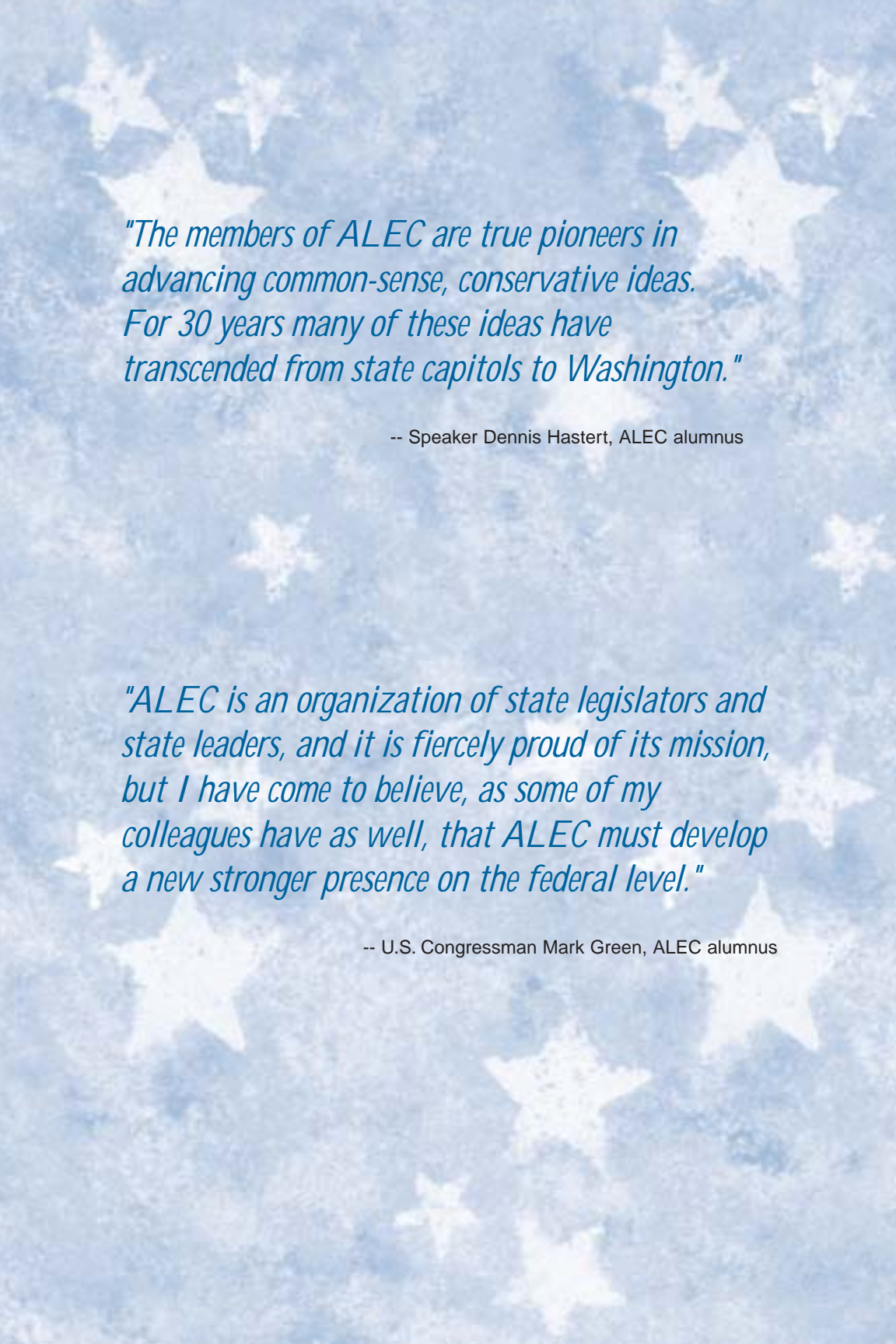


# ALEC FEDERAL FORUM



*PROMOTING DIALOGUE BETWEEN  
STATE & FEDERAL LAWMAKERS*

AMERICAN LEGISLATIVE EXCHANGE COUNCIL  
**ALEC**



*"The members of ALEC are true pioneers in advancing common-sense, conservative ideas. For 30 years many of these ideas have transcended from state capitols to Washington."*

-- Speaker Dennis Hastert, ALEC alumnus

*"ALEC is an organization of state legislators and state leaders, and it is fiercely proud of its mission, but I have come to believe, as some of my colleagues have as well, that ALEC must develop a new stronger presence on the federal level."*

-- U.S. Congressman Mark Green, ALEC alumnus

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AMERICAN LEGISLATIVE EXCHANGE COUNCIL

ALEC

ALEC Federal Forum

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*ALEC Federal Forum* has been published by the American Legislative Exchange Council (ALEC) as part of its mission to discuss, develop and disseminate public policies which expand free markets, promote economic growth, limit government and preserve individual liberty. ALEC is the nation's largest bipartisan, individual membership organization of state legislators, with 2,400 members across the nation. ALEC is governed by a 21-member Board of Directors of state legislators, which is advised by a 20-member Private Enterprise Board representing major corporate and foundation sponsors. ALEC is classified by the Internal Revenue Service as a 501(c)(3) non-profit public policy and educational organization. Individuals, philanthropic foundations, corporations, companies, or associations are eligible to support ALEC's work through tax-deductible gifts. Nothing written herein is to be construed as necessarily reflecting the view of the American Legislative Exchange Council, its Board of Director, or its membership, or as an attempt to aid or hinder the passage of any bill before the Congress or in state legislatures.

*The mission of the American Legislative Exchange Council is to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a non-partisan, public-private partnership between America's state legislators and concerned members of the private sector, the federal government and the general public.*

## OPERATIONAL STRATEGY

To promote the principles of federalism by developing and promoting policies that reflect the Jeffersonian principles that the powers of government are derived from, and assigned to, first the People, then the States, and finally the National Government.

To enlist state legislators from all parties and members of the private sector who share ALEC's mission.

To engage in an ongoing effort to promote Jeffersonian principles among elected officials, the private sector, and the general public, for the purpose of enacting substantive and genuine legislative reforms consistent with the ALEC mission.

To conduct a policy-making program that unites members of the public and private sector in a dynamic partnership to support research, policy development, and dissemination activities.

To prepare the next generation of political leadership through educational programs that promote the principles of Jeffersonian democracy, which are necessary for a free society.

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## EXECUTIVE SUMMARY

With more than 2,400 members, the American Legislative Exchange Council (ALEC) is the nation's largest non-partisan, individual membership association of state legislators. One-third of all state legislators belong to ALEC. In addition, with more than 300 corporate and private foundation members, ALEC is one of America's most dynamic public-private partnerships. ALEC provides its public and private sector members with a unique opportunity to work together to develop policies that effectively promote the Jeffersonian principles of free markets, individual liberty, and limited government.

Due to the success of ALEC legislative leaders in the states, their careers are expanding beyond the state legislature. ALEC has developed a program for its alumni members: the ALEC Federal Forum. The focus of the Federal Forum is to build a productive bipartisan working relationship among current and former ALEC members at all levels of government. Serving as Federal Forum Co-Chairmen, Senator George Allen and Congressman Mark Green continue their dedication to ALEC's mission at the federal level. Bringing state legislative leaders into contact with their congressional counterparts is the cornerstone of the Federal Forum—enabling ALEC members, both state and federal, to secure and protect a sound and balanced government.

In ALEC's continued service and assistance to its state and federal members, this guide serves as a reference to ALEC's congressional priorities, state legislative action, and policy experts, all based on the Jeffersonian principles of free markets, individual liberty, and limited government.

## FEDERAL FORUM

**B**ringing state legislative leaders into contact with ALEC's alumni members in Congress is the cornerstone of the Federal Forum and is instrumental in maintaining the principles of limited government, individual liberty, and free markets. Through this relationship, ALEC hopes to provide its 96 alumni members with information and testimonial support from the states on pressing policy issues.

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Senator James Inhofe  
Senator Jon Kyl  
Senator Richard Shelby  
Senator James Talent  
Senator Craig Thomas

# PRESIDENTIAL INITIATIVES SUPPORTED BY ALEC MEMBERS

Establishing and Maintaining Health Savings Accounts  
Providing Health Savings Accounts for State Employees  
Providing Health Savings Accounts for Tax Credits  
Medicaid Reform; Providing for and Supporting Medicaid Waivers  
Supporting HIFA Waiver  
Supporting BRAC  
Providing for Public Education on High-Deductible Health Plans  
Urging/Supporting Federal Balanced Budget Amendment  
Urging Repeal/Abolishment/Amendment of Federal Estate Tax  
Supporting Personal Retirement Accounts  
Supporting Federal Enforcement of Immigration Laws  
Exempting Health Savings Account Monies from Creditors  
Abolishing/Repealing Death Tax  
Support of Free Trade - Taiwan  
Support of Free Trade - CAFTA  
Social Security Reform  
Supporting the USA PATRIOT Act  
Supporting No Child Left Behind (NCLB)  
Medical Malpractice Liability Reform Act  
Class Action Improvements Act  
Supporting the Clear Skies Initiative  
Urging/Supporting Tax Cuts and Repealing Taxes  
Supporting ANWR  
Supporting Offshore Drilling  
Supporting President's position on the Kyoto Protocol

# ALEC MODEL LEGISLATION AND RESOLUTIONS ENCOURAGING JEFFERSONIAN PRINCIPLES AT THE FEDERAL LEVEL

## **Civil Justice Task Force**

Resolution on Congressional Mandates & Defective-Product Liability Protection

## **Commerce, Insurance, & Economic Development Task Force**

Resolution Supporting Expansion of Foreign Markets for America's Small Businesses

Resolution Urging Congress to Modernize Social Security with Personal Retirement Accounts

Resolution Opposing Federal Intervention in Insurance Regulation

Resolution Urging Congress Not to Amend or Repeal the McCarran-Ferguson Act

## **Criminal Justice Task Force**

Resolution in Support of the USA PATRIOT Act

Defense of a Free Market and Public Safety Resolution

## **Education Task Force**

Individuals with Disabilities Education Act Resolution

## **Health & Human Services Task Force**

Resolution Calling for Reform in the FDA

Resolution Concerning the Prohibition of Imported Prescription Drugs

Resolution on Federal Health Insurance Reform Legislation

Resolution on Quality Managed Care in a Litigious Marketplace

Resolution Supporting Private Market Initiatives for Children's Health Insurance

Resolution Urging Congress to Create Private Financing of the Medicare Program

Reverse Mortgage Enabling Act

**Natural Resources Task Force**

Resolution in Support of the Healthy Forest Initiative  
Resolution on Reform of New Source Review Regulations  
Resolution in Opposition of Carbon Dioxide Emission Standards  
Resolution Encouraging Development of Liquefied Natural Gas  
Resolution on Renewable Energy Resources in a Competitive Electricity  
Marketplace  
Resolution Supporting the Private Ownership of Property  
Resolution on Environmental Laboratory Privatization  
Resolution on Local Jurisdiction Consent of National Monument  
Designation

**Tax & Fiscal Policy Task Force**

Federal TABOR Resolution  
Internet Taxation Resolution  
Resolution in Favor of a Federal Flat Tax  
Resolution in Favor of a U.S. Constitutional Amendment on Judicial  
Taxation  
Resolution on State and Local Business Activity Taxes  
Resolution Opposing the United Nations Drive for Global Taxes  
Resolution to Repeal the Federal Unified Gift and Estate Tax  
Resolution Urging Congress to Aid State Tax Reform  
Resolution Urging Congress to Reject Authorization of the Streamlined  
Sales Tax Project

**Telecommunications & Information Technology Task Force**

Resolution Supporting Pro Consumer Public Policy for Voice, Video, and  
Data Services  
Resolution on United States Encryption Export Restrictions  
Resolution Opposing Government Intervention in the Multichannel Video  
Programming

**Trade and Transportation Task Force**

Resolution on States' Rights; Vehicle Weight and Size Regulations  
Resolution on the Federal Highway Trust Fund  
Resolution on Federal Trade Promotion Authority  
Resolution on the Use of Transportation Taxes  
Resolution on Unilateral Trade Sanctions  
Resolution to Repeal the Non-Transportation Federal Fuels Tax  
Statement of Principles on Federally Mandated Blood Alcohol Level

# ISSUE PRIORITIES

## FOR THE 109<sup>TH</sup> CONGRESS

One of the founding principles of the American Legislative Exchange Council (ALEC) is a firm dedication to federalism. For ALEC, federalism is not merely a means to identify which branch or level of government should undertake a particular activity. It is a recognition that our system of government is built on distinct, enumerated and delegated powers among the different branches and different levels of government. Although ALEC believes there are a great many policy issues best addressed by the individual states as established by the Tenth Amendment of the U.S. Constitution, there are a number of issues that can only appropriately be addressed by the federal government. ALEC recognizes that federalism is a two-way street.

Over the past three decades, ALEC has focused its efforts primarily at the state level. However, in order for ALEC members to ensure that their legislative initiatives are effective, they must maintain a keen interest in policy at the federal level. Whether the federal government fosters economic growth or expands a tax and regulatory burden on the economy, the choices and opportunities for meaningful reform by state lawmakers is impacted. When the federal government tries to impose “minimum national standards” or enforce “uniformity,” the most dynamic feature of our system of government, competitive federalism, is weakened. States are less the “laboratories of democracy” and increasingly the branch offices of a central government.

The purpose of ALEC’s Federal Forum is to foster a dialogue between its members at both state and federal levels. Although ALEC’s alumni now serve in the executive branch or in federal legislative office, they have an understanding of the unique and critical role served by our nation’s state legislatures. As background for this dialogue, this handbook outlines current legislative priorities for ALEC members. It primarily addresses federal issues, to provide federal members with some perspective from their fellow ALEC members working diligently at the state level. This handbook will also include a summary of ALEC’s state legislative priorities.

### **POLICY INITIATIVES - FEDERAL**

- **Federal Tax Relief & Reform:** A top priority for Congress should be to create a climate for further economic growth. Significant tax relief and, ultimately, reform of our federal tax system, will unleash the creative

energies of our nation's entrepreneurs and businesses. This is also the most effective way for Congress to address the budget crisis in the states. In fact, it is the only way Congress should address this crisis. Over the last decade, many states enacted unsustainable spending increases. These increases, coupled with anemic economic growth, were responsible for the current budget crisis. Pro-growth federal tax reforms would help state and local governments, and hopefully spur states to reform their own tax codes.

- **Medicaid Reform:** Only the free market can cure the Medicaid spending crisis plaguing the states. Medicaid's inefficient and perverse incentives shield individuals from the costs of their health decisions, meaning that beneficiaries want the best health care that someone else's money can buy. This results in skyrocketing health care costs and confines our most vulnerable citizens to a bankrupt system.

A recent ALEC study estimated that by 2020, Medicaid will consume all state revenues. Part of the blame for this lies with state governments, who in the 1990s exploited the federal matching formula to pay for an increasingly-larger population of eligibles. The federal government, however, has an important role to play in reform. Congress should fight the political urge to expand Medicaid eligibility and keep the program sustainable for the truly needy. Congress can also create a viable Medicaid marketplace by allowing states maximum flexibility in providing consumer-directed care without unnecessary mandates. Federal and state governments should work together to build a bridge between public and private coverage, allowing beneficiaries to move out of the Medicaid system and become truly empowered health care consumers.

- **Energy Sustainability:** Carbon dioxide, even though it is classified neither as an ambient air pollutant nor a hazardous air pollutant, has been targeted by regulators as a dangerous greenhouse gas. Science on this issue is hardly established, and regulators risk getting ahead of the issue. Efforts to regulate carbon dioxide amount to a de facto tax on energy, which will have a crippling impact on the economy. Additionally, in recent months, we have witnessed several supply shocks to our energy markets. With continued uncertainty in the Middle East, it is critical that our nation expands its access to reliable and affordable sources of energy. Furthermore, improvements are necessary to enhance our energy distribution

infrastructure. Energy resources are only useful if they can reach end users. We need to improve the electrical grid, explore ways to increase supply of natural gas through the importation of liquid natural gas, and examine new and innovative ways of distributing our energy resources to consumers.

- **Access to Public Lands:** ALEC promotes federalism through the advancement of state sovereignty and economic freedom. It is critical that access to North America's fossil fuels be expanded to enhance our energy security without damaging our natural resources. Coastal resources must be explored and barriers limiting multiple use of and access to interior lands must be removed. Opening access to public lands for sustainable forestry, mining, and energy infrastructure will create economic opportunities for both local communities and our nation.
- **Tort Reform - Asbestos:** While most tort reform measures are appropriately matters of state policy, the federal government should intervene in what the U.S. Supreme Court has called the "asbestos-litigation crisis." Personal injury lawyer-sponsored mass asbestos exposure screenings have flooded the system with unimpaired claimants with dubious claims. Over 70 companies have filed bankruptcy because of asbestos liability and the crisis will only continue to burgeon if the truly sick are not given priority over the unimpaired in court. ALEC's *Asbestos and Silica Claims Priorities Act*, which has been adopted in Florida, Texas, Georgia and Ohio, sets objective medical criteria standards so those suffering from asbestos-related illnesses have their cases tried first.
- **Lawsuit Abuse Reduction Act (LARA):** In 1993, Rule 11 of the Federal Rules of Civil Procedure was changed to no longer provide for mandatory sanctions against frivolous lawsuits filed in federal court. LARA restores Rule 11 to its original intent and also adopts language similar to ALEC's *Intrastate Venue Shopping Reform Act*, which prevents "forum shopping" by providing that personal injury claims may only be filed in the state and county where the person bringing the claim resides, where the injury occurred, or in the state and county where the defendant's principal place of business is located. LARA is essential for restoring a degree of fairness and predictability to the civil justice system.
- **Free Trade:** ALEC members strongly believe that barriers to free and open trade are economically and politically disastrous. They have worked

diligently with members of Congress to promote mutually agreed upon, free-trade agreements between the United States and other nations and regions, especially the developing countries of the world. Such agreements benefit not only the American economy by introducing competition to the marketplace, but benefit those partner countries' economies in much the same manner. Further, without open trade into and out of the American marketplace, American companies are at a distinct disadvantage to countries where labor practices or government policies are far more lax, allowing for the inexpensive production of goods overseas. And finally, related to such policies and practices, the level of engagement and dialogue that results from negotiating these free trade agreements serves as a powerful tool that leads to greater personal and political freedom in countries with which the United States may not agree ideologically or politically. Free and open trade with these countries has great potential for changing oppressive behavior by their governments.

- **Commonsense Consumption Act:** Over 20 states have enacted versions of ALEC's *Commonsense Consumption Act* which protects food manufacturers and sellers from frivolous obesity-related litigation. Not only do lawsuits against restaurants and food manufactures for an individual's obesity-related health problems make a mockery of the principle of individual liberty, they have the potential to create devastating effects on the United States economy. The average profit margin for a restaurant averages around four percent; just one frivolous lawsuit is enough to put a small restaurant out of business. Regardless of their merit, these lawsuits need to be defended, and at high cost. Not only restaurant owners but wait staff, cooks, farm suppliers, and even schools suffer from obesity-related lawsuits. Obesity is a serious problem across the nation; however, the health problems related to obesity cannot be solved by litigation, but through education. The United States Congress should follow the lead of the states and enact the federal Commonsense Consumption Act.
- **School Choice, Individuals with Disabilities in Education Act (IDEA), and No Child Left Behind Act (NCLB):** ALEC has long worked for education reform in the states. ALEC's *Report Card on American Education* has become the benchmark to evaluate the progress states make on improving educational achievement. While most matters of education are appropriately dealt with by state and local governments,



the federal government can help foster meaningful reform.

With the recent passage of DC School Choice, the nation's first federally funded educational option program, over 2,700 students received \$10 million in scholarship assistance during the 2004-2005 school year. ALEC supports any Congressional effort to expand choice efforts, especially those provisions within the No Child Left Behind Act that help create a climate to expand choice throughout the nation. Also, the reauthorization of IDEA provides a unique opportunity to address a growing problem within the education arena; enormous growth in IDEA is due to students being labeled "learning disabled" only because they are not receiving an adequate education.

Therefore, ALEC supports reform that weeds out those students who do not belong in IDEA programs and returns them to their proper grade levels where they can receive the instruction they deserve. The IDEA program offers an important opportunity to further introduce the discipline of competition and choice by allowing states to experiment with a system that allows those truly in need of IDEA program benefits to seek out the best program for their needs.

- **Welfare Reform Reauthorization:** The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) gave states the opportunity to prove that local innovation -- rather than federal mandates -- can effectively move Americans from welfare to work. The results have been stunning. Millions of Americans who had been locked in a cycle of dependence now know the importance of a paycheck rather than a benefit check. As PRWORA comes up for reauthorization, Congress should resist efforts to turn back the clock and continue to build on these important achievements.

# AGENDA FOR LIBERTY

**A** guide for newly elected state legislators, ALEC's *Agenda for Liberty* arms legislators with background information and model legislation on pressing policy issues such as the growing budget crisis, health care, and tort reform. Federal attention on such issues helps create a climate for reform in the states. ALEC is able to respond immediately on issues that correlate to its model legislation on both the state and federal level, essentially communicating policy directives from the states. For a complete list of model legislation, please contact Andrew Schauder, Director of Federal Affairs at (202) 466-3800 or [aschauder@alec.org](mailto:aschauder@alec.org).

## **LOWER TAXES & LIMITED GOVERNMENT**

The prosperity of the 1990s led to unprecedented increases in state government expenditures. When state budgets were hit with the “perfect storm” of 9/11, a recession, and rising Medicaid costs, many state lawmakers raised taxes to continue unfettered government expansion. This response violates the Jeffersonian principles of free markets, individual liberty, and limited government.

ALEC believes in a better way: states must rein in the growth of government by enacting tax and expenditure limitations, get serious about discovering waste, fraud, and abuse in government by setting up permanent cost-savings commissions, and enhance representative government by clearly showing the people how their hard-earned tax dollars are being spent. Eschewing these solutions in favor of tax increases not only ignores the financial windfall from taxpayers to state coffers in the 1990s, but also takes more money from the people at a time when they need it to buy more goods, start more businesses, and provide education and health care for their families.

*Tax and Expenditure Limitation Act*

*Commission on Economy and Productivity in State Government Act*

*Truth in Spending Act*

*Efficiency in Government Act*

*Sales and Use Tax Collection Protection Act*

*State Internet Tax Freedom Act*

## HEALTH CARE REFORM

Medicaid reform is at the top of every state's agenda. Budget-busting spending, combined with an ever-increasing eligibility pool and lagging state revenues, has bankrupted the system for the truly needy. ALEC's Medicaid Reform Project offers cutting-edge policy solutions that lawmakers can use to change the system from a command-and-control entitlement to a pro-patient, consumer-directed health care marketplace. ALEC works with its legislative members to explore ways in which states can expand access to innovative prescription drugs while avoiding the pitfalls associated with overreaching and price fixing.

*Health Savings Account Act*

*Health Care Tax Relief and Equity Act*

*High-Risk Health Insurance Pool Model Act*

*Medicaid Consumer Directed Care Act*

## ENERGY SUSTAINABILITY

ALEC's Energy Sustainability Project encourages energy diversity and sound public policy that balances environmental concerns with economic costs. ALEC's *Agenda for Liberty* arms state legislative leaders with the skills to question and decipher scientific testimony and make informed legislative decisions that secure energy sustainability for their citizens.

*Verifiable Science Act*

*Power Plant Siting Act*

*State Regulatory Responsibility Act*

*Conditioning the Regulation of Non-Pollutant Emissions on Science*

*Electricity Transmission Principles*

*A Resolution Encouraging Development of Liquefied Natural Gas*

## EDUCATION REFORM

A strong, accountable education system is paramount if the nation wishes to compete in the global economy, and a first-rate public school system is a vital component to the future. Each year, ALEC's *Report Card on American Education* takes a comprehensive look at the state of public education, and invariably, the data show that no statistically evident correlation exists between educational performance and taxpayer input to the system—clearly refuting the claim that more money equals better education. Instead, ALEC advocates for strong accountability in public schools, providing a path for alternate teacher certification and promoting charter schools and choice

programs. Allowing parents to determine which option best meets the needs of their child guarantees that a student's academic future is determined at the most local level possible – their parent.

*Alternate Certification Act*

*Charter Schools Act*

*Family Education Tax Credit Act*

*Parental Choice Scholarship Act*

*Special Needs Scholarship Act*

*Virtual Schools Act*

### **DISORDER IN THE COURT**

Since the tobacco lawsuits of the late 1990s, an emerging trend has brought about the regulation of industry by litigation, not legislation. ALEC's Disorder in the Court Project seeks to restore America's civil justice system by developing legislative remedies to ensure that the power of policy-making remains in the legislative branch. To date, over 200 bills based on Disorder in the Court model legislation have been introduced across the country.

*Private Attorney Retention Sunshine Act*

*Appeal Bond Waiver Act*

*Class Action Improvements Act*

*Legal Consumers Bill of Rights*

*Jury Patriotism Act*

*Commonsense Consumption Act*

*Intrastate Venue Shopping Reform Act*

*Commonsense Scientific and Technical Evidence Act*

*Constitutional Limits on Punitive Damages Act*

*Asbestos and Silica Claims Priorities Act*

# STATE POLICY EXPERTS

**I**nteracting with state legislative leaders on a daily basis, ALEC policy experts have in-depth knowledge on state legislative issues and activity. In addition, ALEC staff, legislators and advisors provide authoritative testimony before state legislatures and Congress.

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# ALEC LEADERS IN THE STATES

Since 1973, the citizen legislators of the American Legislative Exchange Council have advanced a common sense conservative agenda based on the fundamental principles of free markets, limited government, federalism and individual liberty. Today, with 2,400 members, ALEC is the largest non-partisan, individual membership association of state legislators in the nation. In addition to the senior leadership positions listed here, hundreds of other ALEC members are chairmen or ranking members of committees and caucuses, or hold other significant and influential positions. Legislators also contribute to advancing the ALEC agenda by serving on ALEC's Board of Directors, or as State or Task Force Chairs. Among the leadership of America's state legislatures, ALEC members hold an impressive presence: 38 speakers and speakers pro tempore; 25 senate presidents and senate presidents pro tempore; 31 senate majority and minority leaders; 33 house majority and minority leaders. ALEC alumni include six sitting governors, four lieutenant governors, two senior cabinet-level positions, and 96 members of Congress.

## ALABAMA

Representative Jim Carns  
*ALEC State Chair*

## ALASKA

Representative John B. Coghil, Jr.  
*House Majority Leader/ALEC State Chair*  
Representative Ethan Berkowitz  
*House Minority Leader*

## ARIZONA

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*Senate President*  
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# COMMENTARY ON STATE & FEDERAL RELATIONS FOR MEMBERS OF CONGRESS

*By John Armor, ALEC Adjunct Scholar*

I was asked to prepare a review of the respective powers of the federal government and the state governments for consideration by members of Congress. To begin, one should “go back to first principles” as John Adams wrote. As the magnificent biography, *John Adams*, by David McCullough makes clear, Adams was a patriot of absolute integrity, great ability, and total commitment, and a framer who never lost the common touch. His echo of Aristotle in that comment was not accidental – he read and reread the classics in the original Greek and Latin.

He was the “floor leader” for the Declaration of Independence, and without his efforts it could not have achieved the vote in Congress of twelve states in favor and one state abstaining, which was sufficient for the time. As well as any other American who ever lived, he understood the role that the state governments did play, and that the federal government, which had yet to be established, should play. The Constitution he drafted for the Commonwealth of Massachusetts was, in many important ways, the template of the Constitution that James Madison drafted for the United States, once the Articles of Confederation had clearly failed, and the nation made its second and successful attempt at creating “a more perfect Union.”

For those reading these comments, there would be no better way to understand this subject than to set this paper aside, and find by main force the time to read John Adams. In the hopes that most who read this have already done that, we soldier on.

Almost every schoolchild is aware of the “checks and balances” in the federal Constitution. They are taught that the checks and balances exist among three institutions: the legislative, executive and judicial branches of the government. The intent is clear; the three branches have separate functions. Various means of both independence of each from the other, and checks by each over the other, are provided. The purpose in the writing of the Constitution was to prevent any one branch from dominating, or “usurping,” the functions of any other.

This theory is correct, as far as it goes. But there is a fourth, and essential,

pattern of checks and balances that is not included in this civics-book description. That one is the proper relationship between the federal government and the states. That one is today's subject.

Our first government, the Articles of Confederation, failed over this very point. The federal government then had insufficient authority to raise money. Congress could only set its budget, apportion that cost among the states, and then send "assessments" to the states and hope that they would pay them. There was no guarantee that the assessments would be paid, and no enforcement mechanism. The result was that most states, in most years, failed to pay their full amounts.

The result was that the federal government was perpetually bankrupt. Its ambassadors became little more than well-dressed panhandlers, seeking high-interest loans from foreign governments to pay the operating expenses of the United States. (The first great achievement of John Adams was, in fact, obtaining the first of many such loans from the Dutch, after persuading them to recognize the new "United States of America.")

The Constitution was written against this backdrop. The "Federalists" (those who supported ratification of this new document) were right at the time that the federal government would necessarily fail, unless it were given new and enlarged powers. Their concern was that the new federal government might be dominated and overwhelmed by the powers of the states. The "Anti-Federalists" (who opposed ratification) had the opposite concern, that the new Constitution gave so much authority to the federal government that it would overwhelm and dominate the states.

Most students of history know that the opposition by the Anti-Federalists led to the agreement to add a Bill of Rights. James Madison, by then a congressman, was assigned the task of distilling the 200-some state demands for rights into the 17 that passed the House. The Senate passed 12 of those, and eventually 11 of were ratified as part of the Constitution. (We will skip the unique history of the 27th Amendment, called the "Madison Amendment," ratified almost two centuries after it came from the pen of Madison.)

The central question here is whether the Anti-Federalists were wrong in their day, but right in ours, about the tendency of the federal government to overwhelm the powers of the states. For a detailed discussion of this subject, see the 24-page introduction to the facsimile reprint of *Secret Proceedings and Debates of the Convention to Form the U.S. Constitution*, by Robert Yates, originally published in 1821; reprint published in 1987 by the Linn-Henley Research Center of the Birmingham Public Library. (Yates was the leading Anti-Federalist.)

The checks and balances between the states and the federal government in the Constitution, as written, rested on three pillars. First was the fact that the senators were originally elected by the state legislatures. Senators were

expected to abide by the “instructions” they were given by the legislatures. Some even resigned their positions as senators when it became clear their views were not in accord with the views of their legislatures. Among those who resigned for that reason was John Quincy Adams, son of John Adams, later to become President himself.

This pillar disappeared with the ratification of the 17th Amendment in 1913, which made senators popularly elected, rather than chosen by the state legislatures. There is no need to argue the wisdom of that amendment because there is zero doubt that it will ever be reconsidered. Still, from a standpoint of federalism, it was a body blow to the ability of the states to express their independent views effectively in Washington.

The second pillar of these checks and balances was the 10th Amendment. Along with freedom of the press and religion, this text was the most common of the demands of the states to be included in the Bill of Rights. It reads:

*“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”*

This check and balance remained in force for 197 years, until the Supreme Court decided the case of *Garcia v. San Antonio Transit District*, 1985, a 5-4 decision. Until that case, the Court had regularly taken cases which questioned whether the federal government had “exceeded its enumerated powers” and was seeking to act in governmental areas that were reserved to the states. We will omit the history of cases in which the Court restrained the federal government from certain actions because they “violated the 10th Amendment,” because all those prior cases were reversed by *Garcia*.

Two of the harshest dissents in the history of the Supreme Court were filed in the *Garcia* case. The majority decided that the 10th Amendment was a “political” matter, and the Court would no longer seek to enforce it as a matter of law. Justice Powell wrote in dissent:

*“I note that it does not seem to have occurred to the Court that it – an unelected majority of five Justices – today rejects almost 200 years of the understanding of the constitutional status of federalism.” (Emphasis in the original.)*

Justice O’Connor wrote in dissent:

*“With the abandonment [of its precedents], all that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self restraint...”*

Until such time as the Garcia case is reversed, the second pillar of the checks and balances between the states and the federal government is gone.

The third pillar of these checks and balances is found throughout the text of the Constitution. The express powers of the Congress are found in Article I, Section 8, clauses 1 - 18. They range from the obvious (“power To lay and collect Taxes” - clause 1) to the unique (“To exercise exclusive Legislation... over... the Seat of Government...” - clause 17). For the present discussion the two most important clauses are the Commerce Clause (3) and the Necessary and Proper Clause (18).

As the Supreme Court and many other observers have stated, the Federalist, written by Alexander Hamilton, John Jay, and James Madison, is the most thorough and accurate analysis of the science of politics ever written in the United States. The fourth, and greatest, Chief Justice of the United States, John Marshall, wrote:

*“The Federalist ... is a complete commentary on our Constitution, and is appealed to by all parties in the question to which that instrument has given birth. Its intrinsic value entitles it to highest rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed.”*

One of the two that Chief Justice Marshall was referring to was James Madison, generally credited as being “the father of the Constitution.” In the Federalist, No. 45, in describing the enumerated powers in the Constitution, he wrote:

*“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the states are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; ... The powers reserved to the several States will extend 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.”*

Please stop and reread Madison’s statement. Please reflect on how faint the resemblance is between the federal government that he and the other framers created, and the federal government that exists today.

The change from how the federal government was designed and how it now operates has occurred primarily in the 20th century. It required the destruction of the third pillar of the federal-state checks and balances through the abuse of the Necessary and Proper Clause and the Commerce Clause.



As Alexander Hamilton wrote in the *Federalist*, No. 33, and Madison followed in No. 44, the Necessary and Proper Clause was included so that Congress could carry out the specific powers granted in the previous 17 clauses. Otherwise, the Constitution would have had to include a huge catalogue of all possible actions that Congress was empowered to take, for if any specific was omitted, it would forever be barred. I will not quote from those chapters of the *Federalist*; readers are welcome to review them for themselves.

In sum, the Necessary and Proper Clause was not intended as an independent source of power, a blank check for Congress to do whatever it considered, at any time, to be “necessary and proper.” Instead, it was merely authority for Congress to take such steps as are “necessary and proper” to carry out the previously stated powers. This is a fundamental distinction. Yet Congresses have passed, presidents have signed, and the Supreme Court has approved, laws which violate this central point. As the framers themselves observed, because of checks and balances, one branch of government could not usurp the Constitution on its own. It would require at least two branches to usurp the Constitution. Regarding the Necessary and Proper Clause, all three have joined the usurpation.

But the worst has yet to come. The Commerce Clause was written for the obvious reason that the nation could not exist unless Congress, and Congress alone, wrote the laws governing interstate and international commerce. Before the Constitution was written, both New York and Pennsylvania taxed “imports” that came from New Jersey. The result was that “New Jersey was a cask that was corked at both ends.” States could not be allowed to impede commerce.

For nearly a century and a half, the Commerce Clause did act as a dividing line between powers legitimately held by Congress and those reserved to the states. Congress was chary about passing laws that interfered with the internal affairs of the states. And in the few instances where Congress overstepped those bounds, the Supreme Court was willing to strike down such laws as being in violation of the Commerce Clause. That clause is the basis of perhaps 90 percent of all the domestic legislation passed by Congress.

That restraint ended in 1981 with the decision in *Hodel v. Virginia Surface Mining* by the Supreme Court. Both Virginia and the county involved had their own laws and regulations concerning the operation of strip mines. But Congress passed a law overriding both of those. The defendant mining company argued in vain that it was located solely in Virginia, solely in that county, and that its land never, at any time, crossed a state border. The government argued, and the Supreme Court accepted the argument, that the coal from the mine either entered interstate commerce or was commercially indistinguishable from other coal that did.

Therefore, the Court concluded that the company's operations were "connected" with interstate commerce, and Congress had the power to act. Since it is nearly impossible in the modern economy to imagine any state-based commercial activity that is not "connected" to interstate commerce by that definition, on the day of the Virginia Surface Mining decision the Commerce Clause died as the last part of the last pillar of state-federal checks and balances.

To review, Figure 1 outlines the respective powers of the state and federal government as stated in the Constitution and all of its amendments. (Where the power comes from an amendment rather than the original text of the Constitution, that is noted.)

In reviewing these lists of the respective federal and state powers, readers are encouraged to note that it is exactly as James Madison described. The federal government has specific powers, which are stated. The states have general and unlimited powers. State legislators can do anything they deem appropriate for their citizens, restrained only by express limitations found in their state constitutions or the U.S. Constitution. The ultimate limitation on them, as on all elected officials, is the disapproval of the voters in the next election for whatever actions they have taken. As Thomas Jefferson wrote, "The only safe repository of the ultimate sovereignty is in the people."

The local authority of cities, counties, townships, water districts, school boards, etc., are not included here. All of these draw their powers from the states. They, too, have unlimited power within their spheres of activity, limited only by their state constitutions and the U.S. Constitution, their grants of authority from the state, and by the charters of local governments where they operate.

The main point that readers will garner from these lists is the difference between the Necessary and Proper Clause in the Constitution, and the general power to act in the public good which belongs to state governments only. Obviously, federal-state relations do not operate on this basis today.

Since this review is being prepared by the American Legislative Exchange Council for members of Congress, the questions are whether the members are concerned about the imbalance between the states and the federal government, and if so, what steps can they take to redress the balance.

On actions taken by the Supreme Court which have damaged the federal-state relationship, members of Congress have almost no influence. Senators can act only in response to nominations of judges and justices by the president of the United States. They can, at least, inquire about the positions of such nominees on federal-state relations and vote accordingly. Members of the House have no role in that process.

There are six basic steps that any member of Congress can take, if he or she is concerned that the federal government is overwhelming the state

governments, contrary to the intent of the Constitution.

First, when any new law is under consideration, or revision and re-enactment of an existing law is at issue, ask yourself whether this whole law, or specific sections of it, invades the province of the state legislatures in acting on behalf of their citizens. If so, ask yourself not whether this law is a “good idea” in the abstract, but whether it is legitimate under the Constitution, and vote accordingly.

Second, keep in regular communication with your state legislatures, especially on issues that may cross the dividing line between state and federal power. Such consultation between levels of government can produce compromises in which a federal law is designed in harmony with state laws, so the federal government does the part it should, and the states do the part they should.

Third, in all areas of federal laws and regulations, consider whether a regular process to allow “state exemptions” should be built in. Keep in mind that the revisions in the federal welfare rules that were finally made five years ago have turned out to be highly successful. They came about because some states were granted “waivers” from otherwise across-the-board federal requirements. The states receiving those waivers discovered better ways of getting citizens off welfare and into jobs – benefiting both those citizens and all citizens through lower costs and taxes. Then those better ways were applied in federal law. This happened because the states were acting as “legislative laboratories” as Justice Louis Brandeis wrote long ago.

Not only does the one-size-fits-all approach necessarily involve Congress in defining every jot and tittle of a new program, it also shuts out the ingenuity of states through trial and error, to test and prove successful ways of reaching the goals.

Fourth, once you are versed in the subject of what is going wrong with federalism in modern America, please share your understanding with other members of Congress. Outside sources, including ALEC, can write and speak on such subjects as much as possible, but nothing communicates better to one member of Congress than another member of Congress. For a classic example of that on one of the most important subjects that Congress has ever taken up, read the story of John Adams shepherding the Declaration of Independence through Congress on 2 July, 1776, on pages 125-129 of John Adams. Initially, three states were opposed, enough to kill the proposal. But by working with members one by one, Adams turned it around to 12 states in favor, with New York abstaining.

Fifth, be very wary of “mandates,” federal laws which tell states that they must install or conduct a particular program, and saddle the states with

large tax burdens to do what the federal law has commanded. Remember that the American Revolution was fought on the principle of “No taxation without representation.” When Congress writes a law that the states must follow, but the state legislators are then obliged to raise the taxes to pay for it, that is a form of taxation without representation. The legislator who writes a law should be the same one who passes the taxes to pay for it.

It is an entirely different matter if Congress writes a new law and Congress raises the taxes to pay its costs, than if Congress writes the law but pushes off to the state legislators the unpopular burden of paying for it.

Sixth, and related to the last point, ALEC asks members of Congress to consider seriously the few and considered proposals for amendments to the U.S. Constitution that state legislators ask to be placed on the table.

There is a natural temptation, when someone else must pay the bill, to pass a law that “sounds good on paper” and “people will like.” That’s the engine which drives the establishment of federal mandates on state governments. ALEC asks the members of Congress to consider not only whether each particular unfunded mandate is a poor idea, but whether the entire process of unfunded mandates should be eliminated by means of a constitutional amendment.

There are also two practical arguments behind all these theoretical ones. The state of California, were it an independent nation, would be the sixth largest economy in the world. Without arguing the case for or against any specific current policies of that state, aren’t the 30 million or so inhabitants of that state justified in making as much as possible of their own political decisions, with their state representatives being responsible to them for the wisdom, or folly, of those decisions?

The principal point of Thomas Jefferson on the theory of government was that all decisions should be made at the lowest possible level, closest to the people. War and peace obviously is a national question, and the Constitution forbids states from acting in that area. Are building local roads, picking up the garbage, providing police protection, and running the schools (to name a few examples) not equally obviously state or local questions, which should be decided at that level?

Keep in mind that when the Constitution was written the whole nation was but 3 million people. The largest state was Virginia, with 600,000 people. (Yes, in the 1790 Census, Virginia alone had one-fifth of the population.) Today, Alaska is the smallest state, and is fast approaching the size of Virginia, then. If half a million people were entitled to a high level of self-government then, are they not entitled to the same today? That is a viewpoint that ALEC, on behalf of all 7,500 state legislators, wishes to impress on the members of Congress.

The second practical argument is this: Especially in these times, Congress

has burdens on it the likes of which it has not faced since World War II. Congress should not be burdened now with determining the proper size of an elementary school classroom in Peoria. Or the nature of beach front construction in North Carolina. Or the operation of the police department in St. Louis. Or a thousand other subjects that state and local officials stand ready to deal with as they historically have. We are willing to take, and we welcome, the burden of doing more on our part in the governance of the United States. All of us, including all citizens, will be the better for it.

ALEC appreciates the opportunity to present to members of Congress some thoughts on the proper relationships between the state and federal governments. This is not a new subject. It was uppermost in the minds of those who fought and won the American Revolution even before any formal federal government had been created. It will remain a central issue so long as the Republic, and its states, and its Constitution, endure.



*"The state and federal leaders of the American Legislative Exchange Council not only espouse the principles of Thomas Jefferson, they ensure the integrity of free markets and individual freedom in the halls of Congress and state legislatures across the country. The innovative policy brought forth from this organization today unleashes the power of free markets and democracy for future generations."*

-- U.S. Senator George Allen, ALEC alumnus

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