Federalism—the notion that states and the federal government fulfill different but complementary roles and therefore exercise different but complementary powers—is central to the governing framework established by the Founders. As Supreme Court Justice Anthony Kennedy observed in 1995, “Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”

For example, the Constitution gave the federal government the power to coin money, conduct war, regulate foreign and interstate commerce, and levy taxes, while the powers reserved to the states extended to “all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State.”

Overall, federalism has served the United States well for more than two hundred years and the basic idea that some functions and powers are appropriately the domain of the federal government, while other functions and powers should be left to the states, retains broad popular and political support. But the apportionment of roles and authority among different levels of government has also been a consistent source of debate and tension as the federal–state relationship has evolved over time.

In particular, the steady expansion of federal power into new areas of social, economic, educational, technological, and environmental policy over recent decades has prompted growing concern about a deepening and ultimately corrosive imbalance in the federalist system envisioned by our Founders and enshrined in our Constitution.

Restoring a healthy working relationship between the federal government and the states has been a core concern of the Governors’ Council since it first convened in 2011 in an
effort to bring pragmatic state-based perspectives to national issues. This short white paper provides a historical context for understanding and addressing the current imbalance in federal–state relations and offers several targeted recommendations aimed at advancing a return to the more cooperative model of federalism that guided America’s response to the Great Depression in the 1930s. The recommendations reflect our view that greater consideration of the impact of federal laws and regulations on state processes and policies, together with more extensive consultation between state and federal decision-makers, is critical to restoring effective governance at all levels and to rebuilding public confidence in the enduring strength of America’s federalist system.

**Restoring Balance in the Federal-State Relationship**

**Recommendations of the BPC Governors’ Council**

- When legislation has a potential impact on state programs and authorities, governors, state legislators, and relevant state cabinet officials should be consulted, regardless of political affiliation, prior to determining whether an issue requires a federal solution.

- The Advisory Council on Intergovernmental Relations (ACIR) should be reestablished. ACIR was created by an act of Congress in 1959 to bring representatives of federal, state, and local government together to consider common problems. One of ACIR’s important duties was to recommend methods for coordinating and simplifying tax laws and administrative practices.

- House and Senate subcommittees focused on intergovernmental affairs should be reconstituted; in addition, the intergovernmental divisions of the Office of Management and Budget and the Government Accountability Office should be restored.

- Recognizing that federal support is often critical to states' ability to implement federal policies and regulations, when Congress reduces funding to state programs, it should consider providing states with some relief from reporting and other paperwork-related requirements associated with corresponding regulations.

- The new president should reaffirm and strengthen Executive Order 13132, which was issued by President Bill Clinton in 1999, and Executive Order 12866, which was issued by President Bill Clinton in 1993. These executive orders instruct the federal agencies on consultation with state and local governments during rulemaking and grant-making processes; in addition, they establish guidelines for federal agencies regarding the pre-emption of state laws.²

Together, these recommendations aim to restore balance in the federal–state relationship and to promote a return to so-called cooperative federalism, in which both levels of government share responsibility and power in certain areas and work together to advance policies and programs that benefit the American people and protect their interests. The next sections of this white paper provide historical context for the council’s recommendations and assess the current state of federalism in America.
**Historical Context**

Federalism has been an enduring feature of America’s system of government since the birth of the nation, and it has proved its usefulness and resiliency across a long history of crises and challenges, from the Civil War to the Great Depression, through two world wars and the Cold War that followed. Over decades, federalism’s role as a core organizing principle for American governance has been reaffirmed many times, by the Supreme Court in numerous major cases, by the executive branch in at least three executive orders on intergovernmental relations, and most recently by Congress in the Unfunded Mandates Reform Act of 1995.

But federalism has also changed and evolved over the last two hundred years. Scholars and historians have described three distinct phases in that evolution, beginning with so-called dual federalism, which described federal–state relations during the period from the ratification of the Constitution to the New Deal in the 1930s. During this period, the federal government’s role was largely limited to those areas specifically referenced (or enumerated) in the Constitution and there was virtually no overlap in state and federal responsibilities.

The phase that followed is often described as cooperative federalism: During this era the federal government and the states increasingly took action jointly rather than exclusively; they routinely shared power and there were no rigid spheres of responsibility. The Great Depression and the New Deal, in particular, prompted a significant expansion of the federal government’s activities into areas where it had never before ventured, including income security.

In the late 1970s and early 1980s, cooperative federalism was replaced by coercive federalism. This era was characterized by a shift in federal grants from places (for example, programs like transportation) to persons (for example, programs like Medicaid). The same period also saw an increase in federal mandates on state and local governments, restrictions on state and local tax powers, and federal preemptions of state and local authority.

In their 2003 book, *Democracy by Decree*, Ross Sandler and David Schoenbrod attempt to list all the federal laws that in some way impose financial penalties on states, pre-empt state authorities, or impose mandates on states. They find that in the 1940s, Congress adopted two laws that regulated state and local governments. Such laws were passed with far greater frequency in subsequent decades: there were 25 in the 1970s, and the 1980s and 1990s each saw the passage of 21 new laws regulating state and local governments.

**Federalism Today**

Most scholars and citizens would agree that America’s current system of government provides accountability and integrity. For example, the federal government has taken responsibility for the elderly as it both funds and administers Social Security and Medicare. Because many elderly people move when they retire, they no longer reside in the states in which they worked; thus, it is appropriate for the federal government to manage these programs. In fact, both Social Security and Medicare, which today account for the largest line items in the federal budget, were established at a time when economic insecurity and access to medical care for elderly Americans were seen as major nationwide challenges that the states could not effectively address on their own.

At the same time, state governments continue to administer most of the programs that serve the non-elderly. There are hundreds of these programs, including those covering education, nutrition, social services, Medicaid, and job training. While many of these programs receive both federal and state funding, all are administered by the states. This division of responsibility allows the states to coordinate programs and tailor them to the needs of their unique populations.

In theory, this system of dual authorities also provides states with the freedom to experiment and innovate new solutions to the
nation’s public policy challenges. Supreme Court Justice Louis Brandeis famously called states “the laboratories of democracy” in a 1932 decision in which he explained that states would enact legislation, other states would follow suit with similar-yet-improved policies, and their actions would eventually prompt changes in federal policy. This process has played out in practice many times and across a wide range of issues; in a relatively recent example, state experiments with welfare policies led Congress to create the Temporary Assistance for Needy Families program in 1996.

While innovation remains a critical piece of the federal–state partnership, federal preemption increasingly stymies state efforts to innovate. While the election of 2016, which will bring a new voice to the White House and fresh views to Congress, provides an important opportunity to rebalance the partnership and define a new phase of federalism—one that is again grounded in collaboration and cooperation.

**The Next Phase**

Throughout our nation’s history, federalism has proved flexible and dynamic enough to keep America at the forefront of the economic, social, and technological changes that have transformed modern life and the global economy. However, we are concerned that the ability of our federal government to respond to concerns of national importance is being hindered by an erosion of the federal–state partnership.

We believe that the best way forward is to return to a model of federalism in which federal decision-makers work with state decision-makers to craft policy solutions that capitalize on the strengths of each. Closer attention to the impact of federal budget cuts on states and more concerted efforts by federal decision-makers to consult with state decision-makers are critical areas where near-term progress can be made.

**Budgets**

Changes to the federal government’s budget often have unintended consequences for state budgets. First, federal grants account for nearly 30 percent of state budgets. Because of state balanced budget requirements, when federal funds are reduced or delayed, states are often left with no other choice but to fill the budget hole with state resources or cut programs.

Further, as the Congressional Research Service (CRS) noted in a recent paper titled “Unfunded Mandates Reform Act: History, Impact and Issues,” most state and local income taxes are designed to integrate closely with federal law and thus changes to federal tax policy can significantly impact state tax policy. Understandably, tax debates involve significant political trade-offs and sensitive negotiations; nonetheless, impacts on state laws and budgets must be part of the discussion.

Finally, members of Congress often view programs solely through parochial committee lenses. The result is that each congressional committee may seek to impose penalties or maintenance-of-effort (MOE) requirements on individual state programs without regard to what another committee has done. The result is a myriad of federally-imposed mandates that not only tie up significant state resources, but also tie the hands of state decision-makers in terms of developing and implementing policies suited to the state’s needs and interests.

For instance, one of the most significant MOEs applies to state funding for elementary and secondary education (K-12). The Elementary and Secondary Education Act (ESEA) required states to provide 90 percent of the same funding as the prior year for its public schools. While Congress made several positive steps in the most recent reauthorization, including new conditions under which the secretary can waive the requirement, it left intact the 90 percent requirement. Thus if a state or school system is losing
Consultation

As partners in governing our great nation, federal and state decision-makers should regularly collaborate and work together to ensure that federal and state policies complement one another, thereby best serving their mutual constituents. While several measures have been passed at the federal level to mandate greater communication with the states—including Executive Order 13132 and the Unfunded Mandates Reform Act of 1995—they are limited in their effectiveness.

In addition, at least three executive orders over the last 30 years have sought to address intergovernmental relations. Essentially, these executive orders require federal agencies to consult with state and local governments, to avoid preempting state laws when possible, and to assess the implications of each regulation for our federalist system. In our experience, these executive orders have been implemented unevenly, with the amount of thoughtful consideration given to state impacts being highly dependent on the agency involved and the specific rule in question. In many instances, unfortunately, the required reviews seem merely perfunctory.

Likewise, the analysis of unfunded mandates required under the Unfunded Mandates Reform Act (UMRA) is often treated as merely obligatory, with federal agencies paying little attention to whether their actions have the effect of imposing an unfunded mandate on states or not. UMRA includes a provision that enables any member of Congress to use a point of order, a parliamentary procedure, to raise federalism concerns about a bill before it is passed. Between 1996 and 2014, the Senate voted just three times to sustain a UMRA point of order against a bill, and two of those three instances involved minimum wage bills where greater political differences, rather than concerns about federalism per se, were at play. A total of 56 UMRA points of order were raised in the House during this same time period, but only one of them succeeded and it likewise involved a minimum wage bill. As the CRS noted in its report, “UMRA points of order in the House have often been raised not to challenge unfunded federal mandates per se, but to use the 10 minutes of debate…to challenge the pace of legislative consideration, limitations on the offering of amendments to appropriations bills, or the inclusion of earmarks.”

Federal preemptions of state law provide another important (and troubling) measure of the current level of cooperation between the two levels of government. Between 1970 and 1991, Congress preempted more state laws than it had over the previous 200 years going back to the first Congress, which convened in 1789. In 1996, the ACIR identified more than 200 separate mandates involving 170 federal laws that directly affected state and local governments. Congress enacted 21 laws in the 1980s and another 21 laws in the 1990s that imposed mandates on the states. By comparison, only two such laws were enacted from the founding of the country through the 1940s.

Additionally, the sheer number of consent decrees that currently “govern” state programs can be seen as a further indication of the current breakdown in a working partnership between the states and the federal government. It is in every American’s interest to ensure that students are educated, that low-income families have access to health care and housing, and that the environment is protected. However, just as with maintenance-of-effort requirements, a plethora of consent decrees—taken collectively—is suffocating state governments and hindering state decision-makers’ ability to best serve their constituents.
Sandler and Schoenbrod highlight the corrosive effect of excessive reliance on consent decrees: “The political deck in Washington is stacked toward creating rights enforceable against state and local government and to announcing those rights without full regard to the costs and difficulties of implementing them. Governors, mayors, and other local officials, no matter how good their intentions, inevitability become lawbreakers.” Governors agree that such decrees and other federal actions over the years have resulted in positive changes in state law. We also agree that consent decrees can be useful tools and we are not advocating that they never be used. For instance, the state of Illinois, through its agencies, is currently a party to nearly 80 consent decrees, some of which date back to the 1970s. However, Congress can instruct the courts to consider additional factors in their decisions, including the length of time a decree can be in place and the scope of issues that can be addressed within a decree. Additionally, the Courts can police themselves by inclusion of consent decrees in continuing education and limiting the decrees to those issues associated with the initial right that is being violated.

Conclusion

The Founding Fathers of the United States intended for power to be shared between the states and the federal government. Given the breadth of issues that the American people now expect their government to address, a recommitment to federalism is more important than ever. States remain “laboratories of democracy” and are actively innovating in many critical policy areas, including social services, health care, workforce development, and education.

We urge the newly elected president and Congress to create an atmosphere that promotes, not hinders, state innovation and that fosters open lines of communication so that, together, the federal government and the states can address the full suite of issues currently facing our nation.

ABOUT THE BPC GOVERNORS’ COUNCIL

The BPC Governors’ Council brings together a bipartisan group of governors who have proven records of working across the aisle with their state legislatures, congressional delegations, and other governors. More information about the Council and previous Council reports are available at bpcdc.org/governors-council.
Endnotes


3 Sandler and Schoenbrod are former attorneys who have brought numerous environmental suits against government agencies.


8 Dilger and Beth., 19.


10 Ibid.

11 Ibid., 22–23.

12 Ibid.
The Bipartisan Policy Center is a non-profit organization that combines the best ideas from both parties to promote health, security, and opportunity for all Americans. BPC drives principled and politically viable policy solutions through the power of rigorous analysis, painstaking negotiation, and aggressive advocacy.