Our American federalism creatively unites states with unique cultural, political, and social diversity into a strong nation. The Tenth Amendment is the cornerstone of constitutional federalism and reserves broad powers to the states and to the people. Federalism protects liberty, enhances accountability and fosters innovation with less risk to the nation. NCSL strongly urges federal lawmakers to maintain a federalism that respects diversity without causing division and that fosters unity without enshrining uniformity.

Individual liberties can be protected by dividing power between levels of government. "The Constitution does not protect the sovereignty of states for the benefit of the States or state governments as abstract political entities, or even for the benefit of public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals." New York v. United States, (1992) This careful balance enhances the express protections of civil liberties within the Constitution.

By retaining power to govern, states can more confidently innovate in response to changing needs. As Justice Brandeis wrote: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, (1932). It is a suitable role for the federal government to encourage innovation by states. Federal officials should
recognize that failure is a risk associated with experimentation and permit states room to act and evaluate without judging prematurely the value of innovative programs. States are inherently capable of moving more quickly than the federal Congress to correct errors observed in policy and can be more sensitive to public needs.

The Supreme Court has sent a strong message to Congress that its powers under the Commerce Clause have boundaries (*United States v. Lopez*, (1995). Congress must heed the wisdom of *Lopez* and not exercise its commerce powers without a compelling need to do so. Similarly, the Supreme Court should add to the ability of states to respond to pressing social and economic problems by interpreting the dormant Commerce Clause in a restrained manner sensitive to the powers of states in the federal system.

Responsiveness to constituencies within state boundaries is diminished as the power of the federal government grows disproportionately. Disturbingly, federal constraints upon state action grow even as states are increasingly acknowledged as innovators in public policy. To revitalize federalism, the three branches of the national government should carefully examine and refrain from enacting proposals that would limit the ability of state legislatures to exercise discretion over basic and traditional functions of state government.

NCSL dedicates itself to restoring balance to federalism through changes in the political process and through thoughtful consideration and broad national debate of proposals to amend the Constitution or to clarify federal law that are specifically intended to redress the erosion of state powers under the Constitution. NCSL does
not by this policy endorse any specific proposal for or against constitutional change or call for a constitutional convention. NCSL continues to support all civil rights laws in force in this country.

**Preemption**

Congress must allow states flexibility to shape public policy. Creative solutions to public problems can be achieved more readily when state laws are accorded due respect. Every preemptive law diminishes other expressions of self-government; therefore, state legislators believe that state laws should never be preempted without substantial justification, compelling need, and broad consensus. Our federalism anticipates diversity; our unity does not anticipate uniformity. While proponents of preemption may claim expected benefits, these must be balanced against the potential loss of accountability, innovation and responsiveness.

Preemption may be warranted in specific instances when it is clearly based upon provisions of the U.S. Constitution authorizing such preemption and only when it is clearly shown (1) that the exercise of authority in a particular area by individual states has resulted in widespread and serious conflicts imposing a severe burden on national economic activity or other national goals; (2) that solving the problem is not merely desirable, but necessary to achieve a compelling national objective; and (3) that preemption of state laws is the only reasonable means of correcting the problem.

The authority of Congress under the Supremacy Clause to preempt state legislation is exercised by the federal government assuming responsibility for regulating under federal law. In addition, the Supremacy Clause allows the federal government to offer states the option of regulating pursuant to federal standards. The power of Congress
to thus preempt state authority must not be expanded to permit the federal
government to commandeer states to administer federal programs.

Congress shall provide reasonable notice to state legislative leaders and governors
of any congressional intent to preempt and shall provide them with opportunity for
formal and informal comment prior to enactment. To ensure that the national
legislature knows the effects of its decisions on other levels of government, members
of Congress shall investigate which of their state’s laws would be preempted by
federal legislation before they vote on the preemptive legislation. Congress shall
develop processes to understand better the impact of proposed bills on federalism.
Congress shall refer bills that affect state powers and administration to
intergovernmental subcommittees.

States should not be undercut through the regulatory process. It is not acceptable for
un-elected federal agency officials to exercise legislative authority in the guise of
regulation and to preempt the decisions of the elected legislatures of the sovereign
states. Any agency intending to preempt state laws and rules must have the express
authority or clear evidence from Congress of the intent to preempt. The Executive
Order on Federalism (E.O. 13132) provides guidance for agency examination of
intergovernmental impact and should be codified and enforced. Circumvention of
rule-making procedures through interim final rule-making and the like, should be
prohibited. An appropriate congressional committee shall review agency regulations
to identify unjustified intrusions into state sovereignty.

State Contracts
NCSL believes that states should partner or contract with religious organizations and engage in charitable choice initiatives pursuant to state and local laws and prerogatives, not nationally mandated standards.

NCSL opposes any charitable choice legislation that preempts state and local laws, is retroactive in its application, undermines existing state-federal grant programs and partnerships by offsetting their funding, creates new private rights of action for individuals to sue states in federal court, and mandates participation on the states according to federal guidelines. NCSL does not support charitable choice legislation that creates an individual entitlement to services in programs where such entitlement does not exist, especially where additional funding is not provided.

5th Amendment Takings
NCSL strongly opposes any federal legislation or regulation that would: 1) attempt to define or categorize compensable "takings" under the Fifth Amendment to the United States Constitution; (2) interfere with a state's ability to define and categorize regulatory takings requiring state compensation; (3) preempt state eminent domain constitutional provisions or statutes; or (4) infringe on state sovereignty under the Eleventh Amendment. NCSL supports collaborative examinations of state and federal use of eminent domain authority.

Grant Conditions and Mandates
When national policy-makers ignore the fiscal impact of proposals that are to be implemented at the state level, it confronts states with an impossible choice – ignore federal law and face stiff financial penalties, or underfund other important state priorities in order to comply with federal unfunded mandates. Ignoring state impact
also creates a rift in intergovernmental relations between states and the federal government. The federal government must be accountable for its policy decisions that ultimately affect the level of services provided by the states or the level at which states are compelled to tax their citizens. States must retain the predominant role in shaping policies for which they will allocate the predominant share of resources.

Among the distortions caused by the excessive power of the national government is the separation of decisions to tax from decisions to spend. The intractable federal debt makes federal spending decisions more difficult and increases reliance on mandates or grant conditions to accomplish goals set by Congress. NCSL maintains that the federal government must fully appropriate designated funds for before application of penalties to states contained in authorized programs are applied. Where statutes are not clear, regulatory guidance must be established before states become subject to penalties. Federal resources shall be adequate to offer meaningful encouragement to state efforts and, at a minimum, to provide technical assistance and oversight.

In *New York v. United States*, the Supreme Court outlined guidelines appropriate for limiting regulation under the Spending Clause. Conditions should be unambiguous and should be reasonably related to the purpose of the expenditure NCSL opposes conditions on grants made to the states beyond such conditions that are necessary to specify the purpose of the expenditure, except where the conditions, such as those relating to civil and individual rights, may fulfill powers expressly delegated to Congress by the Constitution. Existing grants should not automatically become subject to new conditions.
NCSL believes that federal grants to states can achieve national goals without disrupting state laws and procedures. NCSL supports federal legislation that respects the role of the legislature and that does not create an unnecessary preference for state executive decision-making. NCSL maintains that funds received by a state under provisions of federal law shall be subject to appropriation by the state legislature, consistent with the terms and conditions required under such federal law. Legislatures shall also retain authority to designate implementing agencies and to review state plans and applications for assistance. State court systems shall not be commandeered to implement federal policies; in the event federal actions will result in an increased burden on state courts, then the federal government shall also provide funds to implement action by the courts.

NCSL opposes Congress placing responsibility for administrative oversight of grant conditions in the federal courts by relying on beneficiaries to enforce federal grant requirements through lawsuits. In the event the courts are to be relied upon for enforcement, then the federal government shall waive its sovereign immunity and become subject to suit for failures in administration of programs. This policy does not relate to access to federal courts for enforcement of constitutional rights.

**Sovereign Immunity**

limitation on Congress’ Article I Commerce Clause power and its power under Section 5 of the 14th Amendment as applied to the States. In so doing, the Court confirmed that the Eleventh Amendment to the Constitution is a protection of state sovereignty that is purposeful in our federal design. In *Seminole Tribe*, the Court held that Congress lacks power under Article I to abrogate the states’ sovereign immunity from suits commenced or prosecuted in the federal courts. This ruling was extended in *Alden v. Maine* where the Court held that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting States to private suits for damages in state courts. The Court in *Alden* also recognized that sovereign immunity does not derive from the 11th Amendment, but from the structure of the original Constitution itself. The states have been recognized as sovereign entities even before the ratification of the U.S. Constitution.

The Court further constrained Congress’ ability to abrogate state sovereign immunity under Section 5 of the 14th Amendment to the Constitution in *Florida Prepaid*. The Court held that Congress’ powers under § 5 of the 14th Amendment are powers of enforcement only, and that these enforcement powers are remedial. This means that in order for sovereign immunity of a state to be waived under Section 5, Congress must be able to identify a pervasive pattern of wrongdoing under the 14th Amendment, and the federal legislation seeking to remedy the wrongdoing, must be narrowly tailored to do so.

It is NCSL’s position that if Congress intends to abrogate state sovereign immunity it must state its intent in unmistakably clear language, and the federal government should waive its own immunity in order to enhance legislative consideration of the
risks. Normally, equitable and injunctive remedies are sufficient safeguards for ensuring compliance with the law.

**Criminal Jurisdiction**

Federal expansion of criminal jurisdiction, while not specifically preempting state laws, diminishes the role of state legislatures by permitting federal and state prosecutors to circumvent state law. The choice to prosecute in federal court based upon federal penalties entails a choice to by-pass state legislative responsibility. NCSL opposes the federalizing of state criminal offenses because federalism is weakened and because the role of federal courts as courts of limited jurisdiction is thereby undermined. NCSL recognizes that specific crimes may be appropriate for federal action if a systemic failure makes state action impossible or ineffective; such crimes may include those that have complex international or interstate implications, which relate to the protection of civil rights, or where conflicts prevent effective state or local prosecution. NCSL deems inadequacy of state resources to be an insufficient reason for federal takeover of criminal jurisdiction.

**Courts**

It is NCSL’s position that in the process of selecting nominees to the federal courts, the President and the Senate should -- among other considerations -- be mindful of the vital role federalism plays within our constitutional framework.

**Conclusion**

NCSL endorses periodic examination by Congress of the state of American federalism. Members of Congress shall expand formal and informal communications
with their state legislatures in order to defend federal legislation that diminishes state powers and to explore less intrusive means of achieving national goals. In exploring the dimensions of federalism, Congress shall consider the need for statutory and constitutional remedies to restore balance. Together, we should revive appreciation for the principle that sharing power between levels of government enhances America’s ability to develop responsive policy in a changing world.