architecture of state opposition to SSRN, the repository where researchers, academics, and scholars publish work before it enters the formal journal review process. Abstract ID 6459958.

For those of you who have been here a while, you watched this happen. The soft secession framework, the tier structure, the prosecution mechanisms, the historical precedents: all of it developed through the articles you have been reading here over the past year. At some point I looked at what had accumulated and realized it was a complete legal theory, not just a collection of arguments. Several weeks of deliberate construction later, it is now in the academic record. Other researchers can find it, cite it, and build on it.

That is a bigger deal than it might sound. Most ideas flow from academic institutions down into public conversation. This one moved in the opposite direction. You were part of that.

If you pull it up and read it, I want to prepare you for something: it reads differently from what you find here every week. It is written for legal scholars and researchers, which means it is dense, formally structured, and built to withstand serious academic scrutiny. Same ideas, different packaging. Think less article, more source material for a law school textbook.

More accessible coverage of the framework is coming. But I wanted you to see this first, because you are the reason it exists. If you have questions about what any of it means, or want me to break down a specific section in plain language, drop them in the comments.

Be aware that this is roughly a 20 minute read and 3-4x longer than most of my articles. Here is the working paper.

THE CONSTITUTIONAL ARCHITECTURE OF STATE OPPOSITION:

A Taxonomy of Sovereign Posture Under Federal Authoritarian Capture and Electoral Autocracy

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Abstract

[Author's note: This working paper abstract runs longer than standard journal submission length. A condensed version will accompany formal journal submission. The extended abstract is intentional for SSRN distribution to ensure complete presentation of the framework's scope and contributions.]

American states already hold the constitutional authority to check, prosecute, and outlast a captured federal government. The architecture has always been there.

Scholarship on federalism and democratic backsliding has accurately described why subnational opposition to authoritarian federal measures tends to fail: states deploy individual tools in isolation, get outmaneuvered, and lose.59 What that scholarship has not provided is a unified taxonomy of the tools themselves or the recognition that they constitute an architecture that, when assembled deliberately and deployed concurrently, produces something qualitatively different from any single tool applied alone.

Each of these postures has existed throughout American constitutional history. What the literature has never provided is the recognition that they constitute discrete categorical tiers within a single deployable architecture. This paper names and maps that taxonomy across five tiers. Tier Zero is cooperative federalism, the assumed ground state requiring no deliberation. Tier One, uncooperative federalism, describes governments withholding cooperation from federal enforcement, a category Bulman-Pozen and Gerken named in 2009.1 Tier Two, soft secession, describes states building parallel institutional and financial capacity that reduces dependence on federal partnership and builds resilience against federal mismanagement, corruption, and captured law. Tier Three, oppositional federalism, describes governmental actors at any level using sovereign powers offensively to confront and impose direct personal costs on federal officials and institutions, including through criminal prosecution under state law for offenses that are unpardonable by a corrupt federal executive. Tier Four is constitutional non-compliance, the condition at which states actively do the thing the federal government has prohibited, constructing competing legal regimes that directly contradict specific federal law as a matter of explicit state policy, with documented historical precedent across the political spectrum.

The architecture is tier-modular, domain-modular, and actor-modular. A mayor, a city council, a state attorney general, a governor, or a state legislature can move from Tier Zero directly to Tier Three in a single session without prerequisites; any tier is independently deployable without activating the others; and any governmental actor can occupy different tiers simultaneously across different policy domains. Full concurrent deployment produces the constitutional infrastructure specifically suited to the failure mode the existing literature identifies but has not prescribed for: authoritarian federal capture by actors engaged in the systematic dismantling of democratic governance and the rule of law.

The doctrinal foundation draws on dual sovereignty, the anti-commandeering doctrine, intergovernmental immunity, and the Tenth Amendment's structural reservation of sovereign authority to the states, doctrines consistently applied across two and a half centuries of American constitutional law because they reflect the Constitution's design rather than any particular political moment.2 Notably, the anti-commandeering doctrine at the architecture's foundation was built by conservative jurisprudence for entirely different purposes. Justice Scalia wrote Printz to protect states from federal gun control mandates. The doctrine he articulated does not ask which political faction is deploying it. They enable every tier of this framework, from refusing federal cooperation to prosecuting federal officials, without federal permission, federal oversight, or presidential interference. The framework does not conflict with the Supremacy Clause, which governs conflicts between state and federal regulatory regimes and has never been understood to immunize federal officials from state criminal liability for conduct that violates state law, to compel states to assist federal enforcement, or to displace the parallel criminal jurisdictions that dual sovereignty established at ratification. Because no single actor controls the architecture and no federal action can foreclose it, the framework is resistant to the very countermeasures that have historically crushed subnational opposition.

I. Introduction

Shortly after 2 a.m. on July 15, 2020, Mark Pettibone was walking home through downtown Portland, Oregon, after a night of protest near the federal courthouse. An unmarked minivan pulled up in front of him. Four or five men in camouflage fatigues jumped out and grabbed him. They pulled his own beanie hat over his eyes so he could not see where they were taking him. They drove him through the city for several minutes, then unloaded him in what he later learned was the parking garage of the Mark O. Hatfield federal courthouse. They read him his Miranda rights, asked if he would waive them, and when he declined and asked for a lawyer, they released him. He received no written record of an arrest, no citation, no documentation of any kind. He still does not know, with certainty, which agency took him.3

What happened to Mark Pettibone on the streets of Portland that night met the definition of kidnapping under Oregon criminal law. The agents who grabbed him were operating on Oregon soil, subject to Oregon's sovereign jurisdiction. The Oregon Attorney General filed a federal lawsuit within two days, and the dean of Berkeley Law said publicly that what occurred was, by definition, kidnapping.4 Not one agent was ever charged. The federal government refused to identify them. Oregon responded by asking a federal court to tell the federal government to stop. If Pettibone's kidnappers had been private citizens, Oregon law enforcement would have opened a criminal investigation without the perpetrators' cooperation, convened a grand jury, and pursued charges. The badge changed none of the legal authority and all of the institutional response. Oregon had the jurisdiction, the statutes, and the evidence. It chose a federal lawsuit over a criminal investigation. The men who grabbed Pettibone went home.

This paper maps that architecture.

The scholarship on federalism and democratic backsliding has reached a pessimistic consensus. Kaufman and Kelemen's comparative analysis concludes that federalism functions as a guardrail against authoritarian consolidation only under a narrow and difficult-to-achieve set of conditions.5 Gardner, writing in Publius in 2026, argues that while subnational governments often mount initial resistance to nationally authoritarian measures, that resistance is typically met with effective countermeasures, and federalism provides no reliable protection against the consolidation of authoritarian federal power.6 This paper does not dispute what those scholars observed. It disputes the conclusion they drew from it.

States get isolated and crushed because they deploy individual tools haphazardly, without recognizing that those tools belong to a unified constitutional architecture that, when assembled deliberately and deployed concurrently, constitutes something qualitatively different from any of its parts. Oregon knew it had jurisdiction. It lacked the statute that would have let it use that jurisdiction efficiently. That gap, between authority held and authority deployable, is what the existing literature has never mapped, and what this paper provides.

Part II develops a five-tier taxonomy of state-federal constitutional postures, demonstrating that each tier has historical precedent in American federalism and that, together, they constitute a complete and deployable architecture. Part III develops the doctrinal foundation in dual sovereignty and anti-commandeering doctrine, demonstrating that the architecture rests on settled constitutional law. Part IV identifies the gap between current state practice and full concurrent deployment, and outlines the full paper's forthcoming prescriptive analysis.

II. The Taxonomy: Five Tiers of State-Federal Constitutional Posture

Federalism scholarship has long recognized that states occupy different postures toward federal authority depending on political conditions, institutional incentives, and strategic calculation. What the literature has not previously provided is a complete taxonomy of those postures, named and bounded as discrete categorical tiers, with the structural properties of the taxonomy identified and its deployable architecture mapped. This Part provides that taxonomy.

A. Tier Zero: Cooperative Federalism

Cooperative federalism is the ground state of the American federal system. It requires no deliberation, no legislation, and no political will. States administer federal programs, share enforcement resources with federal agencies, coordinate policy implementation, and function as partners in a joint governance enterprise. This is the normal operating condition that the constitutional architects designed and that most of American history has reflected.

Naming Tier Zero establishes the full spectrum of the taxonomy. A framework that begins at Tier One implicitly treats opposition as the baseline, which distorts both the descriptive and normative claims. Cooperation is the constitutional default, and the upper tiers are deliberate departures from it. The taxonomy only holds together if the ground it departs from is named. This distinction also carries the paper's central normative argument: the upper tiers are not inherently justified, they become justified when the federal government abandons the conditions that make the default appropriate.

The existing federalism literature, including Bulman-Pozen and Gerken's foundational work on uncooperative federalism, takes cooperative federalism as assumed backdrop rather than as a named tier. Naming it does two things: it establishes the full spectrum of available postures rather than only the opposition end, and it makes clear that the framework is descriptively neutral, mapping what states can do rather than advocating that they always do it.

B. Tier One: Uncooperative Federalism

In 2009, Jessica Bulman-Pozen and Heather Gerken coined the term "uncooperative federalism" to describe states using their role as administrators of federal programs to resist federal policy from within.7 Their core insight was that the servant role creates leverage: a state that administers a federal program holds enormous practical power over how that program actually operates and can use that power to express dissent, force federal attention to state concerns, and create political costs for policies the state

opposes.

The clearest contemporary expression of Tier One is the sanctuary jurisdiction. A city or county that declines to honor federal immigration detainers, share data with federal enforcement agencies, or allow its officers to participate in federal enforcement operations withholds cooperation that the federal government lacks the constitutional authority to compel. The anti-commandeering doctrine, developed in Part III below, prevents Congress from conscripting state and local officers into federal enforcement; without that cooperation, significant portions of federal enforcement become operationally dependent on what states choose to provide.1314

Tier One's posture toward the federal government is: we will not help you.

C. Tier Two: Soft Secession

Where Tier One describes states withholding cooperation, Tier Two describes states building capacity that makes their cooperation less necessary in the first place. This paper terms this posture "soft secession." The phrase appeared occasionally in political discourse before 2025, without consistent definition, theoretical grounding, or strategic architecture, and was sometimes used interchangeably with Tier One non-cooperation.30 What the author contributed was the first systematic framework distinguishing soft secession as a discrete tier with its own properties, separating it clearly from uncooperative federalism and positioning it within a complete taxonomy of state-federal postures.8 That framework has since been cited by the Brookings Institution, covered by Mother Jones and NPR, and incorporated into existing scholarship on the subject.

Soft secession describes states building parallel institutional and financial capacity that reduces dependence on federal partnership and builds resilience against federal mismanagement, corruption, and captured law. The Bank of North Dakota, founded in 1919, provides a clear model: a state-chartered public bank that gives North Dakota financial infrastructure independent of the federal banking system and the private banks that dominate it.18 Municipal broadband networks, interstate compacts that coordinate state action without federal participation, and state fiscal reserves large enough to absorb federal funding cuts all represent Tier Two deployment.

Tier One and Tier Two operate through different mechanisms with different effects. Tier One requires federal action to have something to refuse. Tier Two builds capacity that renders certain federal actions irrelevant regardless of the state's cooperation posture. A state with robust non-tax revenue infrastructure is less vulnerable to federal funding threats than a state that depends entirely on federal transfers. The capacity does not require a fight to be useful; it changes the terms of any potential confrontation before

that confrontation begins.

State and municipal spending, contracting, and investment authority provides a related mechanism that operates independently of federal campaign finance law. Governments have broad discretion over who receives public contracts, subsidies, and public investment, and several jurisdictions have enacted responsible contractor ordinances and political spending transparency requirements as conditions of public business. Public pension funds and state investment vehicles represent significant financial leverage that states direct according to their own fiduciary standards and statutory authority. Citizens United protects private political spending from government prohibition.19 It does not require governments to subsidize or contract with entities that engage in it. A state that conditions public contracts and investment on restrictions against using public resources to fund political activity is not restricting speech. It is exercising settled spending authority: the government is not required to subsidize the exercise of constitutional rights, and the decision about who receives public money belongs to the government writing the check.20 A city or state deploying this authority does not need a court to revisit Citizens United. It builds accountability conditions within its own jurisdiction using power it already holds.

Cannabis legalization illustrates Tier Two's most powerful mechanism: building parallel infrastructure that renders federal law functionally inoperative through entrenchment and distributed adoption. Colorado and Washington independently legalized in 2012, not through coordination or shared strategy but through democratic responsiveness to constituent demand combined with a political calculation that federal enforcement would be too costly and unpopular to execute.21 States were doing what their constituents wanted in a policy space where federal action had stalled, building regulatory systems, generating tax revenue, and creating economic constituencies that made reversal progressively more costly the longer it ran. The federal government did not act in 2012. It watched more states follow independently, each building the same entrenched infrastructure, until federal law had become functionally inoperative on the question across dozens of jurisdictions simultaneously.46 Distributed independent adoption across enough states made the cost of enforcement across all of them exceed any conceivable federal budget or political appetite. This is Tier Two operating at full power: parallel infrastructure so entrenched and so widely distributed that federal authority over the domain becomes practically meaningless without a single constitutional confrontation.

Tier Two's posture toward the federal government is: we do not need you and we won't let you take us down with you.

D. Tier Three: Oppositional Federalism

Tier Three is this paper's central coinage. Oppositional federalism describes governmental actors at any level using sovereign powers offensively to confront, constrain, and impose direct personal costs on federal officials and institutions. Where Tier One refuses cooperation and Tier Two builds independence, Tier Three goes on offense.

The primary mechanism is criminal prosecution under state law. Under the dual sovereignty doctrine, the federal government and each state are independent sovereigns with concurrent authority to define and punish conduct occurring within their respective jurisdictions. Presidential pardons reach only offenses against the United States; they have no constitutional effect on state criminal charges.22 A federal official who commits assault, murder, bribery, sedition, or any other offense that has been defined under state law while operating within that state's borders can be prosecuted under state law, convicted in a state court, and sentenced by a state judge, and no presidential action of any kind can reach that verdict.954

A preliminary note on why state criminal prosecution has become the appropriate first response rather than a measure of last resort. In a functioning accountability system, the conduct Tier Three addresses would have been caught earlier: by congressional oversight, inspector general investigations, civil regulatory enforcement, or administrative remedies. Criminal prosecution was historically reserved for the most egregious cases because the layers above it were operational. The specific failure mode this framework addresses is the systematic dismantling of those layers. Congressional oversight gets obstructed. Inspectors general get fired. Regulatory agencies get captured. Civil accountability mechanisms get disabled. State criminal law then becomes what remains of a functional accountability system, and deploying it against federal actors who have committed crimes against state residents is the straightforward application of existing law to the conditions that now exist.

Tier Three operates on two distinct tracks that run simultaneously. The first requires no new legislation. Existing state computer fraud, identity theft, privacy, and criminal statutes already cover a broad range of conduct committed by federal actors against state residents. A federal badge has never been a categorical exemption from state criminal law. The Supremacy Clause immunity federal officers can invoke is conditional, not blanket: it protects only conduct that was lawfully authorized and no more than was necessary and proper to fulfill federal duties.23 Conduct that falls outside those limits, including plainly unlawful force, unauthorized data access, and actions that exceed statutory authority, carries no immunity. The deference states have historically extended to federal actors reflects a presumption of good faith between cooperative sovereigns, not a legal obligation. As Justice Holmes confirmed, a federal employee "does not secure a general immunity from state law while acting in the course of his employment."57 Modern courts apply a two-part test: immunity attaches only when the federal actor was

performing an act authorized by federal law, and only when the conduct was no more than necessary and proper to fulfill that duty.58 Personal criminal conduct falls outside both prongs. Qualified immunity has never extended to conduct that is fully criminal rather than merely tortious,24 and even where immunity questions arise they present issues worthy of investigation rather than grounds for deference.

When federal actors access the personal records of state residents through a chain of authorization that was unlawful or exceeded statutory limits, they commit conduct that existing state statutes already cover. County prosecutors across the country hold jurisdiction over crimes committed against their constituents, and in many jurisdictions state law imposes an affirmative duty to prosecute such crimes regardless of the identity of the perpetrator. The correct analytical frame is to strip the federal wrapper from the conduct and evaluate the elements of the offense: someone in another jurisdiction accessed your residents' private financial and medical records through authorization that violated federal privacy law and exceeded the statutory authority of the agencies directing it. That description of the crime does not change because the actor holds federal employment.

The same principle applies to financial conduct involving federal actors and their associates. State securities fraud and business fraud statutes operate independently of federal enforcement priorities in the jurisdictions where the conduct occurred or where investors were solicited.34 New York's Martin Act provides the clearest existing proof of concept for Tier Three First Track deployment: it reaches fraudulent and deceptive practices in the sale of securities without requiring proof that the defendant knew the conduct was fraudulent.25 Attorneys General Spitzer and James used it to pursue and produce accountability for conduct the SEC had reviewed and declined to prosecute.26 The federal government's decision not to act did not close New York's jurisdiction. States have already done this. The framework names what they did and shows it can be intentionally replicated to more broadly restore law and order. Where a company misrepresents the nature of its business activities to state regulators or investors in states where it operates, state jurisdiction attaches regardless of whether federal enforcement has acted. The jurisdictional analysis is the same: strip the federal wrapper, identify the conduct, apply the elements of the state offense.

The second track addresses genuine gaps where existing statutes do not cleanly reach the conduct in question, or where prosecutorial ambiguity would allow defense counsel to challenge the basis of the charge. Model legislation establishing clear jurisdiction, defining applicable offenses under state law, and creating specific statutory vehicles for prosecution of white collar crime, corruption, financial fraud, and related misconduct makes Tier Three more operationally reliable and more durable against legal challenge. This track does not create authority that track one lacks. It strengthens and systematizes authority that already exists.

Track two legislation survives Supremacy Clause challenge on three grounds. First, it must be facially neutral and generally applicable, defining categories of conduct rather than categories of actors.32 A statute criminalizing bribery, obstruction of state criminal proceedings, or fraudulent misrepresentation to state regulators applies to everyone within state jurisdiction. Federal actors who commit the defined conduct fall within it because everyone does, not because the statute was written to reach them. Second, states have broad, longstanding, and largely undisturbed authority to define and enforce criminal law within their borders in domains the federal government has not exclusively occupied, including white collar crime, corruption, and financial fraud.33 Track two legislation fits within continuous historical state practice rather than representing a novel intrusion into federal operations. Third, where the Supreme Court has explicitly left regulatory space to states, as it did in Snyder v. United States when it held that federal anti-corruption law does not reach gratuities and grounded that holding partly in federalism principles,36 states filling that vacancy are doing precisely what the constitutional structure invites. A state statute criminalizing conduct the Supreme Court has said federal law does not reach produces no conflict with federal law because federal law has stepped back. The Supremacy Clause resolves conflicts between state and federal law.31 Where federal law is absent, there is no conflict to resolve.

Tier Three also encompasses emergency declarations by governors mobilizing state resources in response to federal conduct;51 regulatory action making federal priorities expensive or logistically difficult to implement within state borders; coordinated litigation forcing federal agencies and officials to defend on multiple fronts simultaneously, multiplying legal costs and administrative burden; and legislation creating personal financial liability for federal contractors and collaborators who participate in conduct disallowed by state statute. The common thread across all these mechanisms is the imposition of personal costs on the specific human beings who make specific decisions, rather than abstract institutional pressure on agencies that cannot feel discomfort.

Tier Three's posture toward the federal government is: we are coming after you.

The reach of Tier Three extends further than existing federal enforcement because state anti-corruption statutes were not gutted by the same judicial decisions that narrowed federal law. When the Supreme Court held in Snyder v. United States that the primary federal anti-corruption statute does not criminalize gratuities paid to officials after an official act, it explicitly left regulation of such conduct to state and local governments.17 State and local governments currently have statutes applicable to these activities, though they have not been applied to federal actors due to institutional deference, rather than legal requirement or lack of standing. A payment that federal prosecutors can no longer reach under that narrowed statute may remain fully prosecutable under

state bribery and corruption law in the jurisdiction where it occurred. Obstruction, abuse of office, and financial misconduct follow the same logic: where federal statutes have been narrowed or federal enforcement has declined to act, state criminal law occupies the remaining space.35 The gap between what federal law now tolerates and what state law still prohibits is precisely where Tier Three prosecution authority operates.

Tier Three prosecution authority is also self-reinforcing in a way the existing literature has not recognized. A state grand jury investigating crimes committed on state soil has the authority to subpoena witnesses and compel testimony. Federal officials who refuse to comply, who instruct subordinates not to cooperate, or who actively work to impede that investigation are committing obstruction of a state criminal proceeding under state law. That charge lands on the specific human beings who made specific decisions: the agent who refused to testify, the official who directed the refusal, the supervisor who coordinated the cover. Qualified immunity has never protected criminal conduct in the same way that attorney-client privilege has never protected criminal conduct.35 A federal government that stonewalls a state grand jury does not make the investigation disappear. It adds names to the indictment. The more aggressively federal actors obstruct state criminal process, the more defendants the state prosecution generates. Where multiple states maintain concurrent prosecutions arising from the same federal conduct, obstruction of one proceeding constitutes a separate offense in each jurisdiction where a grand jury sits. The federal government's resource and retaliatory advantage, formidable against any single state, attenuates across the full field of concurrent proceedings. Each act of interference generates independent criminal exposure in each jurisdiction. The architecture is designed to be uncontainable by the actor it holds accountable. The federal government's institutional advantage narrows as its misconduct expands. Every additional jurisdiction where a federal actor commits a crime is another prosecutor with standing, another grand jury with subpoena authority, another independent evidentiary record. The architecture grows with the offense.

The strategic power of Tier Three multiplies when multiple states run parallel independent investigations into overlapping conduct while sharing information across state lines. The federal government can threaten one state. It cannot effectively retaliate against ten states running independent grand juries under ten different sets of state criminal statutes, each with independent subpoena authority, each generating its own evidentiary record, each imposing its own costs on the same actors. This distributed accountability architecture has documented historical precedent: the multistate opioid litigation produced consequences for pharmaceutical manufacturers that decades of federal enforcement had failed to achieve, precisely because dozens of independent state investigations, coordinated through information sharing but each maintaining independent legal authority, created a web of accountability no single defendant could contain.27 Applied to federal misconduct, the same architecture produces a constitutional response that no federal resource advantage, retaliatory funding cut, or

targeted prosecution can neutralize in full.

E. Tier Four: Constitutional Non-Compliance

Tier Four is the tier where states actively do the thing the federal government has prohibited. Not refusing to help enforce it, as in Tier One. Not building independent capacity around it, as in Tier Two. Not prosecuting the actors who violated state law, as in Tier Three. Actually constructing a competing legal regime that directly contradicts a specific federal law or directive as a matter of explicit policy. The state is not working within the system or around it. The state is building a contradictory legal reality on a specific question and presenting the federal government with the choice of accepting it or confronting it.

Constitutional carry is the clearest contemporary example. States that permit concealed carry without a license are not refusing to cooperate with federal gun enforcement. They are affirmatively creating a state licensing regime, or the deliberate absence of one, that directly contradicts what federal regulatory frameworks contemplate.28 The city, state, or municipality has constructed a competing legal reality on the specific question of who may carry a firearm and under what conditions. Dozens of states have done this. The federal government has not moved to stop them.37

The oath every governor, attorney general, and state legislator swears is an oath to the Constitution, not to federal directives.38 That premise underlies the entire framework of constitutional government. When federal directives conflict with constitutional obligation, the oath runs to the Constitution. Three conditions, when they converge, move state action from policy choice to constitutional duty: the federal conduct must be facially unconstitutional,39 compliance must require the state to actively facilitate rather than merely tolerate it,40 and the ordinary mechanisms for checking the conduct must have been captured or disabled.41 Policy disagreement alone does not reach this threshold.42

The historical precedent on the threshold's existence is unambiguous, if contested on its application. In Ableman v. Booth, decided in 1858, the Supreme Court held that Wisconsin could not use its courts to release Sherman Booth, a newspaper editor held under federal authority for violating the Fugitive Slave Act.10 Wisconsin ignored the ruling. The state Supreme Court issued the writ of habeas corpus, and Wisconsin's political leadership declined to enforce the federal court's assertion of jurisdiction.43 Several northern states had enacted personal liberty laws specifically designed to make the Fugitive Slave Act unenforceable within their borders.44 Between 1850 and 1860, federal authorities managed to return only approximately 332 people under the Act, a small fraction of those sought, largely because state non-compliance made enforcement practically impossible.29

The same tier has been occupied in the wrong direction. Southern states invoked constitutional non-compliance to resist Brown v. Board of Education and subsequent federal civil rights enforcement, claiming the Supreme Court had itself violated the Constitution by ordering desegregation. The justification depends entirely on which actor has abandoned constitutional obligation, not on which political faction is deploying the tier. The Southern states were wrong because the Supreme Court's desegregation orders were constitutionally correct and the resisting states were the actors in violation. The northern states refusing to enforce the Fugitive Slave Act were right because the federal law was constitutionally abhorrent and refusal honored the deeper constitutional obligation.45 The tier does not validate the actor who invokes it. The constitutional analysis does.

This distinction matters for the escalation calculation governors make when considering higher tier action. The fear of federal retaliation is rational and the retaliation will come. But the documented record of states constructing competing legal regimes suggests the calculation is more favorable than governors currently act as though it is.21283746 States have been occupying Tier Four for decades on firearms, cannabis, and other domains, constructing explicit state policy that contradicts federal law, and the federal government has largely declined to confront it at scale.283746 The constitutional architecture available to states with far stronger justifications for their policy choices is identical. The asymmetry is political. The architecture is the same.

The most consequential contemporary application involves federal seizure or manipulation of state electoral processes. Elections are the mechanism by which governmental authority derives its democratic legitimacy.47 A federal government that attempts to override state election administration, install federally preferred outcomes, or use the federal enforcement apparatus to determine the results of state-administered elections is dismantling the constitutional structure that makes its own authority legitimate.48 A governor who directs state election officials to conduct elections according to state law in direct defiance of federal directives designed to corrupt that process has met the three threshold conditions: the conduct is facially unconstitutional, compliance would require active state facilitation of the constitutional violation, and the mechanism by which the violation would be checked is precisely what is being destroyed.

Tier Four carries a predicate obligation the framework must name explicitly: the duty to know. Authoritarian consolidation works by controlling information, restricting access, and ensuring that officials with authority to act do not know what is happening until it is too late to act effectively.4149 A governor who does not know what is happening inside a federal detention facility operating on state soil cannot invoke Tier Four in response to what they do not know exists. The duty to know is the obligation that makes Tier Four

fully operable. A governor with reasonable grounds to believe federal conduct within their state may have crossed criminal and constitutional threshold has an affirmative obligation to investigate, demand access, deploy state law enforcement to inspect facilities operating on state soil, and treat obstruction of that investigation as itself a constitutional signal that the threshold may have been crossed.

Tier Four differs from nullification, with which it shares surface resemblance but not constitutional logic. Nullification claims states may void federal law based on policy disagreement or contested constitutional interpretation.50 Tier Four describes the condition at which a state constructs an explicit competing legal regime on a specific question, based on a constitutional or democratic determination that the federal position cannot stand. The distinction is between wholesale rejection of federal authority and targeted defiance on a specific question where the state has determined that federal law or conduct has crossed a threshold where active opposition is necessary.

Tier Four's posture toward the federal government is: you said we cannot do this. We are doing it.

F. The Three Structural Properties

The five tiers share three structural properties that distinguish this framework from prior accounts of state opposition and that determine the architecture's practical power.

The tiers are tier-modular. No tier requires any other as a prerequisite. A state legislature can move from Tier Zero directly to Tier Three in a single session by enacting the relevant statutes, without first practicing uncooperative federalism or building soft secession infrastructure. No ladder must be climbed. No intermediate steps are required.

The tiers are domain-modular, meaning any tier can be deployed in any policy area without affecting a governmental actor's posture in others. A state can be at Tier Zero on highway funding administration, Tier One on immigration enforcement cooperation, Tier Two on financial infrastructure, and Tier Three on federal officer accountability, all simultaneously. These postures do not interact; each operates independently within its domain. The same actor can hold multiple postures at once because the postures are defined by domain and mechanism, not by general disposition toward federal authority.

The tiers are actor-modular. Any governmental actor with sovereign authority can deploy any tier in any domain without waiting for any other actor to move first. A mayor can instruct city law enforcement not to honor federal detainers without waiting for the state legislature. A state attorney general can open a criminal investigation of federal conduct using existing state law without waiting for new legislation. A governor can declare a state of emergency and mobilize state resources without federal permission.51

A city council can enact ordinances restricting cooperation with federal enforcement without state authorization. The architecture distributes authority rather than concentrating it, which means it has no single point of failure and no actor whose cooperation is necessary before any other actor can move. The Fight Against Federal Overreach coalition, formed in January 2026 by district attorneys from nine jurisdictions spanning five states, demonstrates this property in practice: local prosecutors independently asserting Tier Three authority across multiple jurisdictions simultaneously, each maintaining independent legal standing, without waiting for state legislatures, governors, or federal permission to move.11

This independence has a structural dimension that distinguishes it from prior accounts of coordinated state opposition. Because no actor's posture depends on another actor moving first, each governmental actor can calibrate their own exposure to their own political constraints, eliminating the collective action problems that have historically allowed the most risk-averse participant to define the ceiling for all.52

Emergency powers deserve particular note because they are not confined to any single tier. A governor exercising emergency authority can simultaneously mobilize state financial infrastructure that reduces federal dependence, direct state law enforcement to refuse cooperation with federal operations, and authorize state agencies to begin investigations of federal conduct which may have occurred within state borders. A single state of emergency declaration can activate Tier Two capacity, Tier One non-cooperation, and Tier Three investigative authority at once, across multiple domains, through a single executive act. Emergency powers are among the most powerful cross-tier tools in the architecture precisely because they concentrate actor authority while spanning the full taxonomy. Further, the multitude of crises that radiate as a result of federal authoritarian capture result in circumstances fully and explicitly authorized by emergency powers granted to all 50 governors with the intent of granting broad and unilateral response authorities as a result of emergent threats for which existing traditional governmental action cannot sufficiently address.51

Full concurrent deployment across tiers and domains produces a constitutional architecture qualitatively different from any single tier operating alone. A state with Tier Two financial independence is less vulnerable to federal economic mismanagement or funding threats against its Tier Three prosecutions. Tier One non-cooperation starves federal enforcement operations while Tier Three litigation occupies those same agencies on legal defense. The architecture's components reinforce each other without requiring coordination, because each operates through independent constitutional authority.131453

III. The Doctrinal Foundation

The architecture rests on two constitutional doctrines, both developed primarily by conservative jurisprudence, and both developed for purposes entirely distinct from the failure mode this paper addresses. The political portability of the architecture follows directly from this doctrinal origin.

A. Dual Sovereignty

The federal government and each state are independent sovereigns. This principle is embedded in the constitutional structure, confirmed in the text of the Tenth Amendment, and reaffirmed repeatedly in Supreme Court doctrine across two and a half centuries of American constitutional law.33131453 The practical consequence for the pardon power is direct: presidential pardons reach only offenses against the United States.22 The Double Jeopardy Clause's bar on successive prosecution for the same offense does not apply when separate sovereigns bring the charges, because each sovereign pursues its own distinct legal interest in vindicating its own distinct body of law.954

The Supreme Court most recently reaffirmed this principle in Gamble v. United States, decided in 2019, where the Court held 7-2 that the dual sovereignty doctrine permits separate state and federal prosecutions arising from the same underlying conduct.12 Justice Alito's majority opinion traced the doctrine to the founding, explaining that the structure of American constitutional government presupposes two distinct sovereigns, each with the authority and the obligation to enforce its own law. The dual sovereignty exception to double jeopardy reflects a foundational constitutional recognition that state law and federal law are separate bodies created by separate lawmaking authorities to vindicate separate sovereign interests. In Alito's words: "An 'offence' is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two 'offences.'"[12] A crime against two sovereigns therefore "constitutes two offenses because each sovereign has an interest to vindicate."[12]

The consequence for Tier Three deployment is significant. A federal official pardoned for a federal civil rights violation arising from conduct that also constitutes assault, bribery, corruption, or sedition under state law remains fully exposed to state prosecution.22 The pardon the president signs is constitutionally inert against the state charge. The state prosecutor who brings the charge answers to the state's voters, not to the federal administration. The state judge who presides over the trial serves at the pleasure of state law, not federal appointment. The jury sits in a state courthouse. At no point in the proceeding does the federal executive have any constitutional mechanism to intervene.

B. Anti-Commandeering

The anti-commandeering doctrine provides that Congress cannot conscript state

legislatures or executive officers into federal service.1314 The federal government may regulate individuals directly, imposing obligations on private citizens and private entities through the commerce power and other enumerated authorities.55 What it cannot do is require state governments to administer federal programs or state officers to enforce federal law.

New York v. United States, decided in 1992, established that Congress cannot compel state legislatures to enact regulatory schemes to implement federal policy, even with substantial financial incentives attached.13 Justice O'Connor's majority opinion grounded the holding in a structural protection of democratic accountability: if Congress could require state legislatures to act, it could effectively impose federal policy while insulating federal officials from political accountability for that policy. The citizens would hold their state representatives responsible for laws those representatives had no choice but to enact. The constitutional structure, O'Connor held, does not permit this displacement of accountability. In her words, "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."13

Printz v. United States, decided in 1997, extended the doctrine to state executive officers.14 The case arose from a provision of the Brady Handgun Violence Prevention Act requiring state chief law enforcement officers to conduct background checks on handgun purchasers until a federal system was established. Justice Scalia's majority opinion held that the federal government cannot conscript state executive officers into federal enforcement operations. Scalia held that the anti-commandeering doctrine is essential to preserving the Constitution's vertical separation of powers, because permitting federal commandeering of state officers would give Congress the capacity to accomplish through state administrative machinery what the Constitution requires it to accomplish through its own.14 Its function is to prevent the federal government from using state administrative machinery as its own without compensating or politically accounting for that use. As Scalia wrote for the Court: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[14] The Murphy Court later confirmed that adherence to this principle is important precisely because the rule serves as "one of the Constitution's structural safeguards of liberty."[14]

The doctrine's practical consequence for Tier One deployment is direct: when states refuse cooperation with federal enforcement, the federal government must conduct that enforcement with its own personnel, paid from its own budget, facing whatever political

and legal costs that deployment produces. States cannot be ordered to make immigration arrests. State police cannot be compelled to assist federal raids. State attorneys general cannot be directed to enforce federal civil law.1314 The federal government that wants state cooperation must persuade, incentivize, or tolerate refusal.

C. The Political Portability of the Architecture

The doctrinal foundation produces a result its architects did not anticipate because they built it for different circumstances. Antonin Scalia wrote Printz to protect states from federal regulatory overreach in the context of gun control legislation.14 Sandra Day O'Connor wrote New York v. United States to protect state legislatures from congressional commandeering.13 The doctrines they articulated are not dependent on the political alignment of the state deploying them or the federal administration being checked.

The portability is the framework's most important structural feature. The constitutional architecture this paper maps belongs to the constitutional system, not to any political faction. Any state, at any time, deploying any tier in any domain, draws on the same doctrinal foundation. A state that used anti-commandeering to resist federal drug enforcement mandates draws on the same doctrine as a state using it to refuse cooperation with federal immigration operations.1314 A state prosecuting a federal official for corruption under state law draws on the same dual sovereignty doctrine that has governed American federalism since ratification.954 The tools are available to any governmental actor willing to use them, in any direction the constitutional structure requires, against any actor that has abandoned the obligations that make its authority legitimate.

The Harvard Law Review's 2025 article on entrepreneurial federalism documents how states across the political spectrum have used their reserved powers to act on national security concerns in ways that parallel or exceed federal law, demonstrating the same constitutional portability across a different domain.15 The framework this paper develops is available to any governmental actor, at any level, in any domain, without permission from the government it seeks to check, and without regard to the political alignment of the actor deploying it.

D. The Supremacy Clause Objection

The most common objection to frameworks of state opposition is that they conflict with the Supremacy Clause, which provides that federal law is the supreme law of the land and that state law must yield where the two conflict.56 The objection sounds powerful and collapses under examination, because the framework does not place state law in conflict with federal law at any tier.

Tier One presents no Supremacy Clause problem because a state withholding cooperation is not overriding federal law. The Supremacy Clause requires states to yield when their own regulatory regimes conflict with federal ones.31 It does not require states to affirmatively assist federal enforcement. Printz settled this directly: the federal government cannot conscript state officers into federal enforcement, and a state that declines to participate is not violating the Supremacy Clause, it is exercising a constitutional right the Court has repeatedly confirmed.1314

Tier Three presents no Supremacy Clause problem because state criminal law and federal criminal law occupy parallel jurisdictions over the same conduct without conflicting. There is no federal law permitting federal officials to commit assault, bribery, corruption, or sedition. A state prosecuting a federal official for conduct that violates state law is not overriding any federal legal permission; no such permission exists. Justice Holmes confirmed that a federal employee "does not secure a general immunity from state law while acting in the course of his employment."57 The two-part test courts apply confirms the same principle: immunity attaches only when the officer was performing an act authorized by federal law and only when the conduct was no more than necessary and proper to fulfill that duty.58 Personal criminal conduct falls outside both prongs. The Supremacy Clause has never been understood to immunize federal officials from state criminal liability for their personal conduct.235758 What it protects is federal regulatory supremacy in areas of genuine conflict,31 rather than a general shield for individuals who happen to hold federal employment.2357

The closest genuine objection runs through intergovernmental immunity doctrine, which McCulloch v. Maryland established to protect federal governmental functions from state interference.16 That doctrine protects federal institutions and operations from state regulation that would directly burden the exercise of federal power. It does not extend to individual federal officials committing crimes in their personal capacity. The officer who assaults a citizen, accepts a bribe, or commits sedition is not exercising federal power in any sense the immunity doctrine was designed to protect. Personal criminal conduct falls outside the doctrine's scope, and state prosecution of that conduct raises no Supremacy Clause problem that two and a half centuries of constitutional law has recognized.17

IV. Conclusion and Further Research

American states already hold the constitutional authority to check, prosecute, and outlast a captured federal government. The architecture has always been there. What has been missing is the recognition that the tools constitute a unified deployable system, and that the system is tier-modular, domain-modular, and actor-modular.

This working paper presents the taxonomy and its doctrinal foundation as a contribution to the scholarly literature on federalism and democratic backsliding. The existing scholarship accurately describes why states fail when they deploy individual tools in isolation.59 This framework argues that the failure is architectural rather than inherent: states are not deploying the complete concurrent architecture, and the gap between current practice and full deployment is precisely what the existing literature has not been able to map or prescribe for.

The full paper, currently in preparation, will develop this framework in four additional directions. First, a comparative analysis of existing state deployments will demonstrate the implementation gap empirically, examining specific cases where states have deployed individual tiers without assembling the full concurrent architecture. Second, the historical bidirectionality of the framework will be examined, including cases in which the federal government properly deployed its own constitutional tools against states that had abandoned their constitutional obligations, particularly during the civil rights era, demonstrating that the framework's normative argument is conditional on which actor has abandoned constitutional obligation rather than categorical in its support of state opposition. Third, the paper will address the full range of constitutional objections, including Supremacy Clause challenges, intergovernmental immunity doctrine, and preemption arguments, demonstrating that the architecture is durable against the most serious challenges a sophisticated counterargument would mount. Fourth, the paper will develop a systematic treatment of the constitutional amendments and Supreme Court doctrine that underwrite each tier, moving through the relevant case law in depth: the Tenth Amendment's structural reservation of sovereign authority, Fourth Amendment implications for state investigations of federal conduct, First Amendment constraints on the Tier Two spending and contracting mechanisms, and the Fifth and Fourteenth Amendment due process questions that arise when state grand juries subpoena federal officials.

Several additional lines of inquiry fall outside the scope of even the full paper and are identified here as subjects for dedicated future work. The actor-modular dimension of the architecture raises questions about the role of state attorneys general as independent constitutional actors that deserve treatment as a separate inquiry. The interstate coordination mechanisms implied by Tier Three, including the legal structure of interstate compacts and the constitutional status of tax escrow arrangements, present doctrinal questions the taxonomy identifies but does not resolve. The question of what evidentiary threshold triggers the transition from Tier One to Tier Four, including how courts should evaluate claims of facially unconstitutional federal conduct in real time, raises issues of institutional competence that require dedicated attention. Perhaps most significantly, the taxonomy's relationship to the historical tradition of Black resistance deserves treatment as a dedicated inquiry. The constitutional tools this architecture deploys were not invented by academics. Dual sovereignty, parallel institution-building,

and the strategic use of state law against federal overreach were practiced and theorized by abolitionists, by Frederick Douglass, by the organizers of the civil rights movement, and by the Black Panther Party, all of whom understood that communities unable to rely on federal protection had to build sovereign capacity of their own. The association of states' rights with white supremacy is a historical accident of who held power, not an inherent feature of the constitutional structure. Reclaiming this framework for the communities that developed its underlying theory of resistance is a project this taxonomy makes possible but does not attempt.

Governors act when the political cost of inaction exceeds the political cost of action.60 The only people who change that calculation are the ones who create the public demand that makes inaction costly.61 This framework is a map of what is constitutionally available, and it represents the structure of democratic accountability working as designed during what the V-Dem Institute's peer-reviewed research describes as a process that could make the United States the fastest autocratizing country in contemporary history that does not involve a coup d'état.62 The person who needs to be convinced is not the governor. It is your neighbor.

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Notes

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