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# Making Federalism Work: Lessons from Health Care for the Green New Deal

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# MAKING FEDERALISM WORK: LESSONS FROM HEALTH CARE FOR THE GREEN NEW DEAL

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*For decades, federalism had a bad reputation. It often was perceived as little more than a cover for state resistance to civil rights and other social justice reforms. More recently, however, progressive scholars have argued that federalism can meaningfully advance nationalist ends. According to these scholars, federalism allows for spaces in which norms can be contested, developed, and extended. This new strain of scholarship also recognizes, however, that these federalist structures can still shield national-level reforms from reaching all Americans. Many see such gaps as a regrettable but unavoidable feature of our federalist system.*

*But to embrace federalism as an important component of the U.S. legal architecture does not mean that one must abandon efforts to craft effective federalist programs. To the contrary, this Article argues that the scholarly coalescence around the virtues of federalism raises a pressing new question: are there ways to structure federalist programs that help to build constituencies and participation over time? That is, for those who accept federalism but are committed to expanding essential services and goods to all Americans, how can policymakers best make federalism work?*

*To answer this question, the Article analyzes an important case study in modern federalism: the Affordable Care Act. We argue that the ACA experience offers three critical lessons about how to structure modern, federalist social justice legislation that both respects states as partners and builds effectively toward national norms. These lessons involve (1) the new importance of federal program*

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*"backstops," (2) the need to create unusual coalitions, and (3) the counterintuitive benefits of building upon entrenched statutory programs.*

*These lessons from the ACA should, we assert, help architects and scholars of new legislative efforts better understand how to make federalism work to achieve social justice ends today. To illustrate how, the Article concludes by applying these lessons to the Green New Deal—the vibrant new legislative effort to jointly tackle climate change and inequality.*

## INTRODUCTION

Many on the left have long been skeptical of federalism. Based on its association with state resistance to nationally imposed civil rights reforms, skeptics have viewed federalism as little more than a rhetorical device to advance recalcitrance and obstructionism.[1] But recently, scholars sympathetic to social justice ends have called for a "détente" in the federalism–nationalism debate, arguing that federalism often serves to enhance projects aimed at achieving greater social justice.[2] These "new school" federalism scholars[3] have argued that federalism provides generative spaces

1. Noting this trend, Sara Mayeux and Karen Tani observe that a "common [perception] among U.S. historians generally" has been that "invocations of federalism [in the twentieth century] must have been pretexts for reactionary political projects—whether undoing the gains of Reconstruction and the civil rights movement (federalism as synonymous with 'states' rights'), or rationalizing libertarian opposition to economic regulation." Sara Mayeux & Karen Tani, *Federalism Anew*, 56 AM. J. LEGAL HIST. 128, 130 (2016); *see also* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 534 (1995) ("Unfortunately, too often careful analysis has been absent and federalism has been used as a slogan or as a guise to hide the real issue in dispute. For example, during the debate over civil rights in the 1950s and 1960s, opponents talked about federalism and states' rights rather than the real issue: racial equality.").

2. *See* Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS L. REV. 997, 997 (2015); Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1697 (2017) [hereinafter Gerken, *Federalism 3.0*]; Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1081 (2014) (offering "a sympathetic rendering of partisan federalism," for its role in allowing states to "check the federal government by channeling partisan conflict through federalism's institutional framework"); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1889–91 (2014) (synthesizing the work of the "nationalist school of federalism" that celebrates federalism's ability to serve nationalist ends, and arguing that debates about devolution and centralization are "means to the same end: a well-functioning democracy"); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 317 (1997) ("[W]e have made too little effort to value (weigh or measure) the worth of the values (ideals) federalism is said to serve.").

3. *See* Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689, 1694 (2018) (using this terminology).

for such projects, creating "sites where we battle over—and forge—national policy, national politics, and national norms."[4] Examples that validate this theory are easy to come by: consider how early state and local action built to the Supreme Court's sanctioning of gay marriage,[5] or how states and localities have achieved substantial climate change policies in the absence of a national consensus.[6]

This new strain of scholarship also recognizes, however, that in certain cases federalist structures still shield national-level reforms from reaching all Americans. Perhaps the most significant modern example of this phenomenon is the landmark 2010 statute designed to expand Americans' access to health care, the Patient Protection and Affordable Care Act ("ACA" or the "Act").[7] The ACA takes a cooperative federalism approach to its mission, enlisting the states as partners in health care expansion.[8] Consequently, certain states resistant to its goals have been able to block its full implementation within their borders, leaving millions of Americans uninsured—not to mention the 15,600 deaths that a 2019 study attributed to state non-expansion decisions.[9]

The response of the new school federalists to these kinds of lamentable gaps has been to point out that they are, themselves, the result of contested norms at the national level. National norms, in this view, must be built and earned in our federalist system from

4. *See* Gerken, *Federalism 3.0*, *supra* note 2, at 1696 (emphasis omitted).

5. United States v. Windsor, 570 U.S. 744, 744–47 (2013) (holding that the Defense of Marriage Act, denying federal recognition of same-sex marriage, violated due process); *see* Molly Ball, *How Gay Marriage Became a Constitutional Right*, ATLANTIC (July 1, 2015), www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/ [https://perma.cc/R9QA-VNZH].

6. *See* Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. 305, 307 (2020); Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 267 (2017); Uma Outka, *Cities and the Low-Carbon Grid*, 46 ENVTL. L. 105, 105 (2016); Jim Rossi, *Carbon Taxation by Regulation*, 102 MINN. L. REV. 277, 280–81 (2017); Vicki Arroyo, *From Paris to Pittsburgh: U.S. State and Local Leadership in an Era of Trump*, 31 GEO. ENVTL. L. REV. 433, 433 (2019); Richard B. Stewart, *States and Cities as Actors in Global Climate Regulation: Unitary vs. Plural Architectures*, 50 ARIZ. L. REV. 681, 681 (2008); Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 669 (2010).

7. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

8. *See infra* Part I.

9. Sarah Miller, Norman Johnson & Laura R. Wherry, *Medicaid and Mortality: New Evidence from Linked Survey and Administrative Data* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 26081, 2021), https://www.nber.org/papers/w26081 [https://perma.cc/AZS6-FXZ5].

the ground up.[10] If a national movement is strong enough, it can override federalist tendencies and pass legislation that mandates a national program, as would proposals for Medicare for All in the health care context.[11] But thus far, Medicare for All has not been able to pass Congress—only the ACA has—suggesting that the norms in favor of health insurance for all are not cohesive enough yet for a nationally comprehensive program.

This response strikes us both as (a) essentially correct and (b) cold comfort for the millions of Americans living in states that have denied them access to health care. Thus, in our view, the scholarly coalescence around federalism's virtues raises a pressing new question for scholars and policymakers alike: are there ways to structure federalist programs that help to build constituencies and participation over time? That is, for those who accept federalism for either political or normative reasons but are committed to expanding essential services and goods to all Americans, how can policymakers best *make federalism work*?

This question is pressing across issue areas that implicate shared federal–state administration of welfare-enhancing policies—which is to say, the vast majority of the modern administrative state.[12] As a lens into answering it, we focus on the ACA, considering how its cooperative federalist structures have fared in

10. *See* Gerken, *Federalism 3.0*, *supra* note 2, at 1710 ("Academics often unthinkingly blame decentralization for shortfalls in our equality norms. This simplistic formulation ignores the fact that the turn to decentralization is a sign of weakness in the norms themselves.").

11. *See, e.g.*, Medicare for All Act of 2019, S. 1129, 116th Cong. (2019); Medicare for All Act of 2019, H.R. 1384, 116th Cong. (2019). For an overview of the 2020 Democratic presidential candidates' stances on Medicare for All proposals, see Alice Miranda Ollstein, *2020 Candidates' Views on Medicare for All: A Voter's Guide*, POLITICO (Feb. 9, 2020), https://www.politico.com/2020-election/candidates-views-on-the-issues/health-care/medicare-for-all/ [https://perma.cc/7K5A-RCCB].

12. *See* Bulman-Pozen, *supra* note 2, at 1083 ("[T]he states and the federal government increasingly regulate in overlapping areas rather than separate spheres."); Heather K. Gerken, *The Federalis(m) Society*, 36 HARV. J.L. & PUB. POL'Y 941, 942 (2013) ("Cooperative federalism is where the action is. It is where the future is."); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 538 (2011) (tracing the historical arc of cooperative federalism); Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950) (observing how the New Deal "converted [federalism] into an instrument for the achievement of . . . economic security for 'the common man'"); *see also* JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC 39–50 (2017) (tracing the rise of the modern administrative state since the New Deal); Daniel B. Rodriguez & Barry R. Weingast, *The "Reformation of Administrative Law" Revisited*, 31 J.L. ECON. & ORG. 782, 782 (2015) (arguing that "beginning in the 1960's . . . new techniques of

building toward the Act's goal of comprehensive health insurance. The ACA is not exemplary in its federalist structures, but it is the lone piece of major social justice legislation passed in the preceding decade. That makes it a rare case study of how to structure federalist programs in our modern, hyperpartisan era,[13] with its attendant congressional gridlock.[14]

Although the ACA's coverage remains incomplete, regulators have built creatively toward the Act's goals in the face of judicial challenges and state recalcitrance, slowly cajoling states into cooperation and thus bringing health insurance to tens of millions more Americans.[15] The Act is certainly not an unqualified success, but it

regulatory policymaking reconfigured the relationship between the national and state governments").

13. On hyperpartisanship, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 273 (2011) ("Over the last generation, American democracy has had one defining attribute: extreme partisan polarization."); Joseph Fishkin & Heather K. Gerken, *The Two Trends That Matter for Party Politics*, 89 N.Y.U. L. REV. ONLINE 32, 33 (2014) ("The divide between the parties in terms of both ideology and voting patterns is deeper and clearer than it has been for at least sixty years."); Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1, 2. On climate change and hyperpartisanship, see Oliver Milman, *Climate Crisis More Politically Polarizing Than Abortion for US Voters, Study Finds*, GUARDIAN (May 22, 2019, 1:00 AM), https://www.theguardian.com/us-news/2019/may/21/climate-crisis-more-politically-polarizing-than-abortion-for-us-voters-study-finds [https://perma.cc/K4EV-MCZC].

14. Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217 (2013); Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065 (2013). Acknowledgement of this pervasive gridlock is both popular and scholarly. *See, e.g.*, Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html [https://perma.cc/F8F9-K25X]; Jeff Jacoby, *Three Cheers for Congressional Gridlock*, BOS. GLOBE (Nov. 14, 2018, 12:27 PM), https://www.bostonglobe.com/opinion/2018/11/14 /three-cheers-for-congressional-gridlock/aNUy80tVALaN0tELFuDmmL/story.html [https://perma.cc/W5UA-WAUX]; Christopher Ingraham, *Congressional Gridlock Has Doubled Since the 1950s*, WASH. POST (May 28, 2014, 1:01 PM), https://www.washingtonpost.com/news/wonk/wp/2014/05/28 /congressional-gridlock-has-doubled-since-the-1950s/ [https://perma.cc/2UAN-EMQW].

15. *See infra* Parts I, V (detailing the constitutional and statutory challenges to the ACA and implementation resistance among governors and state legislatures). On the reduction in uninsured individuals, compare SARA R. COLLINS, HERMAN K. BHUPAL & MICHELLE M. DOTY, HEALTH INSURANCE COVERAGE EIGHT YEARS AFTER THE ACA tbls. 1 & 3 (Feb. 7, 2019), https://www.commonwealthfund.org/sites/default/files/2019-02/Collins_hlt_ins_coverage_8_years_after_ACA_2018_biennial_survey_tables.pdf [https://perma.cc/F27M-C55D] (reporting 24 million uninsured Americans in 2018), with Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Mar. 20, 2010) [hereinafter Pelosi Letter], https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/amendreconprop.pdf [https://perma.cc/7HYJ-PRN8] (projecting that, in the absence the ACA, there would be 54 million uninsured by 2019).

has admirable structural elements that have allowed it to expand its reach over time.[16]

Moreover, the ACA has achieved these goals in an interesting way. Rather than implementing a single federalist policy, it simultaneously introduced two separate federalist structures into the modern political landscape. These two structures have had surprisingly different levels of success in achieving their stated goals. The ACA experience therefore illuminates contrasts in the implementation of two different federalism structures, further enhancing the ACA's appeal as a particularly useful study of contemporary federalism in action.

We argue that the ACA offers three critical lessons about how to structure modern, federalist social justice legislation that both respects states as partners and builds effectively toward national norms.[17] The first regards the uses and limits of federal funding. Much of the ACA's structure, particularly as reinterpreted by the courts,[18] relies upon voluntary uptake by the states. The Act motivates state uptake through a familiar statutory structure: offer the "carrot" of greater control or federal funding to the states, and economic rationality will induce their participation.[19] In the case of the ACA, however, states have been perfectly willing to reject eco-

16. For caveats to the ACA's success, see *infra* section II.A (discussing the Supreme Court's opinion in *National Federation of Independent Business (NFIB) v. Sebelius* rendering the state Medicaid expansion optional, and the varying state decisions to expand); *infra* notes 106–09 and accompanying text (discussing individuals declining to purchase insurance on the Exchanges); *infra* note 167 and accompanying text (discussing repeal of the individual mandate).

17. We focus in particular on the Act's approach to questions of "intrastatutory" federalism—that is to say, its structural choices regarding how to allocate power and authority between the states and the federal government. On the concept of "intrastatutory federalism," see Gluck, *supra* note 12.

18. As we explain *infra*, the Supreme Court's opinion in *NFIB* transformed the Medicaid expansion component of the ACA from a mandatory requirement on the states to expand or else lose all funding, into a choice states could make to accept or reject federal funding contingent on Medicaid expansion. *See infra* section II.A; *see also* NFIB v. Sebelius, 567 U.S. 519, 581–85 (2012).

19. For programs employing this structure, see, for example, 42 U.S.C. § 1396a (Medicaid, Title XIX of the Social Security Act and Children's Health Insurance Program, Title XXI of the Social Security Act); 42 U.S.C. § 7509 (Clean Air Act provision conditioning highway funding on state compliance); 49 U.S.C. § 31103 (National Transportation Assistance Act); and 20 U.S.C. § 6316(a)(1) (No Child Left Behind Act).

nomically rational decisions in order to maintain ideological purity[20]—a reality that has undermined many of the structural assumptions of the Act. Moreover, this economic irrationality has been mirrored at the individual level, with nearly 5.8 million individuals electing not to purchase insurance even when doing so would have been cheaper than paying the ACA tax penalty.[21] For architects of new legislative efforts, the key takeaway is that economic incentives, whether in the form of generous federal funding offers or noncompliance penalties, cannot necessarily trump hyperpartisanship. Consequently, more aggressive backstop policies, i.e., policies that apply in the absence of voluntary state or individual participation, are a vital component of modern statutory structure.[22]

Second, we argue that the ACA's durability in the face of initial resistance owes much to the statute's creation of unusual coalitions that helped, in certain instances, to break down the hyperpartisanship that marks our modern politics. In Madisonian fashion, the statute pitted ambition against ambition by structuring programs in ways that leveraged the support of newly insured individuals, critical portions of the business community, and certain agency personnel and governors in red states.[23] Although no panacea, studies have shown that these cross-partisan alliances proved useful in prodding at least certain Republican-controlled states to expand Medicaid under the ACA.[24] As such, the ACA underscores the need to focus not only upon rules, but also upon allies and coalitions. It teaches a lesson underappreciated in the design of federal statutes: the necessity of designing reforms to create the political conditions necessary for their continued success through fracturing old coalitions, creating new coalitions, and empowering sympathetic actors inside and outside government.[25]

20. *See infra* section II.A.

21. Matthew Rae, Larry Levitt & Ashley Semanskee, *How Many of the Uninsured Can Purchase a Marketplace Plan for Less than Their Shared Responsibility Penalty?*, KAISER FAM. FOUND. (Nov. 2017), http://files.kff.org/attachment/Issue-Brief-How-Many-of-the-Uninsured-can-Purchase-a-Marketplace-Plan-for-Less-Than-Their-Shared-Responsibility-Penalty [https://perma.cc/5AFU-5G6B].

22. *See infra* Part III.

23. THE FEDERALIST NO. 51 (James Madison). For the application of this Madisonian concept to the ACA, see *infra* Part IV.

24. *See infra* Part III.

25. *See infra* Part III.

Finally, the ACA has valuable information to offer about the utility of leveraging what we call "statutory entrenchment"—by which we mean the value of building new programs on the shoulders of old programs that have become politically, administratively, and legally entrenched components of the U.S. regulatory state.[26] Contrary to assumptions about the stability and continuity of law, experience with the ACA suggests that building on entrenched programs may have surprisingly muted legal benefits but significant political benefits under modern hyperpartisan conditions. These political gains are best evidenced by the portion of the ACA that built upon Medicaid. The Medicaid expansion component of the Act has been the most widely adopted over time, including in Republican-controlled states, typically after a period of popular pressure within the state.[27] Thus, entrenchment offers a methodology for enhancing the norm-building that new federalism scholars appropriately argue is central to nationwide achievement of social justice goals.

These three lessons from the ACA—about the newly important need to backstop federal funding, the utility of party-fracturing coalitions, and the counterintuitive contemporary benefits of entrenchment—all point to a need to reexamine classic models of cooperative federalism in our hyperpartisan era. By developing these three takeaways, our analysis focuses on lessons the ACA offers regarding how to make social justice legislation *succeed* and *endure* within the federalist structures that now dominate the modern administrative state. In drawing these lessons, we have benefitted from a wealth of literature that scrutinizes the lessons that the ACA offers to modern federalism scholarship.[28] However, our lens

26. *See infra* section IV.A.

27. *See infra* Part III.

28. *See, e.g.*, Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495 (2020); Gluck & Huberfeld, *supra* note 3 (reporting key findings on the ACA's relationship to commonly touted federalism values); Gluck, *supra* note 12; Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013) [hereinafter Gluck, *Federalism from Federal Statutes*]; Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Gillian E. Metzger, *Agencies, Polarization, and the States*, 115 COLUM. L. REV. 1739 (2015) [hereinafter Metzger, *Agencies*]; Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, *in* THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227 (Nathaniel Persily et al. eds., 2013); Frank J. Thompson & Michael K. Gusmano, *The Administrative Presidency and Fractious Federalism: The Case of Obamacare*, PUBLIUS, Summer 2014, at 426, 426; Gillian E. Metzger, *To Tax, to Spend, to Regulate*, 126 HARV. L. REV. 83 (2012) [hereinafter Metzger, *To Tax*]; Gerken, *supra* note 12, at 944

is a different one: we are interested not in how the ACA illuminates debates about the theories and values of federalism, but in how the ACA's federalist structure has related over time to achievement of its substantive goal of expanding access to health care.[29]

Although the ACA's implementation trajectory is unique, we contend that it offers trans-substantive lessons regarding statutory structure to both scholars and policymakers alike. To support this contention, the final section of the Article applies its lessons to a leading new national social justice project: the Green New Deal ("GND").[30] The GND aims to address two of the most significant challenges facing the United States today: climate change and inequality. To jointly tackle these problems, the GND and similar emerging legislative efforts call for federal legislation that puts Americans to work in well-paying jobs that will build the clean energy infrastructure needed to rapidly decarbonize the U.S. economy.[31] However, the precise contours of the GND, including answers to questions about how to design such an ambitious program within the thicket of entrenched cooperative federalist structures that pervade U.S. energy and environmental law,[32] are yet to be worked out.

We show how the lessons offered by the ACA might aid drafters of a GND-like program in design choices regarding how to build upon existing state or federal efforts, how to best incentivize state

(arguing that the ACA offers critical lessons about "the power of the servant" in cooperative federalist arrangements).

29. *Cf.* Bulman-Pozen, *supra* note 2, at 1081 (acknowledging that more work needs to be done on the substantive implications of uncooperative federalism).

30. Most notably, Representative Alexandria Ocasio-Cortez and Senator Ed Markey introduced a (non-binding) Green New Deal Resolution in the House and Senate in February 2019. *See* H.R. Res. 109, 116th Cong. (1st Sess. 2019).

31. *See id.*

32. *See infra* section II.B; *see also* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 304 (2011) (describing the "interjurisdictional zone" that dominates contemporary environmental law); John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1185 (1995); Jonathan H. Adler & Nathaniel Stewart, *Is the Clean Air Act Unconstitutional? Coercion, Cooperative Federalism and Conditional Spending After* NFIB v. Sebelius, 43 ECOLOGY L.Q. 671, 673 (2016); New York v. United States, 505 U.S. 144, 167, 173–74 (1992) (approving of cooperative federalism arrangements wherein Congress "offer[s] States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation"); Texas v. EPA, 726 F.3d 180, 196 (D.C. Cir. 2013) (explaining that the Supreme Court has "repeatedly affirm[ed] the constitutionality of federal statutes that allow States to administer federal programs but provide for direct federal administration if a State chooses not to administer it").

participation, and how to enhance the power of supportive constituencies over time. This applied analysis fleshes out our contention that acceptance of the virtues or political necessity of federalism need not foreclose critical inquiries into how best to make modern federalism work.

We make this argument in five Parts. Part I begins with an overview of the ACA and its federalist structures. Parts II through IV examine the three lessons the ACA offers for maximizing the success of federalist structures, with each Part devoted to the study of a different lesson. Part V applies these lessons to the GND. A brief conclusion follows.

## I. SETTING THE STAGE: AN INTRODUCTION TO THE ACA

The ACA is a dizzyingly complex piece of legislation, covering 906 pages.[33] What's more, the Act's original structure has been altered substantially by intervening court decisions, making its structure in practice quite different from its original structure on the page. In this Part, we offer a synopsis of the structure of the ACA as it has taken shape through implementation. We also explain why, politically, Congress settled upon this particular federalist structure for expanding health care access.

The overarching goal of the ACA is to expand access to health care for Americans, and to accomplish this by increasing the number of individuals with health insurance coverage.[34] In pursuit of this goal, the Obama administration largely left questions of policy design to Congress, a direct response to the prior experience of the

33. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.). The reconciliation bill enacted as a companion to it was an additional 55 pages. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

34. Health policies typically are described as pursuing one of three goals: access, quality, or cost reduction. On the Affordable Care Act's prioritization of access, see, for example, Gluck & Huberfeld, *supra* note 3, at 1726 ("The ACA responded to . . . gaps in coverage with an overarching philosophy one of us has called 'universality'—universal access to healthcare through universal access to insurance coverage. . . ."); President Barack Obama, Remarks by the President on the Affordable Care Act (Oct. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/20/remarks-president-affordable-care-act [https://perma.cc/SMK8-JXL5] ("[W]e gave states funding to expand Medicaid to cover more people."); King v. Burwell, 576 U.S. 473, 478 (2015) (describing the ACA as "designed to expand coverage"). Despite its structural focus on increased access, the Act of course also included provisions aimed at the goals of quality improvement and cost reduction. *See* Patient Protection and Affordable Care Act §§ 3001–3602, 124 Stat. at 122–24.

Clinton administration, where failure to accomplish health reform was widely blamed on the administration's efforts to dictate policy design to Congress.[35] In response, Congress enacted a law that contained two complementary policies, each of which applies to a specific population. Under the first policy, the Act expanded the Medicaid program, a federal–state hybrid program that, since its original enactment in 1965, has provided health insurance to certain specified low-income individuals.[36] Under the second policy, the Act created health insurance marketplaces in each state, known as "Exchanges," designed to expand access to private health insurance plans for individuals who would exceed the income threshold for Medicaid participation.[37] Today, each of these reforms provides a distinct (and useful) model of federalism in action, even though each model was perhaps the product of accident rather than design.

### A. *Medicaid Expansion*

The ACA's first major reform was to expand the existing Medicaid program. Since its inception, the Medicaid program has offered each state the option to create and administer a health insurance program that the federal government partly subsidizes, if the program meets certain federal standards.[38] One such federal standard relates to the population that is provided with insurance under the program. Prior to the ACA, each Medicaid insurance plan was required to provide coverage only to certain qualified groups (e.g., children, pregnant women) whose annual income fell below a specified threshold.[39] With respect to these populations,

35. *See* Jacob S. Hacker, *The Road to Somewhere: Why Health Reform Happened*, 8 PERSP. ON POL. 861, 865–66 (2010).

36. *See* Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (codified as amended in scattered sections of 42 U.S.C.).

37. On the interaction of each policy's income thresholds, see *infra* notes 47 and 66 and accompanying text.

38. The Medicaid program also operates in the District of Columbia and the territories. Note that Medicaid operates differently in the territories than in the states; this Part's description of the Medicaid program is specific to the states. For application in the territories, see Cornelia Hall, Robin Rudowitz & Kathleen Gifford, *Medicaid in the Territories: Program Features, Challenges, and Changes*, KAISER FAM. FOUND. (Jan. 25, 2019), https://www.kff.org/report-section/medicaid-in-the-territories-program-features-challenges-and-changes-issue-brief/ [https://perma.cc/9RVX-SV4W].

39. Social Security Amendments of 1965 § 1902(a)(10)(A)(i), 42 U.S.C. § 1396a (Supp. 2006).

states were required to design insurance programs that, at a minimum, provided coverage for a core set of health insurance benefits.[40] If a state created an insurance program that met these (and other) requirements, then the federal government would subsidize a percentage, ranging from fifty percent to eighty-three percent, of the cost of coverage under the insurance plan.[41] Today, every state participates in the Medicaid program, with the last holdout state (Arizona) beginning participation in 1982.[42]

Under this traditional Medicaid program, states retain significant flexibility in the design of their insurance plans. For example, they can choose to provide coverage for additional populations and benefits that are listed as optional under the statute,[43] and receive federal funds to partly subsidize these optional costs.[44] Moreover, states can pursue a variety of methods for furnishing insurance under the program, including state-run, fee-for-service models and privately run managed-care models.[45] And states remain the front-line administrative implementers of the insurance program, a role that gives them significant control over the disbursement of funds and the practical implementation of the program.[46]

Under the ACA, as drafted at least, states participating in Medicaid were required to make their Medicaid plans available to a new population: individuals with income under 133 percent of the

40. *See, e.g.*, *id.* § 1902(a)(10), 42 U.S.C. § 1396a (Supp. 2006); *id.* § 1905(a), 42 U.S.C. § 1396d (Supp. 2006).

41. *Id.* § 1903, 42 U.S.C. § 1396b (providing payment with respect to approved state plans); *id.* § 1905(b), 42 U.S.C. § 1396d (specifying federal payment rate).

42. Mary K. Reinhart, *Medicaid in Arizona: A Timeline*, AZCENTRAL.COM (June 10, 2013, 4:17 PM), http://archive.azcentral.com/news/politics/articles/20130610medicaid-expansion-timeline.html [https://perma.cc/V3ZN-BK7M]. Every other state participated by 1972. *See id.*

43. For optional populations, see § 1902(a)(10)(A)(ii), 42 U.S.C. § 1396a. For optional services, see, for example, *id.* § 1902(a)(47), 42 U.S.C. § 1396a(47) (ambulatory prenatal care).

44. *See id.* § 1903, 42 U.S.C. § 1396b (providing percentage of expenditures to be paid by federal government for items and services).

45. *See* CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICAID MANAGED CARE ENROLLMENT AND PROGRAM CHARACTERISTICS, 2017 (Winter 2019), https://www.medicaid.gov/medicaid/managed-care/downloads/enrollment/2017-medicaid-managed-care-enrollment-report.pdf [https://perma.cc/BDP6-SYAX].

46. *See, e.g.*, § 1906, 42 U.S.C. § 1396e (contemplating state use of group health plans to provide coverage).

federal poverty line, a group often described colloquially as the "expansion population."[47] In a break with the original Medicaid program, this coverage of low-income individuals was required regardless of whether the individuals belonged to a specified population group.[48] The Act thereby sought to transform the Medicaid program into a comprehensive insurer of a particular socioeconomic cross-section of the population.

The Medicaid expansion in the ACA was thus drafted to enact a specific federalist vision. Under that vision, the federal government would present states with an all-or-nothing choice: either expand their Medicaid programs to cover this broader set of individuals, or else opt out of the Medicaid program entirely. If states chose the latter option, they would cease to receive any corresponding federal Medicaid subsidies and support. For states that elected to expand (which it was assumed all states would do), the previously established federalist structure of the Medicaid program would continue without interruption, including with respect to the new expansion population. States would continue to administer the program, for example, and to make coverage decisions regarding optional services. Moreover, the federal government would subsidize coverage of the new expansion population particularly heavily, covering 100 percent of its costs for an initial three-year period, a percentage that subsequently phased down to ninety percent by 2020.[49] (By contrast, the Medicaid program's default subsidization percentage does not, in practice, exceed seventy-seven percent.[50])

In theory, therefore, the ACA's Medicaid expansion leveraged the familiar federalist structure of the long-running Medicaid program. However, the Supreme Court redesigned the Medicaid expansion before it fully occurred, holding in the 2012 case of *NFIB v. Sebelius* that the expansion, as drafted, was unconstitutionally

47. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2001, 124 Stat. 119, 271 (2010) (adding § 1902(a)(10)(A)(i)(VIII) to the Social Security Act).

48. *Id.*

49. § 1905(y), 42 U.S.C. 1396d. The American Rescue Plan Act of 2021 also increases this percentage by an additional five percent for a two-year period for states that expand subsequent to its enactment. *See* Pub. L. No. 117-2, § 9814, 135 Stat. 4, __ (2021).

50. § 1905(b), 42 U.S.C. § 1396d. In practice, the highest FMAP for fiscal year 2020 is approximately seventy-seven percent. *See Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier*, KAISER FAM. FOUND. [hereinafter *FMAP for Medicaid*], https://www.kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier/?currentTimeframe [https://perma.cc/469N-M2GC].

coercive of the states.[51] Rather than simply striking down the expansion, however, the Court chose to remedy this constitutional defect by deeming coverage of the expansion population to be optional, not mandatory, for the states.[52] This is how the Medicaid expansion has been implemented ever since.

The Court's opinion in *NFIB* thereby transformed the Medicaid expansion into an experimental federalism arrangement unforeseen by the drafters of the ACA. Under this arrangement, the federal government uses its fiscal leverage to present states with an option to expand their Medicaid programs at a heavily subsidized rate, but it cannot induce them to do so by otherwise placing all Medicaid funding in jeopardy. For states that decide to expand, the federal government dictates certain minimum criteria that must be built into the design of the state's insurance plan. Beyond these basic criteria, states retain significant flexibility to decide how to structure and administer their subsidized insurance plans. As of March 2021, thirty-eight states and the District of Columbia have adopted the Medicaid expansion, while twelve states have not.[53]

In addition to changing the legal structure of the Medicaid expansion, *NFIB* has resulted in further state flexibility under the program. Section 1115 of the Social Security Act gives the Secretary of Health and Human Services broad authority to waive several key statutory Medicaid requirements on the states if, "in the judgment of the Secretary, [such waiver] is likely to assist in promoting the objectives of [the Medicaid program]."[54] After *NFIB*, this waiver option became the focal point of negotiations between states and the Obama administration, with the administration acceding to creative and novel waivers of statutory requirements for the expansion population in exchange for states agreeing to participate in the Medicaid expansion.[55] The Trump administration continued this aggressive use of Medicaid waivers, extending prior waiver concepts to apply even with respect to non-expansion pop-

51. 567 U.S. 519, 574–85 (2012).

52. *Id.* at 585–86.

53. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Mar. 12, 2021) [hereinafter *Medicaid Expansion Decisions*], https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/ [https://perma.cc/HB5M-ZZYT].

54. § 1115(a), 42 U.S.C. § 1315(a).

55. On these negotiations, see Gluck & Huberfeld, *supra* note 3.

ulations, and granting waivers for elements that stretched the legal limits of the Section 1115 waiver authority (such as work requirements, which have been challenged in the courts).[56] As of February 2021, sixty-one waivers had been approved across forty-five states, and twenty-eight additional waivers were pending across twenty-four states.[57] Four waivers in four states, meanwhile, had been set aside by courts.[58] While the Biden administration now appears to be reversing key Trump administration waiver policies (such as by beginning to withdraw waivers for work requirements), it nonetheless seems fair to say that the optional Medicaid expansion created by *NFIB* has paired with a broad, preexisting waiver authority to create federal–state negotiations that have introduced new changes into the decades-old Medicaid program—sometimes to the detriment of covered populations.

### B. *Health Benefit Exchanges*

The ACA includes a second policy that is designed to expand health insurance coverage in the United States, which might be labeled the "Exchange-based policy." This policy is meant to ensure coverage for the segment of society that, due to annual income, is ineligible for Medicaid insurance (even under the pre-*NFIB* vision of Medicaid expansion). In this way, the two policies in the Act were designed to work together toward a goal approaching universal coverage: the Medicaid expansion would ensure insurance coverage for most individuals whose income fell below a threshold level, while the Exchange-based policy would ensure coverage for

56. *See infra* Part V; *see also* Nicholas Bagley, *Are Medicaid Work Requirements Legal?*, 319 J. AM. MED. ASS'N 763 (2018). No states are currently implementing these work requirements, and as of the date of this Article's writing, the Biden administration has begun the process of withdrawing these waivers.

57. *Medicaid Waiver Tracker: Approved and Pending Section 1115 Waivers by State*, KAISER FAM. FOUND. (Feb. 25, 2021) [hereinafter *Medicaid Waiver Tracker*], https://www.kff.org/medicaid/issue-brief/medicaid-waiver-tracker-approved-and-pending-section-1115-waivers-by-state/ [https://perma.cc/P6TG-PV8B].

58. Work requirement waivers and waivers relating to eligibility and enrollment have been set aside in Michigan, Young v. Azar, No. 1:19-cv-03526 (D.D.C. 2020); Arkansas, Gresham v. Azar, 363 F. Supp. 3d 165 (D.D.C. 2019); Kentucky, Stewart v. Azar, 366 F. Supp. 3d 125 (D.D.C. 2019); and New Hampshire, Philbrick v. Azar, 397 F. Supp. 3d 11 (D.D.C. 2019). Waiver relating to benefit, copay, and healthy behavior provisions also has been set aside in Kentucky. *Stewart*, 366 F. Supp. 3d 125; *see also Medicaid Waiver Tracker*, *supra* note 57.

most individuals whose income exceeded that threshold.[59] This Exchange-based policy consisted of three interlocking reforms:[60]

- *Guaranteed Issue & Community Rating Requirements,* which required that, when a private insurer sells health insurance, the insurer must make that insurance available to all individuals who want to purchase it (and, for the most part, at the same price).[61]

- *The Individual Mandate*, which required individuals to either maintain health insurance, or else make a payment to the IRS.[62] This would incentivize healthy individuals (who typically are profitable for insurers) to enter the health care market, thereby offsetting the costs of the guaranteed issue and community rating requirements (which would obligate insurers to cover unprofitable individuals). This policy was subsequently repealed by the Tax Cuts and Jobs Act of 2017,[63] but insurance markets have remained stable in its absence.[64]

- *Low-Income Tax Credits*, which provided individuals whose incomes did not exceed 400 percent of the federal poverty line with tax credits that could be used to purchase health insurance.[65]

59. Even under this scheme (which would not be fully realized), coverage would not be universal. The Congressional Budget Office estimated at the time of enactment that the Act still would leave roughly "23 million nonelderly residents uninsured (about one-third of whom would be unauthorized immigrants)." Pelosi Letter, *supra* note 15.

60. As the Court put it in *King v. Burwell*: "The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful . . . . These three reforms are closely intertwined." 576 U.S. 473, 481–82 (2015).

61. 42 U.S.C. § 300gg.

62. 26 U.S.C. § 5000A.

63. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified as amended at 26 U.S.C. § 5000A) (repealing individual mandate).

64. *See* Peter Sullivan, *Analysis: ObamaCare Market Stable and Profitable Despite Loss of Individual Mandate*, HILL (Jan. 6, 2020, 10:47 AM), https://thehill.com/policy/healthcare/476916-analysis-obamacare-market-stable-and-profitable-despite-loss-of-individual [https://perma.cc/6YHY-BMF9].

65. 26 U.S.C. § 36B. The American Rescue Plan Act of 2021 also extends premium tax credits for 2021 and 2022 to reach those with incomes above the 400 percent threshold. *See* Pub. L. No. 117-2, § 9661, 135 Stat. 4, __ (2021); *see also id.* § 9662 (preventing clawback of excessive 2020 premium tax credits).

Under the Act, these three interlocking reforms would be implemented largely through "American Health Benefit Exchanges."[66] Each of these Exchanges would operate as a central marketplace for purchasing private insurance—a shopping mall, in effect, where customers could compare and purchase private insurance plans. The Democratic Party had coalesced around this Exchange model during the 2008 presidential campaign. All three major Democratic candidates supported some iteration of it because of its proven ability (in Massachusetts) to garner buy-in from key interest groups while generating meaningful expansion of insurance coverage.[67] Although those 2008 candidates also had all supported the inclusion of a governmentally run insurance option on the Exchanges (i.e., a "public option"), Joe Lieberman's opposition to that idea led to its removal (as Lieberman's vote was needed to end a Senate filibuster).[68] As a result, the Exchanges would operate simply as a market for the purchasing of private insurance plans.

Despite lacking a public option, it was believed the Exchanges would provide a useful vehicle for realizing the Act's reforms. The low-income tax credits would apply only to plans purchased through an Exchange, for example. As a condition of selling insurance on the Exchanges, insurers would be required to comply with various access-enhancing rules, such as the guaranteed issue and community rating requirements.[69] As a result, the Exchanges would become the locus of a new private insurance marketplace, legally structured to provide individuals with access to quality, affordable health insurance plans.[70]

Each state could elect to design and maintain its own Exchange, an action that would allow the state to assume several noteworthy responsibilities.[71] For example, the state would gain administra-

66. Patient Protection and Affordable Care Act § 1311(b), 42 U.S.C. 18031(b).

67. *See* Hacker, *supra* note 35, at 866.

68. *See id.* at 862, 866.

69. A separate, largely redundant set of legal provisions also would apply these requirements to off-Exchange plans. *See* Public Health Service Act §§ 2701–2708 (as added by Patient Protection and Affordable Care Act § 1201); Public Health Service Act §§ 2711–2719 (as added by Patient Protection and Affordable Care Act § 1001).

70. This section focuses on describing the Exchanges created to sell insurance on the individual market. The Act also provided for the creation of "SHOP Exchange[s]" where small businesses could purchase group health plans to cover employees. *See* § 1311(b)(1)(B), 42 U.S.C. § 18031(b)(1)(B).

71. *Id.* § 1311(b), 42 U.S.C. § 18031(b).

tive control over eligibility determinations and enrollment outreach efforts.[72] It also would obtain control over determinations of insurance plan compliance with many of the ACA's insurer requirements, such as those relating to plan rates and benefits, insurer marketing, and insurer performance on quality metrics.[73] By contrast, if a state declined to maintain its own Exchange, then the federal government would maintain an Exchange within the state.[74]

Just as the federalism scheme of the Medicaid expansion was the accidental result of *NFIB v. Sebelius*, the scheme of the Exchanges may have been the accidental result of congressional politics. When Congress was debating health care proposals, a bill was passed by the House of Representatives that would have created a national insurance Exchange (rather than a series of state-based Exchanges).[75] The death of Ted Kennedy in August of 2009, however, led Senate Democrats to lose their filibuster-proof majority—and, as a result, congressional Democrats then focused on the only iteration of health care reform that had passed the Senate prior to Kennedy's death.[76] That bill, which was the hastily merged product of two drafts (produced by the Senate HELP Committee and the Senate Finance Committee, respectively), consequently would become the enacted law.[77] The result is the federalism scheme that exists under current law—one that lets states opt into administering their own Exchanges, with backstop federal authority to run Exchanges in states that elect not to design and maintain their own Exchanges.

In practice, however, the Exchanges have not operated in this cleanly bifurcated, state-or-federal manner. As political backlash to the Act emerged in the wake of its enactment, a number of states signaled their intent not to create state-based Exchanges. In the

72. Sarah Goodell, *Federally Facilitated Exchanges*, HEALTHAFFAIRS (Jan. 31, 2013), https://www.healthaffairs.org/do/10.1377/hpb20130131.766527/full/ [https://perma.cc/H7XR-5LSH].

73. *Id.*

74. § 1321(c), 42 U.S.C. § 18041(c).

75. H.R. 3962, 111th Cong. (2009). It also would have included a federally created public option.

76. *See* Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 78 (2015).

77. *Id.* at 76–77.

effort to encourage state participation, therefore, the Obama administration treated the Act's bifurcated Exchange option not as a legally required choice, but instead as the starting point for negotiations with the states. In many instances, these negotiations resulted in hybrid Exchanges—i.e., Exchanges that split control between federal and state governments. Under these hybrid Exchanges, the federal government assumes certain functions—functions that might include maintenance of the Exchange's digital platform, setting of geographic rate areas, or conducting rate reviews—while the state otherwise maintains administrative authority.[78]

The Trump administration continued this practice of allowing hybrid Exchanges. As a result, the Exchanges that existed for 2021 could be roughly categorized as fifteen state-based Exchanges (including Washington, D.C.), six state-based Exchanges that make use of a federal platform, six Exchanges that are more extensively split between federal and state governments, and twenty-four federally facilitated Exchanges.[79] Within these broad categories, there remains tremendous diversity and nuance in the divisions of labor between federal and state government in the Exchanges.[80]

The ACA therefore presents a critical case study of how two different federalism models have unfolded, side-by-side, in a modern hyperpartisan political climate. As such, we believe it can offer unique federalism lessons for other federal legislative projects—lessons we turn to in the sections that follow.

## II. THE USES (AND LIMITS) OF FEDERAL FUNDS AND INCENTIVES

Particularly since the New Deal, federal programs routinely have relied on the power of economic incentives to induce desired activity by state and private actors.[81] In relying upon incentives,

78. *See* Gluck & Huberfeld, *supra* note 3, at 1763–64.

79. Louise Norris, *Health Insurance Marketplaces by State*, HEALTHINSURANCE.ORG (Oct. 7, 2020), https://www.healthinsurance.org/state-health-insurance-exchanges/ [https://perma.cc/FF5V-GKE9]; *see also State Health Insurance Marketplace Types, 2021*, KAISER FAM. FOUND., https://www.kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/W5CN-G8U5].

80. *See* Gluck & Huberfeld, *supra* note 3, at 1763–64.

81. *See, e.g.*, Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (offering farmers fiscal incentives to cut production), *invalidated by* United States v. Butler, 297

program designers have assumed that these are economically rational actors, who will undertake federally desired projects so long as it makes financial sense to do so.[82] In prior decades, this economic-rationality assumption has proven accurate. There have been notable exceptions, of course—with poorer southern states sometimes proving less responsive to federal welfare program enticements than their wealthier northern counterparts, for example.[83] Yet a variety of studies examining state action have concluded that, by and large, state governments are indeed rationally responsive to economic inducements.[84] And a host of landmark federal statutes have successfully leveraged economic incentives to achieve desired reforms.[85] This story changed, however, with the ACA.

U.S. 1 (1936) (effectively restored by the Agricultural Adjustment Act of 1938 following invalidation by *Butler*); Individuals with Disabilities Education Act, 20 U.S.C. § 1407(a)(1) (2006); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006); Clean Air Act, 42 U.S.C. §§ 7410, 7420 (2006).

82. *See, e.g.*, Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 819 (1998) ("The federal government can purchase the services of state and local governments whenever it is cost-effective to do so; it has no more need to conscript such services than it has to conscript the services of secretaries, FBI agents, janitors, or Supreme Court Justices."). We focus here on the uses and limits of federal funds after enactment. As such, we do not discuss federal funding's pre-enactment benefits—most notably, its ability to let Congress pursue reforms via the filibuster-proof method of reconciliation bills. We note, however, that reconciliation bills (and other fast-track procedures) increasingly are how Congress gets its lawmaking done. *See, e.g.*, Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (codified as amended at 26 U.S.C. § 1) (Trump tax bill that was reconciliation bill); Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (reconciliation bill enacted as companion to ACA).

83. *See* Gluck & Huberfeld, *supra* note 3, at 1710. Race dynamics also clearly complicate state decisions around health care. *See, e.g.*, *id.*; DAVID G. SMITH & JUDITH D. MOORE, MEDICAID POLITICS AND POLICY, 1965–2007, at 6–10 (2008) (detailing role of race in Medicaid decisionmaking). Several scholars have suggested that racism has played a role in distorting decisionmaking under the ACA as well. *See, e.g.*, Colleen M. Grogan & Sunggeun Park, *The Racial Divide in State Medicaid Expansions*, 42 J. HEALTH POL. POL'Y & L. 539 (2017) (presenting findings that state Medicaid expansion decisions have been significantly less responsive to nonwhite public opinion); Mark A. Hall, *States' Decisions Not to Expand Medicaid*, 92 N.C. L. REV. 1459 (2014) (arguing that racism may drive state Medicaid expansion decisions).

84. Ae-sook Kim & Edward Jennings, *The Evolution of an Innovation: Variations in Medicaid Managed Care Program Extensiveness*, 37 J. HEALTH POL. POL'Y & L. 815 (2012); Robert S. Erikson, Gerald C. Wright, Jr. & John P. McIver, *Political Parties, Public Opinion, and State Policy in the United States*, 83 AM. POL. SCI. REV. 729 (1989).

85. For examples of such programs, see *supra* note 19.

### A. *Motivating States*

The story of Medicaid expansion offers a particularly salient lesson about the present-day limits of economic incentives. In practice, this expansion presented states with a choice either to adopt the Medicaid expansion or to retain their pre-ACA Medicaid program. The question, therefore, was whether the economic incentive of further federal subsidization would induce states to expand their Medicaid programs. (Recall that this ultimate state choice was different from that intended by the architects of the ACA, who meant to give states the draconian choice between adopting the Medicaid expansion and abandoning their Medicaid programs entirely—a structure the Supreme Court rejected in *NFIB*.[86])

Even as modified by the Court in *NFIB*, the financial incentives for states to adopt the expansion were overwhelming. As Part I explained, the federal government covered 100 percent of a state's expansion-related costs for an initial three-year period—and, in future years, it would never cover less than ninety percent of costs.[87] These rates far exceeded the federal contribution rates under the traditional Medicaid program, which range in practice from fifty percent to seventy-seven percent.[88] Moreover, the costs that states would bear regarding expansion would be partly offset by the reduction of uncompensated care within the state, the cost of which typically falls heavily on the state (or its health care system).[89]

86. *See supra* notes 51–53 and accompanying text.

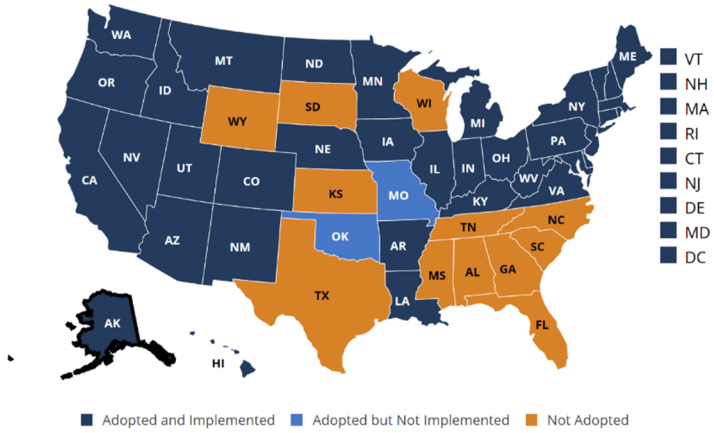
87. Social Security Amendments of 1965 § 1905(y), 42. U.S.C. 1396d (establishing statutory maximum and minimum); *see also supra* note 48 (on temporary increase for new adoption under the American Rescue Plan Act of 2021).

88. *See id.* § 1905(b), 42 U.S.C. § 1396b; *FMAP for Medicaid*, *supra* note 50 (detailing state payment levels in practice).

89. On the distribution of the burden of uncompensated care costs, see Teresa A. Coughlin, John Holahan, Kyle Caswell & Megan McGrath, *An Estimated $84.9 Billion in Uncompensated Care Was Provided in 2013; ACA Payment Cuts Could Challenge Providers*, 33 HEALTH AFF. 807 (2014), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2013.1068 [https://perma.cc/BQX4-SFS3]; Dhruv Khullar, Zirui Song & Dave A. Chokshi, *Safety-Net Health Systems at Risk: Who Bears the Burden of Uncompensated Care?*, HEALTH AFF. BLOG (May 10, 2018), https://www.healthaffairs.org/do/10.1377/hblog20180503.138516/full/ [https://perma.cc/YE83-RHCE]. The ACA simultaneously reduced other means of subsidizing uncompensated care costs, making a non-expansion yet more costly to a state. *See* Patient Protection and Affordable Care Act § 2551, 42 U.S.C. 1396r–4(f). These reductions have been delayed, but currently are set to apply for 2020 through 2025. *Id.* § 1923(f)(7), 42 U.S.C. 1396r–4(f)(7). The costs of uncompensated care in a state can be significant; in Texas, for example, they amount to roughly $5.5 billion annually. Wade Goodwyn, *Texas Loses Billions to Treat the Poor by Not Expanding Medicaid, Advocates Say*, NPR (May 29, 2015, 5:08 AM),

Despite this powerful financial incentive, many states declined to expand.[90] In the wake of the Act's passage, factions within the Republican Party began to argue that state expansion was a form of complicity with the ACA, and these factions persuaded a number of state-level party leaders not to pursue expansion.[91] By 2016, the final year in which states could receive 100 percent federal compensation for expansion-related services, nineteen states still had not decided to expand.[92] Today, twelve states still have not undertaken the expansion (see Figure 1).

Figure 1. Status of State Action on the Medicaid Expansion Decision[93]




It seems, then, that partisan loyalty has trumped economic rationality in many southern and some midwestern and western states. One might have hypothesized that states with the direst

https://www.npr.org/2015/05/29/410470081/texas-didn-t-expand-medicaid-advocates-say-money-is-being-left-on-the-table?utm_medium=RSS&utm_campaign=healthcare [https://perma.cc/AEJ8-LUKT].

90. As Nicholas Bagley has put it: "In conventional economic terms, this resistance is inexplicable. . . ." Nicholas Bagley, *Federalism and the End of Obamacare*, 127 YALE L.J.F. 1, 7 (2017).

91. *See* Alexander Hertel-Fernandez, Theda Skocpol & Daniel Lynch, *Business Associations, Conservative Networks, and the Ongoing Republican War over Medicaid Expansion*, 41 J. HEALTH POL. POL'Y & L. 239, 240–42 (2016) (describing opposition to Medicaid expansion among conservative organizations and grassroots activists, and tracking these opponents' impact upon state expansion decisions).

92. DEP'T OF HEALTH & HUMAN SERVS., MEDICAID & CHIP: AUGUST 2016 MONTHLY APPLICATIONS, ELIGIBILITY DETERMINATIONS AND ENROLLMENT REPORT (2016), https://www.medicaid.gov/medicaid/downloads/august-2016-enrollment-report.pdf [https://perma.cc/PUT9-XV68].

93. *Medicaid Expansion Decisions*, *supra* note 53.

health care needs would be most likely to overcome partisan wrangling. But several studies have concluded that financial factors (and, in particular, levels of state economic need) have not driven state decisions on Medicaid expansion.[94] Moreover, states that had particularly lean Medicaid programs prior to the ACA, and which therefore stood to gain the most via expansion, have proven particularly unlikely to expand.[95] The impact of federal financial incentives under the expansion, it seems, has been far more muted than prior federal experience and pre-ACA research would suggest.

The experience with Exchanges under the ACA reinforces these lessons about the limited effect of incentives on states (although, in this case, not with respect to economic incentives). As rational actors, it was thought, states would prefer to establish their own Exchanges rather than defer to federal Exchanges, to maximize their control over the state's insurance market. This incentive presumably would weigh most heavily upon Republican-controlled states that traditionally have voiced concern for states' rights and local control over policymaking.[96] As Republican grassroots campaigns and lobbying organizations pressed party leaders to abstain from all participation in the Act's reforms, however (such as by mailing envelopes of string to Scott Walker to impugn his proposed attachment to federal funds),[97] various Republican-controlled states elected to defer to federal Exchanges.[98] For 2021, there are fifteen state Exchanges, six federally supported Exchanges, six state-federal partnership Exchanges, and twenty-four federally facilitated Exchanges (see Figure 2).

94. Lawrence R. Jacobs & Timothy Callaghan, *Why States Expand Medicaid: Party, Resources, and History*, 38 J. HEALTH POL. POL'Y & L. 1023, 1035 (2013); Charles Barrilleaux & Carlisle Rainey, *The Politics of Need: Examining Governors' Decisions to Oppose the "Obamacare" Medicaid Expansion*, 14 ST. POL. & POL'Y Q. 437, 442–43 (2014); Martin Mayer, Robert Kenter & John C. Morris, *Partisan Politics or Public-Health Need?*, 34 POL. & LIFE SCI. 44, 44 (2015).

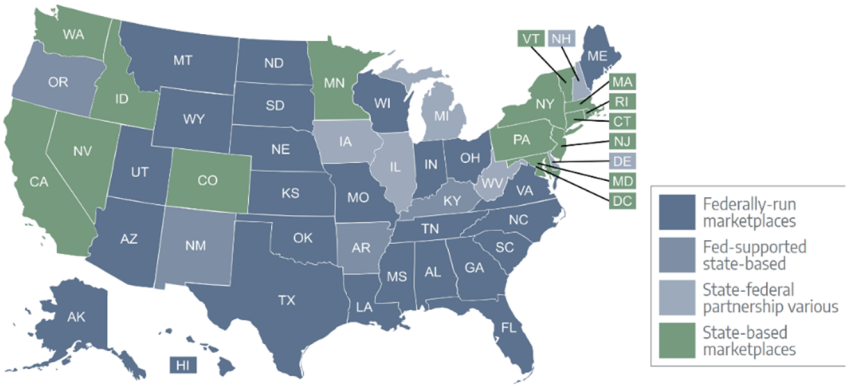
95. Hall, *supra* note 83, at 1461–62.

96. As Mark A. Hall remarked on state decisions not to create Exchanges: "[T]he extent of red-state resistance to the ACA's core structures is surprising. States that run their own insurance exchanges have much more local control over the very kind of important policy and regulatory matters that conservatives vociferously complain the federal government usurps." *Id.* at 1460.

97. David K. Jones, Katharine W.V. Bradley & Jonathan Oberlander, *Pascal's Wager: Health Insurance Exchanges, Obamacare, and the Republican Dilemma*, 39 J. HEALTH POL. POL'Y & L. 97, 120 (2014).

98. For the relationship between Exchange decisions and party control among the states, see Hall, *supra* note 83, at 1460.

Figure 2. Status of Insurance Exchanges by State[99]




As with the Medicaid expansion, therefore, the Exchange-based reforms underscore that, in the current hyperpartisan landscape, politics may often trump the types of rationality assumed by incentive-driven regulatory approaches.

One reasonable conclusion to draw from the ACA's experience with targeted state incentives might be that these are no longer a wise tool for statutory design. But the ACA experience also offers a more nuanced lesson. It instructs that when economic incentives are used, it is vital to buttress them with "backstop" policies—i.e., with policies that, in the absence of rational economic behavior, will apply and achieve statutory goals. When states elected not to create state-run Exchanges, a backstop policy ensured that Exchanges nonetheless would exist in these states—in this case, in the form of federally run Exchanges.[100] As a result, Exchanges now exist in all fifty states (see Figure 2, *supra*).[101]

By contrast, when states opted not to pursue the Medicaid expansion, there was no fallback policy to provide the expansion population with insurance by other means. (Perversely, many of these individuals do not even receive as a fallback the subsidies that are

99. Norris, *supra* note 79.

100. The federal backstop Exchange may even be preferable from the federal government's point of view, as it maximizes its control. *See* Gluck, *supra* note 12, at 594.

101. Moreover, even if the Exchanges collapsed or were repealed, parallel amendments to the Public Health Service Act would accomplish many of the same goals. *See generally supra* note 69.

provided to low-income individuals on the Exchanges; those subsidies assumed a mandatory Medicaid expansion and, therefore, were not drafted to apply to individuals below the poverty line.[102]) The lack of a backstop policy was due to the fact that, as originally drafted, the ACA intended to make the decision to forego Medicaid expansion so draconian that no state was thought likely to object.[103] But following the *NFIB* opinion, which rendered state Medicaid expansion more voluntary, hyperpartisan politics trumped economic rationality. As a result, vulnerable populations in non-expansion states—which amount to approximately 4.4 million people nationwide—are simply going uninsured.[104] The presence or absence of a legislative backstop to guard against irrationality among the states, therefore, has proved a crucial design difference between the Act's two reforms—a difference that has allowed the Exchanges to be more successful than the Medicaid expansion with respect to the goal of expanded health care access. (Indeed, in a sad twist of irony, Erin Ryan has suggested that inclusion of a federal Medicaid backstop might have saved the Medicaid program as originally drafted, since states would not have faced the "all-or-nothing dilemma" that rejecting Medicaid expansion posed in the original ACA.[105])

### B. *Motivating Individuals*

The ACA also exposed limits on the power that financial incentives can exert upon individuals. This was shown, in particular, with the individual mandate. That mandate imposed a tax upon individuals who elected not to obtain health insurance, largely to make it economically rational for all individuals to purchase health insurance.[106] Nevertheless, many people defied economic rationality in their insurance decisions: in 2018, 7.7 million people elected to pay the tax penalty rather than purchase insurance.[107] Among

102. Rachel Garfield, Kendal Orgera & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States That Do Not Expand Medicaid*, KAISER FAM. FOUND. (Jan. 21, 2021), https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/ [https://perma.cc/NUV3-RSXD].

103. *See supra* notes 47–50 and accompanying text.

104. *See* Garfield et al., *supra* note 102.

105. Erin Ryan, *The Spending Power and Environmental Law After* Sebelius, 85 U. COLO. L. REV. 1003, 1055 (2014).

106. Rae et al., *supra* note 21.

107. *Id.*

these individuals, a 2017 Kaiser Foundation study found that fifty-four percent would be better off financially if they instead complied with the mandate and purchased insurance (even if they never used the insurance). Among uninsured individuals eligible for subsidies, it found that a startling seventy percent would have been financially better off purchasing health care.[108] These numbers make plain that individuals, like states, have sometimes undermined the ACA's incentive structures by adopting economically irrational behavior.[109]

The ACA may also have made overconfident downstream assumptions about the rational behavior of insurers. In order for an Exchange to successfully expand health care access, of course, the Exchange must make insurance plans available. Rather than guaranteeing the availability of plans, however, the ACA simply created incentives and revenue streams designed to make the offering of insurance a profitable endeavor, even under the Act's new regulatory constraints. The resulting economic incentives, it was thought, would induce insurers to offer health insurance plans on the Exchanges in each geographic market. The strength of that assumption, however, relies on robust individual participation in the Exchanges, which, as described above, the Act overestimated.

While the downstream assumption about insurer behavior has never collapsed, it has been put under great stress. At one point, it appeared that certain geographic areas might not have any plans available on their Exchanges for 2018.[110] This produced needless anxiety (and politically damaging press coverage) with respect to the Exchanges.[111] This risk could have been avoided if, for example,

108. *Id.*

109. Advances in behavioral economics have suggested many reasons that suppositions of economic rationality might not hold. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974). We do not conjecture here as to the specific reasons that individuals acted irrationally in their responses to the ACA.

110. *See* Olga Khazan, *Why So Many Insurers Are Leaving Obamacare*, ATLANTIC (May 11, 2017), https://www.theatlantic.com/health/archive/2017/05/why-so-many-insurers-are-leaving-obamacare/526137/ [https://perma.cc/96RB-KEWK] (describing the period in which it appeared that a portion of Tennessee would have no Exchange plans available, and reporting that thirty-one percent of counties had only one insurer making Exchange plans available).

111. Hannah Recht, *Thousands of Obamacare Customers Left Without Options as Insurers Bolt*, BLOOMBERG (Apr. 27, 2017), https://www.bloomberg.com/graphics/2017-health-insurer-exits/ [https://perma.cc/3Q6C-RB27]; Tami Luhby, *Humana Pulls Out of Obamacare*

the drafters of the ACA had followed the model found in Part D of the Medicare program. Much like the Exchanges, Part D assumes that health insurers will make plans available in all markets (in this case, with respect to prescription drug coverage for Medicare participants). However, it also provides a statutory backstop that applies if this assumption proves incorrect, as it requires the Secretary of Health and Human Services to contract with a fallback plan to provide drug benefits in a region with no plans.[112] While this Part D backstop policy has never been put to use, it forestalls any concerns that the Part D program is vulnerable to market failures.

In sum, then, the ACA stands as a testament, for better and for worse, of the more limited role that federal funding and other incentives can play today, as compared to past decades. More strategic statutory structures are needed to ensure widespread uptake in hyperpartisan conditions.

## III. THE IMPORTANCE OF COALITIONS

In *Federalist 48*, Madison famously argued that it was insufficient for lawmakers to focus simply on the construction of a system of rules and prohibitions (of "parchment barriers," as he put it), no matter how well-designed.[113] Such a system, without more, had been revealed by state constitutions to be vulnerable to assault by powerful interests. In pursuit of a "more adequate defence" against such interests, Madison and his fellow Founders adopted an approach to system design that also focused on creating and empowering allies and coalitions invested in the system's preservation and success.[114]

*for 2018*, CNN MONEY (Feb. 14, 2017, 5:08 PM), https://money.cnn.com/2017/02/14/news/economy/humana-obamacare-insurer/ [https://perma.cc/YY4C-JXB2]; Max Blau, *No Plans in Knoxville: This Tennessee City Will Soon Have No Health Insurers*, STAT NEWS (Mar. 1, 2017), https://www.statnews.com/2017/03/01/tennessee-obamacare-trumpcare/ [https://perma.cc/GF7Q-CK4E]. For attempts to translate this issue into decreased support for the ACA, see Khazan, *supra* note 110 (describing efforts by President Trump and Secretary of Health and Human Services Tom Price to use low insurer participation rates as evidence that the Act was collapsing).

112. Social Security Amendments of 1965 § 1860D–11(g), 42 U.S.C. 1395w–111.

113. THE FEDERALIST NO. 48, at 256 (James Madison) (Gideon ed., 2001) ("Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?").

114. *Id.*; THE FEDERALIST NO. 51, at 268 (James Madison) (Gideon ed., 2001) (concluding

This Founding-era lesson was developed in the context of constitutional design, but it applies equally to statutes. Indeed, both halves of Madison's lesson have been underscored by the experience of the ACA. On the one hand, the ACA has served as a startling reminder of the vulnerability of "parchment barriers." A number of rules and prohibitions, despite being written into the law, no longer have legal effect as a result of court actions,[115] congressional repeals,[116] and administrative non-enforcement (or creative, alternative enforcement).[117] Especially in a hyper-politicized environment, the ACA has shown, "parchment barriers" can prove remarkably flimsy in the face of assault by ambitious actors. On the other hand, the ACA offers a more optimistic illustration of Madison's lessons about coalitions acting as important checks to such assaults.

The ACA experience illustrates that statutory architects can remedy some of a law's vulnerabilities by designing a statute that creates cross-partisan coalitions invested in the Act's success. The value of coalitions, and the ability of statutes to actively create them, is not a new observation, of course. A significant body of political science research has documented that, in many cases, fed-

that "[a]mbition must be made to counteract ambition" via constitutional separation of powers).

115. *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 585–89 (2012) (finding Medicaid expansion unconstitutionally coercive of states).

116. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified as amended at 26 U.S.C. § 5000A) (repealing individual mandate); *see also* Peter Sullivan, *House Votes to Repeal ObamaCare's 'Cadillac Tax*,*'* HILL (July 17, 2019, 7:00 PM), https://thehill.com/homenews/house/453603-house-votes-to-repeal-obamacares-cadillac-tax [https://perma.cc/4LX2-BURK] (on ongoing efforts to repeal the Act's tax on high-cost health plans, commonly known as the "Cadillac tax").

117. *See supra* notes 78–80 and accompanying text (discussing hybrid Exchanges); *see also infra* notes 179–81 and accompanying text (on awarding of Medicaid waivers violating statutory requirements). For a survey of Obama administration actions testing or exceeding the Act's bounds, see generally Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715 (2016).

eral statutes have played an active role in mobilizing new demographics[118] and forging new coalitions[119] whose support would prove integral to the statutes' long-term survival.[120] For example, both Social Security and Medicare have been celebrated for creating coalitions of seniors that, united across economic classes, have proven important to the statutes' durability.[121] Summarizing the findings of studies into these programs, one pair of political scientists observed: "once established, policies generate both identities

118. *See, e.g.*, Joe Soss, *Lessons of Welfare: Policy Design, Political Learning, and Political Action*, 93 AM. POL. SCI. REV. 363 (1999); ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE (2003); Suzanne Mettler, *Bringing the State Back in to Civic Engagement: Policy Feedback Effects of the G.I. Bill for World War II Veterans*, 96 AM. POL. SCI. REV. 351 (2002); Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817 (2010); SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY (2011); *see also* Jacob S. Hacker & Paul Pierson, *After the "Master Theory": Downs, Schattschneider, and the Rebirth of Policy-Focused Analysis*, 12 PERSP. ON POL. 643, 645 (2014) (reviewing this literature).

119. *See, e.g.*, THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE (2003); Theda Skocpol, *Government Activism and the Reorganization of American Civic Democracy*, *in* THE TRANSFORMATION OF AMERICAN POLITICS (Paul Pierson & Theda Skocpol eds., 2007); Frank R. Baumgartner, Beth L. Leech & Christine Mahoney, The Co-evolution of Groups and Government (Aug. 28, 2003) (unpublished manuscript) (on file with author); Beth L. Leech, Frank R. Baumgartner, Timothy M. La Pira & Nicholas A. Semanko, *Drawing Lobbyists to Washington: Government Activity and the Demand for Advocacy*, 58 POL. RES. Q. 19 (2005); TERRY M. MOE, SPECIAL INTEREST: TEACHERS UNIONS AND AMERICA'S PUBLIC SCHOOLS (2011); Margaret Weir & Theda Skocpol, *State Structures and the Possibilities for 'Keynesian' Responses to the Great Depression in Sweden, Britain, and the United States*, *in* BRINGING THE STATE BACK IN 107 (Evans et al. eds., 1985); ERIC M. PATASHNIK, REFORMS AT RISK: WHAT HAPPENS AFTER MAJOR POLICY CHANGES ARE ENACTED (2008); E.E. SCHATTSCHNEIDER, POLITICS, PRESSURES AND THE TARIFF (1935); *see also* Hacker & Pierson, *supra* note 118, at 645–47 (reviewing this literature).

120. Strong support coalitions have been viewed as an essential ingredient of statutory entrenchment, as defined in the political science literature. *See* Jacob S. Hacker & Paul Pierson, *The Dog That Almost Barked: What the ACA Repeal Fight Says About the Resilience of the American Welfare State*, 43 J. HEALTH POL. POL'Y & L. 551, 563–64 (2018) (summarizing this finding).

121. CAMPBELL, *supra* note 118; *see also* KAREN ORREN & STEPHEN SKOWRONEK, THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT 98–101 (2004); THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES (1992) [hereinafter SKOCPOL, PROTECTING SOLDIERS AND MOTHERS]; Suzanne Mettler & Joe Soss, *The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics*, 2 PERSP. ON POL. 55, 62–65 (2004); Paul Pierson, *Fragmented Welfare States: Federal Institutions and the Development of Social Policy*, 8 GOVERNANCE 449 (1995); Jacobs & Callaghan, *supra* note 94, at 1037–38; Colleen M. Grogan, *Political-Economic Factors Influencing State Medicaid Policy*, 47 POL. RES. Q. 589, 595 (1994); Colleen M. Grogan, *The Influence of Federal Mandates on State Medicaid and AFDC Decision-Making*, PUBLIUS, Summer 1999, at 1, 10.

and groups that equate their interests with programmatic continuation and expansion and generate resources to mobilize beneficiaries."[122]

The ACA has not only underscored the continued validity of these lessons, but has also made clear the importance of specifically building coalitions that, in the modern hyperpartisan era, can serve to fracture partisan lines. In several ways, the Act's design ruptured existing coalitions and created new ones that have been important to the Act's enduring successes. Most notably, the Act created a new coalition of millions of individuals who have gained health insurance due to the Act's reforms.[123] This new coalition has helped turn the tide of public support in favor of the Act as its reforms have rolled out—a crucial element of ensuring that the statute survives beyond an initial, sympathetic federal administration.

The Act also proves instructive on how coalitions can prompt progress on social justice agendas in states whose political leadership proves resistant. Consider the handful of Republican-controlled states that elected to expand Medicaid, bucking the trend of their red sister-states.[124] Studies have pointed toward at least two factors that may have contributed to these seemingly counterintuitive expansion decisions. First, one study found evidence supporting the thesis that, in these states, a policy history of past Medicaid generosity has muted the role of partisanship in Medicaid expansion decisions.[125] The study postulated that this may have occurred partly because earlier Medicaid policies had created stronger and broader coalitions in support of a robust Medicaid

122. Jacobs & Callaghan, *supra* note 94, at 1037.

123. On the number of individuals who arguably owe their health insurance to the Act's reforms, see *supra* note 15. *See also* Gluck & Scott-Railton, *supra* note 28, at 557 (arguing that the ACA's direct provision of benefits to the middle class was key to its entrenchment).

124. As Metzger noted in 2015: "A steady trickle of states with either Republican governors or Republican-controlled legislatures, or both, have expanded Medicaid since 2012. This includes some solid-red states like Indiana and Montana, while governors in other red states like Idaho, Utah, Tennessee, and Wyoming have or are discussing expansion waivers with HHS." Metzger, *Agencies, supra* note 28, at 1783–84.

125. Jacobs & Callaghan, *supra* note 94. For studies finding this pull of past policy decisions as a force in health care in prior contexts, see Kim & Jennings, *supra* note 84, and Henry R. Glick & Scott P. Hays, *Innovation and Reinvention in State Policymaking: Theory and the Evolution of Living Will Laws*, 53 J. POL. 835 (1991).

program in those states.[126] If true, it means that the ACA's leveraging of a preexisting coalition may have served as a driver of wider geographical impact.

A second set of studies, looking at both the Medicaid expansion and the creation of state-based Exchanges in Republican-controlled states, has pointed to the coalition-related effects that these policies triggered within the Republican Party. On the one hand, the Act gave rise to a vitriolic Tea Party movement that was devoted to undermining it. A coalition of conservative interest groups (including Cato, the American Legislative Exchange Council ("ALEC"), the State Policy Network, Americans for Prosperity ("AFP"), and the Heritage Foundation) was extremely effective at bringing pressure upon Republican state-level officials.[127] ALEC, for example, which authored *The State Legislator's Guide to Repealing Obamacare*, sent individuals to advocate to state legislators for "absolute non-collaboration" with the Act, and pressured governors into non-cooperation with the Act.[128] In 2014, AFP spent over $30 million on advertisements against the Act.[129] This coalition was a powerful agent in undermining the Act's entrenchment at the state level.

However, studies have noted that the Act's policies also gave rise to countervailing coalitions that influenced some Republican leaders. Hospital and provider groups strongly supported Medicaid expansion (as it would increase funding for uncompensated care)[130]

126. Jacobs & Callaghan, *supra* note 94, at 1036.

127. *See* Jones et al., *supra* note 97, at 114; Hertel-Fernandez et al., *supra* note 91, at 246–47; Simon F. Haeder & David L. Weimer, *You Can't Make Me Do It: State Implementation of Insurance Exchanges Under the Affordable Care Act*, 73 PUB. ADMIN. REV. S34, S39 (2013); Kelly Kennedy, *Conservatives Campaign Against Insurance Exchanges*, ABC NEWS (May 29, 2012, 4:47 PM) https://abcnews.go.com/Politics/conservatives-campaign-insurance-exchanges/story?id=16453150 [https://perma.cc/SGU3-HHPM].

128. *See* Jones et al., *supra* note 97, at 119; Jason Millman & J. Lester Feder, *Exchanges Hit Roadblocks in Red States*, POLITICO (Apr. 18, 2012, 11:33 PM), www.politico.com/story/2012/04/exchanges-hit-roadblocks-in-red-states-075331 [https://perma.cc/9WKM-RJLK] (last updated Apr. 30, 2012, 3:20 PM).

129. Glenn Kessler, *'Billions' Spent on Attacking Obamacare?*, WASH. POST (Apr. 4, 2014, 6:15 AM), https://www.washingtonpost.com/news/fact-checker/wp/2014/04/04/billions-spent-on-attacking-obamacare/ [https://perma.cc/W4DX-3336].

130. Grogan & Park, *supra* note 83, at 550–51; Hertel-Fernandez et al., *supra* note 91, at 244 ("Virtually everywhere, for instance, hospitals and hospital associations have pushed for states to accept Medicaid expansion."); *see also* Brianne Pfannenstiel, *Missouri Chamber of Commerce Backs Medicaid Expansion*, KAN. CITY BUS. J. (Mar. 13, 2013), https://www.bizjournals.com/kansascity/news/2013/03/13/missouri-chamber-of-commerce-backs.html [https://perma.cc/KZQ6-5UQL]; Robin Flagg, *Medicaid Expansion: A Tale of Two Governors*, 41

and sometimes also supported the establishment of state-based Exchanges.[131] Parts of the insurance industry, sensing potentially enlarged markets, also supported Exchanges and Medicaid expansion.[132] These and other in-state economic interests led a number of business groups (such as chambers of commerce) to support state-based Exchanges[133] or Medicaid expansion,[134] although this support was varied.[135] Indeed, state chapters of the National Federation of Independent Business ("NFIB") sometimes supported the creation of state-based Exchanges, despite their high-profile legal challenge to the Act.[136] These economically focused groups combined with labor unions, faith-based groups, disabilities rights advocates, and others to advocate for cooperation with the Act's programs.[137]

These coalitions were helpful in numerous ways. In addition to applying political pressure to state governments, some hospital groups encouraged hospital CEOs to write op-eds, distribute fact sheets, and hold community forums.[138] The Blue Cross and Blue Shield Association, in its efforts to devise strategies to surmount conservative opposition to state-based Exchanges, coined the term "marketplace" as a descriptor for the Exchanges, a term which the Obama administration eventually would adopt.[139]

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J. HEALTH POL. POL'Y & LAW 997 (2016) (detailing support in Wisconsin and Ohio).

131. Haeder & Weimer, *supra* note 127, at S38 (detailing support of Arkansas Hospital Association and others).

132. *See* Jones et al., *supra* note 97, at 121; *see also* Dean Olsen, *Legislators to Consider Illinois Health-Care Exchange*, WICKED LOC. (Nov. 5, 2011, 5:03 AM), https://provincetown.wickedlocal.com/x1234472147/Legislators-to-consider-Illinois-health-care-exchange [https://perma.cc/3Q6H-WY5S] (example of Illinois); Haeder & Weimer, *supra* note 127, at S40; Flagg, *supra* note 130, at 1019 (citing support of Care Source Health Plan, an insurer offering Medicaid-managed care plans); Hertel-Fernandez et al., *supra* note 91, at 256 (citing support of Michigan Association of Health Plans).

133. *See* T.R. Goldman, *Colorado's Health Insurance Exchange: How One State Has So Far Forged a Bipartisan Path Through the Partisan Wilderness*, 31 HEALTH AFF. 332, 333–34 (2012) (in Colorado); *see also* Olsen, *supra* note 132 (in Illinois).

134. *See* Hertel-Fernandez et al., *supra* note 91, at 244–45, 255–57 (in Missouri and Michigan).

135. *Id.* at 245 ("However, we do observe variation in chamber proclivities and capacities to channel the overall desire of health care businesses to see Medicaid expanded in some form in every state.").

136. Goldman, *supra* note 133, at 333–34.

137. *See* Flagg, *supra* note 130, at 1019–20 (noting SEIU and others); *see also* Gluck & Scott-Railton, *supra* note 28, at 541 (noting newly formed and previously existing interest groups defending the Act post-enactment).

138. Hertel-Fernandez et al., *supra* note 91, at 256.

139. Jones et al., *supra* note 97, at 121.

These interesting contributions notwithstanding, the evidence regarding the ultimate impact of these business-oriented coalitions is mixed.[140] Nonetheless, two different studies have suggested that, in Republican-controlled states, decisions about Medicaid expansion[141] and Exchange creation[142] might be explained by the competing strength of these business coalitions, as opposed to the Tea Party coalitions, within the state. The experience of the ACA therefore recommends policy designs that might fracture (and enlist segments of) coalitions that could otherwise be united in opposition.[143]

Meanwhile, the rise of the Tea Party coalition, and the shape of its opposition to the Act, offers a secondary lesson. In a hyperpartisan climate, it shows that political opposition may take the form of calls for total non-cooperation with any federal program. In the case of the Exchanges, where non-cooperation simply led to the creation of federal Exchanges, the political energy and resources of this opposing coalition were directed toward lobbying efforts that, if achieved, had only remote impacts upon the success or failure of the ACA's ultimate goals. In this way, the study of coalitions arising from the ACA reinforces the lesson regarding statutory safeguards offered in Part II, as it shows that such safeguards may channel opposing coalitions to pursue forms of political opposition that are less threatening to the statute's objectives.

Finally, the ACA also offers a lesson about allies and coalitions *within* the architecture of government. At the state level, various actors have been entrusted with key decisions regarding participation in the Act's reforms, and also with oversight of the Act's implementation.[144] Several studies have found that, among these actors, there are differences in their embrace and pursuit of the Act's reforms. Specifically, state insurance commissioners have proven particularly inclined to support these reforms—governors less so,

140. Flagg, *supra* note 130, at 1019–22 (finding different impacts in case studies of Wisconsin and Ohio).

141. *Id.* at 1014–19.

142. *Id.* at 1011–12.

143. By contrast, organized opposition to ACA repeal by interest groups (and also Republican governors) did not significantly translate at the federal level into Republican legislators voting against repeal. *See* Hacker & Pierson, *supra* note 120.

144. On the entrenchment benefits of involving state governments generally in ACA implementation, see Gluck & Scott-Railton, *supra* note 28, at 568–70.

and state legislators least of all.[145] This suggests that, when designing a federalism-based program, it can be impactful to steer decisions that are entrusted to states toward those actors most inclined to sympathize with the Act's mission and agenda, to the extent possible.

## IV. THE BENEFITS (AND COSTS) OF BUILDING ON ENTRENCHED PROGRAMS

Thus far, we have written about the lessons that the ACA offers for statutory design largely as though legislators were writing onto a blank slate, considering anew whether to select federal funding models and how to build coalitions. But of course, that is far from the case. The modern administrative state is built upon layers of accreted federal and state control over a complex array of regulatory programs.[146] Such varying arrangements are on full display in health care, where the federal government runs the Medicare program for elderly Americans, but jointly administers Medicaid with the states.[147]

The ACA had to be designed with these longstanding federalist arrangements in mind. Its drafters made several impactful decisions in this regard, choosing in one case to expand an existing program (Medicaid), and in another to create a new program (the Exchanges). The differing experiences of these two reforms illuminate the tradeoffs that, in our modern political climate, come with building upon an existing federalist program. An existing program often benefits from entrenchment, by which we mean the phenomenon of becoming an accepted part of the system and thereby gaining legitimacy and durability.[148] This entrenchment can take at least three forms, each of which is explored below: (1) legal entrenchment, (2) political entrenchment, and (3) administrative entrenchment. When reformers design a new project as an expansion of a

145. Gluck & Huberfeld, *supra* note 3, at 1733, 1740, 1770–71; Haeder & Weimer, *supra* note 127, at S40.

146. *See supra* note 32 and accompanying text.

147. *See supra* section II.A.

148. We use the term "entrenchment" in a broader sense than the political science literature, which focuses centrally on the coalitions discussed in the prior Part. *See* Hacker & Pierson, *supra* note 120, at 554 (explaining the political science focus on entrenchment as "the ways in which various individuals and groups become invested in particular programs and thus gain increased incentive to defend them").

current federal program, they might hope that the benefits afforded by each of these types of entrenchment will transfer to their new project. The experience of the ACA suggests, however, that these entrenchment-related benefits do not unfold in hyperpartisan climates in the manner which one might expect—although benefits do still appear to flow from building new programs on existing federalist structures.

### A. *Legal Entrenchment*

When statutory architects build upon an existing legal program, they might first and foremost expect to benefit from what we term "legal entrenchment." This expectation derives from the fact that, in the case of an existing program, the courts presumably already have approved the program's legality. In other words, the judicial system has already reconciled itself to the program as a part of the nation's legal landscape, and it has built up a body of doctrines and case law supporting this position. By scaffolding reforms upon an existing program, reformers might expect to reap the benefits of this legal entrenchment by avoiding court cases challenging the legality of the fundamental architecture of their project.

Legal theory might lead one to believe that, of the different types of entrenchment, legal entrenchment should be particularly strong. Our legal system is regularly praised for its ability, in the midst of rapidly shifting political currents, to provide much-needed stability and orderly growth.[149] Voters may be fickle, the logic goes,

149. This principle often gets discussed with respect to the common law, see, for example, OLIVER WENDELL HOLMES, JR., THE COMMON LAW 7 (2009) (discussing the orderly process of common law growth whereby "old form receives a new content, and in time . . . modifies itself to fit the meaning which it has received"), but it plainly also applies to constitutional interpretation, see, for example, 3 BRUCE ACKERMAN, WE THE PEOPLE (2014) (contrasting nations that underwent transformative change via revolutionary fervor with the American tradition of providing constitutional change only as the culmination of prolonged national dialogue), as well as statutory interpretation, see, for example, WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES 168 (2010) (discussing "the old idea of *stare de statute*, that statutes can be considered precedents, embodying principles that can be the basis for legal reasoning and policies"). The principle of stare decisis captures these values as well, of course—a principle that courts typically apply with added strength to statutory precedents. *See* Flood v. Kuhn, 407 U.S. 258, 284 (1972); *see also* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (describing the Court's "super-strong" stare decisis in statutory cases).

but courts are committed to steady, reasoned elaboration. As a result, legal entrenchment should be one of the more reliable forms of entrenchment.

However, the ACA experience raises deep questions about the power of legal entrenchment. This was underscored by *NFIB v. Sebelius*, the case reviewing the constitutionality of the ACA. Most expected that case to be a referendum on the legality of the individual mandate, a central (and politically controversial) feature of the Exchange-based reform that did not build upon an existing program. Surprisingly, however, the Court upheld the constitutionality of the individual mandate while declaring the Medicaid expansion, as drafted, to be unconstitutional.[150] The Court adopted this position despite the well-settled legality of Medicaid, including its longstanding requirements that states cover certain mandatory populations.[151] Beyond Medicaid, moreover, this type of statutory

150. *See* NFIB v. Sebelius, 567 U.S. 519, 546–89 (2012). On the surprise of this ruling, see Wendy K. Mariner, Leonard H. Glantz & George J. Annas, *Reframing Federalism—The Affordable Care Act (and Broccoli) in the Supreme Court*, 367 NEW ENGL. J. MED. 1154, 1154 (2012).

151. On its settled constitutional status, see KATHLEEN S. SWENDIMAN, CONG. RES. SERV., R40846, HEALTH CARE: CONSTITUTIONAL RIGHTS AND LEGISLATIVE POWERS 10 (2012), https://fas.org/sgp/crs/misc/R40846.pdf [https://perma.cc/XQ7K-6P7Q] ("The Supreme Court has not taken a case challenging [the Medicare, Medicaid, or CHIP] programs as an unconstitutional exercise of Congress's taxing and spending power, possibly because the law on this point was settled by its earlier 1937 decision [in *Steward Machine Co. v. Davis*] upholding Title II (Old Age Benefits) and Title III (Unemployment Compensation) of the same act."). On mandatory requirements coverage, see Social Security Amendments of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 286, 288, 344–45 (specifying under section 1902(a)(10) of the original Medicaid statute that state plans must "provide for making medical assistance available to all individuals receiving aid or assistance under State plans approved under titles I, IV, X, XIV, and XVI"). Also, Congress has routinely expanded the Medicaid program by adding to the list of required conditions that states must meet to qualify for program participation. *See, e.g.*, Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6062(a)(1)(A), 120 Stat. 4, 96–97 (adding subclause XIX); Breast and Cervical Cancer Prevention and Treatment Act of 2000, Pub. L. No. 106-354, § 2(a)(1), 114 Stat. 1381, 1381 (adding subclause XVIII); Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4733, 111 Stat. 251, 522 (adding subclause XIII); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13603(a)(1)(3), 107 Stat. 312, 619–20 (adding subclause XII); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 4601(a)(1)(A), 104 Stat. 1388, 1388-166 (adding subclause VII); Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 6401(a)(1), 103 Stat. 2106, 2258 (adding subclause VI); Medicare Catastrophic Coverage Act of 1988, Pub. L. No. 100-360, § 302(a)(1)(A), 102 Stat. 683, 750–51 (adding subclause IV); *see also* Nicole Huberfeld, Elizabeth Weeks Leonard & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in* National Federation of Independent Business v. Sebelius, 93 B.U. L. REV. 1, 21 (2013) ("The *NFIB* plurality fundamentally misunderstood this history, leading it to overemphasize discontinuities between the existing Medicaid program and the Medicaid expansion. The plurality artificially split Medicaid into two programs: old and new.").

design, with its conditional spending arrangement, has long been permitted by the Court.[152] The underlying program, its conditional-spending structure, and the ACA's method of expanding it all were legally entrenched, in other words. Yet the Court struck it down anyway.

In the current legal–political climate, then, is the idea that there is a benefit to building on preexisting programs illusory? We argue it is not—but that the benefits are largely political and administrative, rather than legal, as we describe below.

### B. *Political Entrenchment*

A second type of entrenchment can be termed "political entrenchment." When a federal program endures for several decades (or several generations), it may become an entrenched part of our political culture—which is to say, it may lose its partisan valence and gain a broader, bipartisan base of political support, acceptance, and legitimacy.[153] Legal scholars have noted this statutory political entrenchment, particularly with respect to landmark statutes,[154] and there is reason to think it may extend to a broader category of federal statutes as well[155]—an idea with significant support in political science literature.[156] When a program becomes

152. Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 864 (2013) ("An enormous amount of the New Deal/Great Society state is built on conditional spending statutes.").

153. John D. Skrentny and Micah Gell-Redman aptly describe this political entrenchment, saying: "In our understanding, entrenchment is akin to what political scientists, sociologists, and organizational theorists call 'institutionalization.' . . . In this view, a statutory model becomes entrenched when it becomes taken for granted as a rational approach to achieve some objective . . . ." John D. Skrentny & Micah Gell-Redman, *Comprehensive Immigration Reform and the Dynamics of Statutory Entrenchment*, 120 YALE L.J. ONLINE 325, 328 (2011).

154. *See, e.g.*, ESKRIDGE JR. & FEREJOHN, *supra* note 149, at 114 (describing and documenting the process by which landmark statutes become "entrenched," by which they "mean that it is beyond partisan debate"); *id.* at 188 (on the mechanics of entrenchment through the pivot from conflict to consensus); ACKERMAN, *supra* note 149, at 71 (describing the process by which landmark statutes undergo "consolidation"); William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001) (describing related concepts regarding the creation of "super-statutes" that "over time . . . 'stick' in the public culture").

155. John Gramlich, *Few Americans Support Cuts to Most Government Programs, Including Medicaid*, PEW RES. CTR. (May 26, 2017), https://www.pewresearch.org/fact-tank/2017/05/26/few-americans-support-cuts-to-most-government-programs-including-medicaid/ [https://perma.cc/S2DX-PYW7].

156. This literature has found, for example, that entrenchment makes statutory repeal increasingly less likely with time. *See* Hacker & Pierson, *supra* note 120, at 559 (citing Jordan Michael Ragusa, *The Lifecycle of Public Policy: An Event History Analysis of Repeals to*

politically entrenched in this way, statutory drafters might consider framing their proposals as expansions of the existing federal program because they suspect that, in so doing, they might transfer its existing political support to their own project.

The ACA provides nuanced lessons regarding these political-entrenchment benefits. At the outset, the experience of the Medicaid expansion warns reformers not to overestimate these benefits. Post-enactment studies have consistently found partisanship to have been the overriding determinant of support for, and adoption of, the reforms in the Act—a finding that has been uncovered with respect to the Medicaid expansion as well as the Exchange-based reform.[157] Consistent with this finding, the twelve states that have not adopted the Medicaid expansion overwhelmingly are subject to Republican control.[158] The Medicaid expansion was thus not able to escape politicization simply by building upon the existing Medicaid program.

Nonetheless, the Medicaid expansion has consistently enjoyed greater levels of public support than the ACA in general. In July 2012, only thirty-eight percent of individuals had a favorable view of the Act (with a slightly lower percentage supporting the individual mandate), whereas sixty-seven percent supported the concept of Medicaid expansion in general and forty-nine percent supported expansion by their state.[159] While support for the Act overall has

*Landmark Legislative Enactments, 1951–2006*, 38 AM. POL. RES. 1015, 1018, 1028 (2010)). For an overview of the political science entrenchment literature more broadly, see *supra* note 148.

157. Jones et al., *supra* note 97, at 130–31; LAWRENCE R. JACOBS & THEDA SKOCPOL, HEALTH CARE REFORM AND AMERICAN POLITICS: WHAT EVERYONE NEEDS TO KNOW 6–8 (2012); Jacobs & Callaghan, *supra* note 94, at 1024–26; Flagg, *supra* note 130, at 1000–01; Hertel-Fernandez et al., *supra* note 91, at 243; Barrilleaux & Rainey, *supra* note 94, at 448, 453; *see also* Robert Pear & Michael Cooper, *Reluctance in Some States over Medicaid Expansion*, N.Y. TIMES (June 29, 2012), www.nytimes.com/2012/06/30/us/politics/some-states-reluctant-over-medicaid-expansion.html?pagewanted=all [https://perma.cc/F4CZ-JM52]; Jonathan Oberlander, *Under Siege—The Individual Mandate for Health Insurance and Its Alternatives*, 364 NEW ENGL. J. MED. 1085, 1086–87 (2011).

158. Of the twelve states that have not adopted the expansion, all but three are states where Republicans control both chambers of the legislature as well as the governorship. The remaining three (North Carolina, Kansas, and Wisconsin) have divided governments. *Compare Medicaid Expansion Decisions*, *supra* note 53, *with Gubernatorial and Legislative Party Control of State Government*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government [https://perma.cc/RT9H-RBQ5].

159. *July Kaiser Health Tracking Poll: A Focus on the Mandate and the Medicaid Expansion in the Aftermath of the Supreme Court Decision*, KAISER FAM. FOUND. (July 31, 2012), https://www.kff.org/health-reform/perspective/july-kaiser-health-tracking-poll-a-focus-on-the-mandate-and-the-medicaid-expansion-in-the-aftermath-of-the-supreme-court-

increased in subsequent years—peaking at fifty-four percent in 2018, and currently at fifty-three percent—it still has not kept pace with support for the Medicaid expansion.[160] As of November 2018, there was seventy-seven percent support for providing states with the option to expand Medicaid, and a startling fifty-nine percent of individuals *in current non-expansion states* reported wanting their states to adopt expansion (versus only thirty-four percent opposed).[161]

Even among those political actors most resistant to the ACA, vitriol was focused primarily on the Exchange-based reforms. By early 2011, twelve states had considered constitutional amendments prohibiting the individual mandate,[162] and by late 2016, five states passed constitutional amendments prohibiting state-based Exchanges or compulsory participation in health care markets.[163] Fourteen additional states had passed laws or resolutions to this end by late 2016.[164] In Idaho, both legislative chambers went so far as to pass a resolution calling for an amendment to the federal Constitution prohibiting Congress from mandating health care market participation.[165] By contrast, the Medicaid expansion, while certainly an object of political backlash in several states, never received these levels of state-sanctioned criticism and resistance.[166]

decision/ [https://perma.cc/5HLY-EJZU].

160. *See KFF Health Tracking Poll: The Public's Views on the ACA*, KAISER FAM. FOUND. (Dec. 18, 2020), https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-viewson-the-aca/#?response=Favorable—Unfavorable&aRange=twoyear [https://perma.cc/3ULF-YPTW].

161. Ashley Kirzinger, Bryan Wu & Mollyann Brodie, *KFF Health Tracking Poll—November 2018: Priorities for New Congress and the Future of the ACA and Medicaid Expansion*, KAISER FAM. FOUND. (Nov. 28, 2018), https://www.kff.org/health-reform/poll-finding/kff-health-tracking-poll-november-2018-priorities-congress-future-aca-medicaid-expansion/ [https://perma.cc/C9FT-NEET].

162. *See* Jones et al., *supra* note 97, at 112.

163. *Legal Cases and State Legislative Actions Related to the ACA*, NAT'L CONF. ST. LEGISLATURES (Nov. 10, 2020), http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx [https://perma.cc/WB4N-Z8MX] (listing Alabama, Arizona, Ohio, Oklahoma, and Wyoming).

164. *Id.* (listing Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, New Hampshire, North Dakota, South Carolina, Tennessee, and Virginia).

165. *See id.*

166. For state actions voicing resistance to Medicaid expansion, see *id.* For the argument that the Medicaid expansion's popularity was the key factor preventing Congress from successfully repealing and replacing the Act, see Gluck & Scott-Railton, *supra* note 28, at 500.

Indeed, the uniquely unpopular nature of the individual mandate still may prove to be the undoing of the entire ACA, though such a result is not expected. To date, this mandate is the only major policy from the Act that political opponents in Congress have mustered the support to repeal.[167] A district court has held that this repeal introduced a constitutional infirmity that rendered the entire Act unconstitutional, and a Fifth Circuit panel, agreeing that the repeal created an unconstitutional provision, remanded for additional district court analysis on the severability issue.[168] The case is now proceeding before the Supreme Court, where oral arguments hinted that the Court is unlikely to strike down the Act. Nonetheless, it is notable that this series of events, which threaten the entirety of the Act, began with Congress capitalizing upon the uniquely unpopular nature of the individual mandate.

Measured by several metrics, in other words, the Medicaid expansion has steadily received greater political support than the Exchange-based reforms (and the individual mandate in particular). Why has this proven true? Although there are no easy answers, many of the political attacks against the Exchanges focused on the "unprecedented" nature of the individual mandate.[169] Despite the availability of analogues and precedents in prior law,[170] these cri-

167. *See* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (codified as amended at 26 U.S.C. § 5000A).

168. Li Zhou, *The Latest Legal Challenge to the Affordable Care Act, Explained*, VOX (July 10, 2019), https://www.vox.com/policy-and-politics/2019/7/9/20686224/affordable-care-act-constitutional-lawsuit-fifth-circuit-court-texas-district-court [https://perma.cc/WB4N-Z8MX].

169. *See, e.g.*, Randy Barnett, Nathaniel Stewart & Todd Gaziano, *Why the Personal Mandate to Buy Health Insurance Is Unprecedented and Unconstitutional*, HERITAGE FOUND. (Dec. 9, 2009), https://www.heritage.org/health-care-reform/report/why-the-personal-mandate-buy-health-insurance-unprecedented-and#_ftn1 [https://perma.cc/8RQP-8H9X]; Dylan Scott, *A Requiem for the Individual Mandate*, VOX (Apr. 13, 2018, 9:00 AM), https://www.vox.com/policy-and-politics/2018/4/13/17226566/obamacare-penalty-2018-individual-mandate-still-in-effect [https://perma.cc/MFV9-M9WN] (quoting John Boehner as describing the mandate as an "unprecedented, unconstitutional power grab by the federal government"); JOSH BLACKMAN, UNPRECEDENTED 47 (2013); *Facts About PPACA Individual Mandate, CribSheet 12-2*, NAT'L FED'N INDEP. BUS. (Feb. 15, 2012), https://www.nfib.com/cribsheets/individual-mandate/ [https://perma.cc/8L5P-M7NG].

170. *See* Jennifer B. Wriggins, Is the Health Insurance Individual Mandate "Unprecedented"?: The Case of Auto Insurance Mandates 1, 4–5 (2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011025 [https://perma.cc/F8H9-8UPC] (noting state mandates to buy automobile insurance); Public Health Service Act, 42 U.S.C. §§ 300gg—300gg–95 (showing Public Health Service Act prior to the amendments by the Affordable Care Act, which applied many ACA individual market reforms to employer market).

tiques of the "unprecedented" nature of the Exchanges proved relatively easy to wage against a reform that—in addition to having several genuinely novel features—was framed as a new landmark project, not an expansion of an old program.

By contrast, fewer critics attacked the Medicaid expansion as an "unprecedented" reform. Such claims were not entirely absent—indeed, Chief Justice Roberts made precisely this claim in *NFIB v. Sebelius*—yet these arguments typically proved less compelling in the political arena.[171] As such, the differing nature of the public debates over the Act's two reforms suggests that the heightened popularity of the Medicaid expansion may have been partly attributable to its design as an expansion of a politically entrenched (and therefore not "unprecedented") federal program.

The experience of the ACA therefore suggests that public support for existing federal programs can, to a modest degree, translate into support for new reforms framed as expansions of the prior federal program. (Interestingly, certain Democrats seem to have reached this same conclusion, as revealed by recent efforts to frame single-payer health care reform as "Medicare for All."[172]) Such additional support may be particularly needed for reforms in the current era in which, as political scientists have noted in studying the ACA, hyperpartisanship otherwise translates into new statutes experiencing surprisingly muted early levels of entrenchment.[173]

For those interested in maximizing state participation in a federal program, this lesson is noteworthy, as state governmental decisions appear at least somewhat responsive to public opinion. Prior research has suggested that program-specific political support is a factor that, in many instances, is predictive of state policy decisions.[174] Moreover, at least one study has found that overall

171. *See* NFIB v. Sebelius, 567 U.S. 519, 583 (2012) ("The Medicaid expansion, however, accomplishes a shift in kind, not merely degree.").

172. *See* Jessie Hellmann, *'Medicare for All' Complicates Democrats' Pitch to Retake Senate*, HILL (Aug. 8, 2019, 6:00 AM), https://thehill.com/policy/healthcare/456574-medicare-for-all-divide-complicates-democrats-pitch-to-retake-senate [https://perma.cc/3PZU-GYV2].

173. *See* Hacker & Pierson, *supra* note 120, at 564, 574.

174. Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 149 (2012). *But see* Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367 (2009) (finding less connection to public opinion when issue is both highly politically salient and requires a supermajority to adopt).

public support for the Medicaid expansion, in particular, has correlated with state expansion decisions.[175] It is thus not surprising that thirty-eight states have participated in the Medicaid expansion, whereas only fifteen have adopted a state Exchange (and twelve more have adopted a hybrid Exchange).[176]

This contrast in state participation suggests that the Medicaid expansion has achieved greater levels of state participation in part through its successful leveraging of Medicaid's existing political entrenchment.[177] Indeed, it raises pointed questions about whether the goals of the Act's Exchange-based reforms could have been more fully achieved by designing (and framing) them as an expansion of the Public Health Service Act's protections regarding employer health plans, rather than as a new federal intervention.

That said, we must note that building the ACA upon the politically entrenched Medicaid model has also created new risks for the Medicaid program itself. Among the general public, the Medicaid program has maintained high levels of bipartisan support in the wake of the Medicaid expansion.[178] However, the story is different with respect to political elites. These elites, following a highly politicized program expansion such as Medicaid, may come to view once-settled political contestations over the existing program as newly reopened.

175. Grogan & Park, *supra* note 83, at 552. These researchers additionally found a racial bias, it should be noted, that makes states more attuned to white public opinion in the state.

176. *See* Hacker & Pierson, *supra* note 120, at 569–70 (noting that the benefits of public opinion or state government support may not translate to the federal level with similar force, as Republican members of Congress supported ACA repeal in ways that defied both public opinion and, in expansion states, their own Republican governors); *see also* Norris, *supra* note 79. *But see* Gluck & Huberfeld, *supra* note 3 (arguing that such tallying is misleading because it elides the fact that there has been a nuanced spectrum of implementation decisions).

177. On the program's bipartisan support, see *Data Note: 5 Charts About Public Opinion on Medicaid*, KAISER FAM. FOUND. (Feb. 20, 2020), https://www.kff.org/medicaid/poll-finding/data-note-5-charts-about-public-opinion-on-medicaid/ [https://perma.cc/RD9K-6PF4] (showing a seventy-five percent overall favorable view of Medicaid in 2019, including a sixty-five percent favorability rating among Republicans).

178. Dan Mangan, *Medicare, Medicaid Popularity High: Kaiser*, CNBC (July 17, 2015, 3:00 AM), https://www.cnbc.com/2015/07/16/medicare-medicaid-popularity-high-ahead-of-birthday.html [https://perma.cc/3SEM-UAG9]; Dylan Scott, *Poll: Medicaid Is Overwhelmingly Popular, Even as Trump Looks to Cut It*, VOX (Mar. 1, 2018, 10:20 AM), https://www.vox.com/policy-and-politics/2018/3/1/17066578/medicaid-work-requirements-poll-kff [https://perma.cc/7DHM-2VSS].

This has been vividly illustrated by the experience with Medicaid waivers. As Part I explained, since the beginning of the Medicaid program, the Secretary of Health and Human Services has always possessed broad authority to waive various statutory requirements in order to allow states to conduct demonstrations that, "in the judgment of the Secretary, [are] likely to assist in promoting the objectives" of the Medicaid program.[179] Technically, this statutory grant of authority is tremendously broad; in practice, however, its application had long been hemmed in by administrative practice and settled state-level expectations. Medicaid expansion, however, changed these norms.

As the Obama administration eagerly sought to increase state participation in the Medicaid expansion after the Court's opinion in *NFIB*, the administration began to entice states by offering novel waivers with respect to the expansion population. Notably, these waivers sometimes were granted not only with respect to state policies that changed the method of providing health care access to individuals (such as delivery system reforms), but also to policies that predictably reduced health care access (such as program lockouts for failure to pay premiums).[180] In this way, waivers sometimes undermined, rather than promoted, the objectives of the Medicaid program. Nonetheless, the Obama administration viewed these waivers as a strategy by which to entrench the fledgling Act, including its Medicaid expansion.

Subsequently, however, the Trump administration expanded this aggressive waiver policy, including, most troublingly, by beginning to apply it with respect to non-expansion populations. Consequently, various states received Medicaid waivers for policies that predictably reduced health care access for *non-expansion* Medicaid populations in unprecedented ways.[181] Many of these novel

179. Social Security Amendments of 1965 § 1115(a), 42 U.S.C. § 1315(a).

180. For breakdowns of the waivers approved with respect to each state, see *Medicaid Waiver Tracker*, *supra* note 57. The Obama administration approved the first lockout waiver provision for a portion of the expansion population in Indiana. *See* Phil Galewitz, *Indiana's Brand of Medicaid Drops 25,000 People for Failure to Pay Premiums*, NPR (Feb. 1, 2018, 9:52 AM), https://www.npr.org/sections/health-shots/2018/02/01/582295740/indianas-brand-of-medicaid-drops-25-000-people-for-failure-to-pay-premiums [https://perma.cc/X9KD-BHNA].

181. These include work requirement waivers, waivers relating to eligibility and enrollment, and waivers with benefit, copay, and healthy behavior provisions. For state-by-state breakdowns of these waivers, see *Medicaid Waiver Tracker*, *supra* note 57. On the Biden administration's early efforts to withdraw some of these waivers, see *supra* note 56 and

and far-reaching Medicaid waivers have been expansions of waiver ideas that the Obama administration already granted with respect to expansion populations. This reverse politicization was also observable in the failed ACA repeal effort in Congress, where Republican proposals included drastic cuts to the Medicaid program that went far beyond a return to pre-ACA Medicaid.[182] In these ways, the partisan politics of the ACA appear to have disrupted longstanding political settlements within the Medicaid program, to the program's detriment.

While this reverse politicization is troubling, it does not necessarily mean that statutory architects should avoid reforms that expand existing federal programs. Rather, it provides these architects with an important reminder that, in many instances, the longstanding structure of a federal program is the product of a complex tangle of statutory requirements, agency rules, and settled informal understandings. Once that program is associated with a new, hyperpartisan reform project, those settled informal understandings (and perhaps also many agency rules) may fall away, placing new strain on the underlying statutory requirements to sustain the structure of the program.

### C. *Administrative Entrenchment*

A final type of entrenchment that the ACA experience speaks to could be labeled "administrative entrenchment." This refers to the idea that, when a state administers a federal program over an extended period, the state often will develop a competent bureaucracy to manage the program. Eskridge and Ferejohn have spoken to this quality of institutional entrenchment,[183] and Gluck has noted its relevance to state-level bureaucracies administering federal programs, including Medicaid.[184] Chief Justice Roberts also identified administrative entrenchment in the Medicaid context in *NFIB*, remarking that threats to take away state Medicaid funds

accompanying text (discussing early steps to withdraw work requirement waivers).

182. *See* Hacker & Pierson, *supra* note 120, at 568.

183. ESKRIDGE & FEREJOHN, *supra* note 149, at 114, 117.

184. Gluck, *supra* note 12, at 569–70 ("[D]ecentralizing the administration of federal statutory law may more effectively entrench the new federal statute by creating a much broader and deeper network of institutions and officials . . . who are invested in the new federal statutory scheme, its meaning, and its success."); *see also* Gluck, *Federalism from Federal Statutes*, *supra* note 28, at 1761; Gluck & Scott-Railton, *supra* note 28, at 499.

are unduly coercive partly because "the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid."[185]

According to research from several academic fields, new reform projects can receive two important benefits when they are designed as expansions of administratively entrenched programs.[186] First, this entrenchment can provide state-level policymakers and stakeholders with confidence in a state's ability to undertake additional reform projects, thereby potentially making these pivotal actors more receptive to such projects.[187] Second, this entrenchment provides state governments with a heightened capacity to design and implement these new programs, ideally resulting in greater effectiveness and efficiency in program administration.[188]

In theory, therefore, administrative entrenchment should offer increased likelihood of adoption and increased effectiveness in implementation. In practice, the experience of the ACA reflects these predictions, albeit with some wrinkles caused by hyperpartisanship.[189] At least two studies of the Act's implementation have concluded that, despite the overriding role of partisanship, existing state administrative capacity still increased the likelihood of states undertaking the Medicaid expansion.[190] In particular, these studies suggest that administrative capacity may have played a role in

185. NFIB v. Sebelius, 567 U.S. 519, 581 (2012).

186. The scholarship cited in the following footnotes includes work by organizational economists, political scientists, and health policy analysts.

187. Jacobs & Callaghan, *supra* note 94, at 1038 (lauding "administrative capacity" on these grounds); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 252, 258 (2000); *see also* SKOCPOL, PROTECTING SOLDIERS AND MOTHERS, *supra* note 121; Theda Skocpol & John Ikenberry, *The Political Formation of the American Welfare State in Historical and Comparative Context*, 6 COMP. SOC. RES. 87 (1983).

188. *See, e.g.*, John Holahan, Stephen Zuckerman, Alison Evans & Suresh Rangarajan, *Medicaid Managed Care in Thirteen States*, 17 HEALTH AFF. 43 (1998); Marsha Gold, Michael Sparer & Karyen Chu, *Marketwatch: Medicaid Managed Care: Lessons from Five States*, 15 HEALTH AFF. 153 (1996); Charles Barrilleaux, Richard Feiock & Robert E. Crew, Jr., *Measuring and Comparing American States' Administrative Characteristics*, ST. & LOC. GOV'T REV. 12 (1992); *see also* Jacobs & Callaghan, *supra* note 94, at 1025–26.

189. *See supra* notes 94–95 and accompanying text (on prior studies showing that partisanship is tempered by state economic need, and on current studies showing that the Medicaid expansion has been largely immune to this countervailing influence).

190. Jacobs & Callaghan, *supra* note 94, at 1040–41; Haeder & Weimer, *supra* note 127, at S42 ("Although some caution is needed in light of the small number of observations, it appears that, consistent with our qualitative analysis, both politics and administrative capacity make a difference [in implementation].").

convincing a handful of Republican-controlled states to adopt the expansion. As one study described it: "Partisanship is a constraint, but it is not a death sentence. [The Medicaid expansion suggests that] [e]nhanced administrative resources and attention to established policy trajectories may offer strategic levers and points of intervention to moderate the depressive effects of party control where they exist."[191]

In light of these studies, it is reasonable to conclude that prior administrative entrenchment of the Medicaid program has been another factor contributing to the comparatively high rate of state participation in Medicaid expansion, relative to Exchange participation. As such, it provides another reason, albeit a modest one, to consider designing new reforms as expansions of existing federalism-oriented programs.

The experience of the Medicaid expansion more clearly affirms the continued relevance of the second benefit cited by research into administrative entrenchment: more effective and successful implementation among participating states. In the case of the Exchanges, several states that created state Exchanges found themselves overwhelmed by technical and administrative difficulties—setbacks so severe that some states entirely abandoned their state Exchanges in favor of hybrid or federally run Exchanges.[192] By contrast, no state appears to have encountered comparable administrative setbacks in its Medicaid expansion. There is good reason to think that these contrasts in implementation are attributable, in significant part, to the fact that the Medicaid expansion utilized entrenched state-level Medicaid administrations, whereas the Exchange-based reforms did not draw upon comparable state-level bureaucracies (or, at a minimum, required entrenched state-level bureaucrats to undertake relatively novel tasks).[193]

191. Jacobs & Callaghan, *supra* note 94, at 1041.

192. Oregon provides the most visible example of this. *See* Gosia Wozniacka, *Oregon Panel Recommends Moving to Federal Exchange*, POST BULL. (Apr. 24, 2014, 9:00 PM), https://www.postbulletin.com/news/news/nation/oregon-panel-recommends-moving-to-federal-exchange/article_77334f03-8262-5af1-a402-f90b32975000html [https://perma.cc/7TEF-DPWG]. Hawaii (now a federally run Exchange) and Nevada (now using a federal platform) provide additional examples.

193. State insurance commissioners, who predate the Act, admittedly have played a central role in creation of the Exchanges. The extent to which they have operated within familiar state-level administrations in the management of Exchanges, however, has varied widely. *See* Haeder & Weimer, *supra* note 127, at 540–41.

In sum, the ACA's experience suggests that one way to ensure broader uptake of federalism-based programs, and thus more fulsome accomplishment of programmatic goals, is to build upon entrenched administrative structures and statutory programs. Such buttressing cannot assure success, or ward off legal risk, but does enhance the chances of a program garnering the political and practical support needed to spread more widely among the states.

## V. APPLYING THE LESSONS: FROM HEALTH CARE TO THE GREEN NEW DEAL

Thus far, we have distilled three structural lessons from the ACA regarding how to make federalism best work. In this Part, we illustrate how these lessons can be applied across subject areas to strengthen the design of federalism-based efforts to improve the lives of all Americans. To do so, we apply the lessons learned from the ACA to the dynamic and burgeoning legislative project to create a Green New Deal.

### A. *The GND: An Overview*

At the center of the GND is an insistence that climate change, economic inequality, and structural racism have common causes and common solutions, and thus must be addressed in concert.[194] This insistence makes the GND different from most climate change policies, which focus centrally on reducing carbon emissions and only peripherally, if at all, on issues of distribution.[195] The GND remains at an early stage of development, with its goals plural, contested, and provisional. That said, a few key blueprints for the GND have been published, and several members of Congress have proposed relevant legislation.[196] And although President Biden has

194. *See, e.g.*, H.R. Res. 109, 116th Cong. (2019).

195. *See* Rhiana Gunn-Wright & Robert Hockett, *Mobilizing for a Just, Prosperous, and Sustainable Economy: The Green New Deal* 6 (Cornell Legal Studies, Research Paper No. 19-09, 2019) ("The Green New Deal is not, then, a 'low-ball,' 'incrementalist,' or otherwise trivial 'tax and incentive scheme' meant to 'nudge' a few private firms into producing some modestly beneficial market outcomes for a few privileged people.").

196. *See* H.R. Res. 109; Gunn-Wright & Hockett, *supra* note 195; GREG CARLOCK, EMILY MANGAN & SEAN MCELWEE, DATA FOR PROGRESS, A GREEN NEW DEAL: A PROGRESSIVE VISION FOR ENVIRONMENTAL SUSTAINABILITY AND ECONOMIC STABILITY 4 (2018); *Community Climate Justice: Governor Inslee's Plan for Environmental & Economic Justice in an Inclusive Clean Energy Economy*, JAY INSLEE FOR GOVERNOR [hereinafter *Community Climate Justice*], https://www.jayinslee.com/issues/climate-justice [https://perma.cc/9X43-JU

disavowed the specific nomenclature of the GND, his platform on climate change includes many of its key tenets outlined below.[197]

On the climate change front, the GND is aggressive—and appropriately so. Just as the GND was taking shape, the Intergovernmental Panel on Climate Change released a shocking report suggesting that if the world is to avoid catastrophic levels of warming, carbon emissions must peak and then begin a rapid decline in just over a decade.[198] The GND takes its carbon emissions reductions goals from this gold-standard scientific research,[199] establishing a goal of net-zero greenhouse gas emissions by mid-century, with an electricity grid that runs on "100% clean energy" created even sooner.[200] The GND also calls for upgrading building stock, reducing emissions from manufacturing and agriculture, and "overhauling" transportation systems to focus on public transit and electric vehicles.[201] To ensure that these climate objectives are accompanied by economic and social transformation, the GND also calls for community ownership of resources, a federal jobs guarantee, and "high-quality health care" and "affordable, safe, and adequate

KG]; *Tackling the Climate Crisis Head On*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/climate-change [https://perma.cc/A3WN-RSGA]; *The Green New Deal*, BERNIE SANDERS, https://berniesanders.com/en/issues/green-new-deal/ [https://perma.cc/ADC3-MNK6].

197. *The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity*, BIDEN HARRIS, https://joebiden.com/environmental-justice-plan/ [https://perma.cc/TSZ5-UPNT]; *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, BIDEN HARRIS, https://joebiden.com/climateplan/# [https://perma.cc/JL2U-G5Z8] (including 100 percent clean electricity by 2035, $2 trillion in federal infrastructure spending, and a dedicated forty percent of all federal green spending targeted to disadvantaged communities). *But see* David Roberts, *What Joe Biden Was Trying to Say About the Green New Deal*, VOX (Oct. 7, 2020, 9:46 PM), https://www.vox.com/energy-and-environment/21498236/joe-biden-green-new-deal-debate [https://perma.cc/F9MD-84M9] (quoting Biden as asserting during a presidential debate that "The Green New Deal is not my plan").

198. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC SPECIAL REPORT ON GLOBAL WARMING OF 1.5°C, at 7–8 (2018) [hereinafter IPCC REPORT], https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf [https://perma.cc/Q46A-Z3SV].

199. *See* H.R. Res. 109, 116th Cong. § 1 (2019) (citing IPCC REPORT, *supra* note 198).

200. The House Resolution both establishes a net-zero goal and calls for a "10-year national mobilization" to accomplish it—which some have taken to mean that the very challenging goal of net-zero emissions should be reached within a decade. *See, e.g.*, Madeleine Cuff, *Green New Deal Blueprint Targets Net Zero US Emissions in 10 Years*, BUSINESSGREEN (Feb. 7, 2019), https://www.businessgreen.com/bg/news/3070686/green-new-deal-blueprint-targets-net-zero-emissions-in-ten-years [https://perma.cc/7Z9E-4BF7]. This is not, however, the necessary meaning of the language used—which might also support a more gradual timeline. *See* H.R. Res. 109 §§ 1(A)–(E), 2. Data for Progress—the most comprehensive blueprint to date—calls for achieving "100% clean" energy by 2035 and net-zero emissions by 2050. *See* CARLOCK ET AL., *supra* note 196, at 5.

201. *See* H.R. Res. 109 § 2(E)–(H); *see also* CARLOCK ET AL., *supra* note 196, at 8.

housing" for all Americans as part of the clean energy transition.[202] Left unanswered are a host of questions about the technical details of this transition, including the role of nuclear power and carbon capture and storage technologies, and whether a carbon tax might form a component of the GND strategy.[203]

Many have pushed back at this multi-pronged, capacious approach to climate change policy. Soon after the introduction of the GND resolution, Speaker Nancy Pelosi dismissed it flippantly: "The green dream, or whatever they call it, nobody knows what it is, but they're for it, right?"[204] Fox News whipped up hysteria, covering the GND more than CNN and MSNBC combined,[205] and calling it a "disaster," an "American nightmare," and most curiously, a "bird-pocalypse."[206] Others insist that the GND is naïve, overly ambitious, or just plain wrong for linking climate policy, economic policy, and social policy—or that there is not possibly the money available to fund it.[207]

202. H.R. Res. 109 § 4(E)–(H), (O)(i)–(ii); *see also* Gunn-Wright & Hockett, *supra* note 195, at 10 (listing similarly worded goals).

203. *See* John Cassidy, *The Good News About a Green New Deal*, NEW YORKER (Mar. 4, 2019), https://www.newyorker.com/news/our-columnists/the-good-news-about-a-green-new-deal [https://perma.cc/G3T3-97WT]; Ed Dolan, *A Carbon Tax Should Be the Centerpiece of the Green New Deal*, SALON (Mar. 12, 2019, 10:30 PM), https://www.salon.com/2019/03/12/a-carbon-tax-should-be-the-centerpiece-of-the-green-new-deal/ [https://perma.cc/S6LV-VQUM].

204. Chris Cillizza, *Nancy Pelosi Just Threw Some Serious Shade at Alexandria Ocasio-Cortez's 'Green New Deal*,*'* CNN POL. (Feb. 8, 2019, 9:29 AM), https://www.cnn.com/2019/02/07/politics/pelosi-alexandria-ocasio-cortez-green-new-deal/index.html [https://perma.cc/43VQ-XP3N].

205. Ted MacDonald, *Fox News Discussed the Green New Deal More Often than CNN and MSNBC Combined*, MEDIA MATTERS (Apr. 9, 2019, 12:19 PM), https://www.mediamatters.org/blog/2019/04/09/Fox-News-discussed-the-Green-New-Deal-more-often-than-CNN-and-MSNBC-combined/223383 [https://perma.cc/9D3Q-A4D2].

206. Justin Haskins, *Green New Deal Would Destroy American Dream, Create American Nightmare*, FOX NEWS (Feb. 17, 2019), https://www.foxnews.com/opinion/green-new-deal-would-destroy-american-dream-create-american-nightmare [https://perma.cc/X7YH-ZF9V]; Stuart Varney, *Stuart Varney: The Green New Deal Is a Disaster for Democrats, Too*, FOX NEWS (Mar. 1, 2019), https://www.foxnews.com/opinion/stuart-varney-the-green-new-deal-is-a-disaster-for-democrats-too [https://perma.cc/9SWA-YGKH]; Justin Haskins, *Alexandria Ocasio-Cortez's Green New Deal Is a Bird-Pocalypse*, FOX NEWS (Mar. 9, 2019), https://www.foxnews.com/opinion/alexandria-ocasio-cortezs-green-new-deal-is-a-bird-pocalypse [https://perma.cc/MP4H-9HJ9] (arguing that "it would result in untold millions of birds being slaughtered by Democrats' supposedly 'environmentally friendly' green energy sources, including wind farms and solar energy facilities").

207. *See* Sean Sweeney, *The Green New Deal's Magical Realism*, NEW LAB. F. (Feb. 2019), https://newlaborforum.cuny.edu/2019/02/19/green_new_deal/ [https://perma.cc/A2TR-JTJR] (describing a "'war' between the rising left wing of the Democratic Party . . . and the party's pro-market neoliberal mainstream"); Dan Drollette Jr., *We Need a Better Green New*

In the face of this opposition, it remains to be seen whether GND proponents will be able to muster the coalition necessary to achieve legislative victories. One important structural decision that may play a key role in these conversations is the extent to which the GND embraces federalist arrangements, and the manner in which it does so. GND backers have understandably focused to date on laying out a broad substantive agenda but have said little about how such an ambitious set of social programs might be structured. When structure is mentioned, supporters often reference the original New Deal and World War II mobilization efforts as models.[208] However, in many ways, the ACA proves a more apt object of study, given how much has also changed in the U.S. administrative state since these earlier models succeeded.

To navigate the entrenched cooperative federalist structures that pervade U.S. energy and environmental law,[209] and which are now complicated by many "uncooperative" states,[210] attention must be devoted to how to map the GND's substantive priorities onto the structure of the modern administrative state. Today, U.S. energy and environmental law are both deeply federalist in their structures. In environmental law, "cooperative federalism" predominates,[211] in which the federal government sets certain minimum standards for environmental quality and then allows states flexibility in planning for how to meet those standards.[212] In energy

*Deal—An Economist's Take*, BULL. ATOMIC SCIENTISTS (Mar. 25, 2019), https://thebulletin.org/2019/03/we-need-a-better-green-new-deal-an-economists-take/ [https://perma.cc/W6GL-K8L8]; Noah Smith, *How to Design a Green New Deal That Isn't Over the Top*, SALT LAKE TRIB. (Feb. 13, 2019, 9:30 AM), https://www.sltrib.com/opinion/commentary/2019/02/13noah-smith-how-design/ [https://perma.cc/56C3-AN8J] ("[T]he plan overreaches in its desire to deliver a raft of expensive new entitlements—guaranteed jobs, benefits, health care, housing, education, income and more."); *Want a Green New Deal? Here's a Better One.*, WASH. POST (Feb. 24, 2019), https://www.washingtonpost.com/opinions/want-a-green-new-deal-heres-a-better-one/2019/02/24/2d7e491c-36d2-11e9-af5b-b51b7ff322e9_story.html?utm_term=.7951f66b3a11 [https://perma.cc/AKW2-BD2G] (critiquing these elements of the GND because "they divert money and attention from the primary mission: rapidly eliminating emissions between now and midcentury").

208. *See* Gunn-Wright & Hockett, *supra* note 195, at 5. ("It is a 'New Deal' in the sense that it works on a scale not seen in our country since the New Deal and World War II mobilizations. . . .").

209. *See* sources cited *supra* note 32.

210. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009).

211. *See* sources cited *supra* note 32.

212. Note that these standards usually form a floor, meaning that states can exceed but not fall below these requirements. *See* Adam Babich, *Our Federalism, Our Hazardous Waste, and Our Good Fortune*, 54 MD. L. REV. 1516, 1534 (1995) ("The essence of cooperative

law, the other body of U.S. law central to efforts at rapid decarbonization,[213] jurisdiction is less cooperative, but also shared.[214] The Federal Power Act ("FPA"), which has structured relations between the federal and state governments in the field of electricity since 1935, gives the federal government control over the pricing of interstate, wholesale electricity sales and interstate transmission lines, but leaves to states control over the retail electricity sector (that is, utility sales of electricity to end-use consumers) and over electricity generation.[215] Similarly, laws about infrastructure siting give states considerable authority over where and when to approve new transmission lines, oil pipelines, and electric generation facilities.[216]

Many states have used their authority under the FPA to respond aggressively to climate change, filling the federal climate change policy lacuna with a range of state-level policies.[217] A growing number of states now have laws that require decarbonization of the

federalism is that states take primary responsibility for implementing federal standards, while retaining the freedom to apply their own, more stringent standards.").

213. In 2018, 26.9 percent of U.S. greenhouse gas emissions came from the electricity sector, and another twenty-eight percent came from transportation, predominantly from the burning of fossil fuels in combustion engines. *See Sources of Greenhouse Gas Emissions*, EPA, https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions [https://perma.cc/WDD2-BLQA].

214. Traditionally, courts treated the Federal Power Act ("FPA") as creating a "bright line" separation of federal and state sovereign spheres. *See, e.g.*, Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215 (1964) ("Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction."). However, given the interconnectedness of the modern grid, courts have more recently suggested that the FPA should be read as a scheme of "collaborative federalism," in which the federal and state governments must work together to achieve the ends that are rightfully within the control of each jurisdiction. *See, e.g.*, Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1300 (2016) (Sotomayor, J., concurring) (describing the FPA as a "collaborative federalism" statute); Fed. Energy Reg. Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 780 (2016) (describing FERC's rule as creating a "program of cooperative federalism"); Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 46 (2d Cir. 2018) (describing the FPA as a "collaborative scheme"). Several scholars have written in detail about this shift. *See, e.g.*, Daniel A. Lyons, *Protecting States in the New World of Energy Federalism*, 67 EMORY L.J. 921 (2018); Joel B. Eisen, *Dual Electricity Federalism Is Dead, but How Dead, and What Replaces It?*, 8 GEO. WASH. J. ENERGY & ENVTL. L. 3 (2017); Jim Rossi, *The Brave New Path of Energy Federalism*, 95 TEX. L. REV. 399 (2016).

215. *See* 16 U.S.C. § 824(a)–(b)(1).

216. *See* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 948 (2015) (explaining that oil pipelines remain under state control, whereas jurisdiction over gas pipelines is federalized); Alexandra B. Klass & Elizabeth J. Wilson, *Interstate Transmission Challenges for Renewable Energy: A Federalism Mismatch*, 65 VAND. L. REV. 1801, 1804 (2012) (analyzing how state authority over transmission impedes renewable energy development).

217. *See Database of State Incentives for Renewables & Efficiency*, DSIRE, https://www.

electricity sector on the same aggressive scale contemplated by the GND.[218] However, other states remain intransigent on climate, or continue to take steps in the wrong direction—such as Ohio's July 2019 legislation actively promoting coal.[219] All to say, hyperpartisanship persists in state climate politics, much as it does in health care.

One central challenge confronting the architects of the GND will be how to structure a successful program that takes advantage of these longstanding federalism arrangements, without succumbing to their weaknesses.[220] On these questions, we believe the ACA offers substantial lessons regarding whether and how—in our contemporary, hyperpartisan times—to effectively build states into major federal social justice legislation.[221]

## B. *Applying the Lessons*

### 1. Federal Funding

There are good reasons—perhaps political above all else—that the GND might choose to use conditional funding to induce states to achieve certain priorities, including affordable housing, clean energy infrastructure development, job creation, and living wages.

dsireusa.org [https://perma.cc/3SUG-GYQ3] (database collecting state incentives on renewable energy and energy efficiency); *see also* sources cited *supra* note 6.

218. These states include Hawaii, California, Washington, New Mexico, Nevada, and New York, with legislation pending in several others (updated June 2019). Phil McKenna, *Washington Commits to 100% Clean Energy and Other States May Follow Suit*, INSIDE CLIMATE NEWS (May 7, 2019), https://insideclimatenews.org/news/07052019/100-percent-clean-energy-map-inslee-washington-california-puerto-rico [https://perma.cc/JZ48-B3VR].

219. *See* Am. Sub. H.R. 6, 133d Gen. Assemb., Reg. Sess. (Ohio 2019) (effective Oct. 22, 2019); *see also* Leah C. Stokes, *While the Planet Overheats, Ohio's Coal Industry Gets a Bailout*, GUARDIAN (July 28, 2019, 10:39 AM), https://www.theguardian.com/commentisfree/2019/jul/28/planet-overheats-ohios-coal-industry-gets-a-bailout [https://perma.cc/MU7V-NMBA].

220. *See* William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 6 WIS. L. REV. 1037, 1039–40 (2017) (arguing that "retaining latitude for state and federal overlap can provide an array of benefits and, especially, reduce risks of disruptive policy reversals").

221. We do not intend by this analysis to diminish from the many possible ways that the GND might embrace a more direct structural relationship between the federal government and local communities. We limit our attention to that possibility only because the ACA has the fewest lessons to offer in this regard—such that localism as a GND strategy will have to draw its moves from other playbooks. In other writing, one of us has been a proponent of the role that cities can play in transitioning to cleaner energy, and other researchers echo this possibility. *See* Shelley Welton, *Decarbonization in Democracy*, 67 UCLA L. REV. 56 (2020); *see also* sources cited *supra* note 6.

Yet, just as in the health care context, there are real costs to such arrangements for a program centered on tackling inequality as a core mission. The same states that would likely prove non-cooperative even in the face of overwhelmingly rational incentives are the ones where low-income communities and communities of color may most need assistance.[222]

To mitigate such risks in conditional funding arrangements, GND drafters might draw lessons from the ACA's experience of backstopping state insurance exchanges with a federal option. Recall that the ACA's drafters wisely erected a federalist structure in which states would default to a federal exchange, should they elect not to run their own.[223] A similar strategy might prove useful in implementing the GND. For example, imagine federal legislation that provides generous funding to states that adopt clean infrastructure expansion programs, and which also create jobs that pay a living wage or invest in certain frontline communities.[224] That same legislation might stipulate that, should a state not opt in within a certain number of years, then the federal government can design its own infrastructure projects to create such jobs and aid frontline communities within the state. Similarly, local communities could be empowered to apply directly, in place of the state.[225]

Alternatively, or in addition, suppose the GND elects to utilize certain incentive programs to induce private industry's participation. Legislation could, for example, offer generous loans or grants to renewables developers who commit to certain job guarantees or

222. On this point, recent research has found a correlation between state-level economic inequality and carbon emissions, with those states with higher levels of inequality also ranking as the highest-emitting. *See* Andrew Jorgensen, Juliet Schor & Xiaorui Huang, *Income Inequality and Carbon Emissions in the United States: A State-Level Analysis*, 134 ECOLOGICAL ECON. 40, 46 (2017). This study both validates the intuitions of GND proponents that the problems of inequality and climate change are inextricably linked, and suggests the importance of achieving robust state buy-in, if the GND's goals are to be met.

223. *See supra* section II.A.

224. *See, e.g.*, *Community Climate Justice*, *supra* note 196 ("Guaranteeing 40% or more of federal investments building a clean energy economy will go to front-line communities facing greater burdens of pollution, income inequality and climate impacts."); *see also* David Roberts, *The 4 Best Ideas from Jay Inslee's New Climate Justice Plan*, VOX (July 30, 2019, 10:50 AM), https://www.vox.com/energy-and-environment/2019/7/30/20731958/jay-inslee-for-president-climate-change-justice-plan-green-new-deal [https://perma.cc/9FJ9-LMUT] (arguing that Inslee's 170-page climate plan is in fact the best model for GND supporters to follow).

225. Controversially, such a program might also have to come with an override of state infrastructure approval and siting authority. *See supra* note 216 and accompanying text (regarding states' jurisdiction over clean energy infrastructure).

rates of infrastructure development. In that case, the ACA's less successful experience with ensuring robust insurance exchanges instructs that the GND might provide a backstop allocation of funding to a public option, should private industry prove unwilling to fully participate.[226] If, for example, a pool of money is made available for clean infrastructure development in frontline communities,[227] the GND might stipulate that it reverts to a federal entity to pursue such projects if not fully utilized by the private sector.

In sum, the experience of the ACA teaches that hyperpartisan conditions demand new, more complex relationships between the federal and state governments. Should GND drafters accede to arrangements where states are invited—rather than commanded—into participation, constructing federal backstops could induce states to participate on their terms, rather than the federal government's terms. This participation, in turn, might help states with varying political conditions approach decarbonization in usefully different ways—all of which might ultimately strengthen nationwide norms in favor of climate action.[228]

### 2. Coalition-Building in the GND

The architects of the GND have already thought a lot about coalitions. In particular, considerable attention has focused on getting labor unions' support,[229] and on ensuring that the program's design is a bottom-up collaborative effort, rather than technocratically directed from the top down.[230] The ACA's experience suggests several

226. *See supra* note 68 (regarding public options).

227. *See, e.g.*, CARLOCK ET AL., *supra* note 196, at 14; *100% Clean Energy for America: Governor Jay Inslee's Plan for 100% Clean Electricity, Vehicles and Buildings*, JAY INSLEE GOVERNOR, https://www.jayinslee.com/issues/100clean [https://perma.cc/FZJ8-Y7UJ].

228. *See* Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 638 (2017) (arguing that policy experimentation on climate will allow different political ideologies to select different sets of policies, thereby potentially defusing some resistance).

229. Bob Massie, *Unions Are Finally Learning to Love the Green New Deal*, NATION (July 12, 2019), https://www.thenation.com/article/green-new-deal-unions/ [https://perma.cc/U6FJ-2PVG]; Umair Irfan, *The Green New Deal Is Fracturing a Critical Base for Democrats: Unions*, VOX (June 19, 2019, 9:24 AM), https://www.vox.com/2019/5/22/18628299/green-new-deal-labor-union-2020-democrats [https://perma.cc/RCF4-NA3J].

230. *See* H.R. Res. 109, 116th Cong. (2019) ("[A] Green New Deal must be developed through transparent and inclusive consultation, collaboration, and partnership with frontline and vulnerable communities, labor unions, worker cooperatives, civil society groups, academia, and businesses . . . .").

more cross-partisan partners that the GND drafters might consider as they structure legislation. To be sure, creating cross-partisan coalitions on climate change and redistribution may prove more challenging than health care—Republicans at least *believe* that health care is real.[231] But just as the ACA enlisted certain partners within the business community and within state government, so could the GND. The burgeoning renewable energy sector has already proven capable of thriving in Republican-controlled states, some of which see in it considerable economic potential.[232] As Jonathan Gilligan and Michael Vandenbergh have traced, several powerful tech companies have also been allies of clean energy.[233] These companies have pushed southern and western states to invest in clean technologies that they have otherwise resisted in exchange for the companies agreeing to locate major operations in these states.[234] The housing, real estate, and construction industries, too, might see considerable upside in a project that focused on the need to retrofit buildings and to invest in new, more efficient housing stock—particularly if such a program took an incentive form rather than a mandate (another argument, then, in favor of conditional spending arrangements).

There are, of course, risks to structuring a statute to curry corporate favor if it conflicts with its core social justice mission. Indeed, the ACA's structure itself—which built upon the private insurance industry rather than displacing it—might be a testament

231. Many Republicans still disclaim anthropogenic causes to climate change, although the numbers are shifting. *See* ANTHONY LEISEROWITZ, EDWARD MAIBACH, CONNIE ROSER-RENOUF, SETH ROSENTHAL, MATTHEW CUTLER & JOHN KOTCHER, POLITICS & GLOBAL WARMING, MARCH 2018 (2018), https://climatecommunication.yale.edu/publications/politics-global-warming-march-2018/2/ [https://perma.cc/JL59-YBQG] (finding that "55% of liberal/moderate Republicans (14 percentage points higher than in October 2017), but only 26% of conservative Republicans" think that "global warming is caused mostly by human activities").

232. *See* Emma Hibbard, *Green Energy in Red States*, CLIMABLE BLOG (Sept. 4, 2018), https://climable.org/blog/2018/9/4/green-energy-in-red-states [https://perma.cc/HBT9-BDVN]; Eric Biber, *Cultivating a Green Political Landscape: Lessons for Climate Change Policy from the Defeat of California's Proposition 23*, 66 VAND. L. REV. 399, 402 (2013) (documenting how climate "winners" have helped to build coalitions that advance ever-tougher climate policies); Buzbee, *supra* note 220, at 1044 (arguing that "entrenchment of supportive coalitions through a process of path dependence dynamics [can] result in 'increasing returns' and 'costs of exit'").

233. MICHAEL P. VANDENBERGH & JONATHAN M. GILLIGAN, BEYOND POLITICS: THE PRIVATE GOVERNANCE RESPONSE TO CLIMATE CHANGE 138–44, 211–12 (2017) (describing how firms with roots on the U.S. west coast, including Amazon, Google, and Facebook, are greening their southwestern data centers).

234. *See id.*

to such risks.[235] Nevertheless, the ACA points to some realities about the benefits of pitting certain corporate interests against others in the structure of the Act, so as to have powerful partners that might break down resistance in hostile state governments.

Additionally, the ACA's experience regarding relative levels of support *within* state government suggests that the GND might be wise to enlist the support of state environmental regulators in particular. These regulators might be more inclined to pursue vigorous implementation than other state agencies, particularly, state public utility commissions, which in Republican-controlled states have been fairly resistant to prioritizing climate change.[236] Ultimately, the key lesson is this: to the extent that the GND embraces federalism as a strategy, thinking hard about not just the coalitions necessary to win passage, but also to drive implementation, will be one way to boost success.

### 3. Entrenchment and the GND

Finally, the ACA has important lessons to offer the GND with respect to entrenchment—that is, the wisdom of building upon existing federalist programs. As in the case of the ACA, there may be limited *legal* benefits to building off an entrenched program.[237] The Clean Air Act has already proven an unreliable vehicle for delivering climate policy and is likely to remain so.[238] Nevertheless, the ACA suggests several ways in which political and administrative

235. There is an ongoing intra-party rift among Democrats about whether "Medicare for All" or expansion of the ACA should be a legislative priority. *See* Kevin Uhrmacher, Kevin Schaul, Paulina Firozi & Jeff Stein, *Where 2020 Democrats Stand on Health Care*, WASH. POST. (updated Apr. 8, 2020), https://www.washingtonpost.com/graphics/politics/policy-2020/medicare-for-all/ [https://perma.cc/MD5K-YQXH].

236. *See* John A. Sautter & Kari Twaite, *A Fractured Climate? The Political Economy of Public Utility Commissions in an Age of Climate Change*, 22 ELECTRICITY J. 68, 69 (2009) (finding carbon emissions to be much higher in states that elect their public utility commissioners); *cf.* Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 381 (2019) (exploring the implications of the delegatory choices Congress makes among and between agencies).

237. *See supra* section V.A.

238. Indeed, given the current disregard for settled precedent, one could even imagine a lawsuit over the statute's definition of an "air pollutant," seemingly decided in *Massachusetts v. EPA*. *See* 549 U.S. 497, 528–29, 559–60 (2007) (finding that the Clean Air Act's definition of "air pollutant" unambiguously includes greenhouse gases). The Supreme Court has since narrowed the Clean Air Act's application to greenhouse gases. *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 316 (2014) (finding that "air pollutant" does not mean the same thing under other provisions of the statute, and does not have to include greenhouse gases for purposes of those provisions).

entrenchment might redound to the benefit of the GND, if it is built on the shoulders of preexisting and largely successful programs.

Two GND proposals advanced thus far explicitly rely on preexisting federalism arrangements as building blocks for decarbonization policy.[239] First, mirroring the Clean Air Act's longstanding federalist structure,[240] one recently proposed House bill calls for Congress to establish an aggressive nationwide decarbonization trajectory, and then requires states to submit plans to meet this trajectory—with the inducement of federal funding as an incentive for compliance.[241] Similarly, several have suggested that the GND could be centered around a federal "Clean Energy Standard," based on popular state-level laws that require utilities to source an increasing percentage of their electricity from renewable or clean energy sources.[242] Twenty-nine states and Washington, D.C. currently have their own "Renewable Portfolio Standard," which vary in stringency from 2.5 percent renewable energy by 2021 in South Carolina, to 100 percent by 2045 in Hawaii, California, Washington, and New Mexico.[243]

Building off either of these preexisting arrangements obviously carries risks and rewards. GND architects will want to harness leading states' climate progress without allowing laggard states to thwart the programs' aims. And they will want to build legislation that proves durable in the face of changes in administration.[244] On

239. Both of these potential policy vehicles are suggested in CARLOCK ET AL., *supra* note 196, at 5–6.

240. *See* 42 U.S.C. §§ 7407–7410; *see also* Union Elec. Co. v. EPA, 427 U.S. 246, 249 (1976) (describing the feature of using state implementation plans as the "heart" of the Clean Air Act); Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans—Thirty-Seven Years of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 211 (2004).

241. Memorandum from Frank Pallone, Jr., Chairman, Comm'n on Energy & Commerce, The CLEAN Future Act (Jan. 2020), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/CLEAN%20Future%20Act%20Memo.pdf [https://perma.cc/475Y-XK98].

242. "Clean energy" standards typically denote programs that include sources that are carbon-free, but not technically renewable—most notably, nuclear power. *See, e.g.*, S. 100 § 5, 2018 Leg., Reg. Sess. (Cal. 2018) (defining eligible resources for the state's 100 percent clean energy goal to include "zero-carbon resources").

243. *See Renewable & Clean Energy Standards*, DSIRE (June 2019), http://ncsolarcen-prod.s3.amazonaws.com/wp-content/uploads/2019/07/RPS-CES-June2019.pdf [https://perma.cc/HLG7-SJJV]; *see also* Lincoln L. Davies, *State Renewable Portfolio Standards: Is There a "Race" and Is It "To the Top,"* 3 SAN DIEGO J. CLIMATE & ENERGY L. 3, 5–6 (2012) [hereinafter Davies, *State Renewable Portfolio Standards*] (noting that thirty-seven states total have renewable standards or goals).

244. *See* Buzbee, *supra* note 220, at 1045 (emphasizing the importance of durability); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present*

all of these topics, the experience of the ACA helps bring into focus the tradeoffs of using federalist structures to accomplish social justice ends.

Both the ACA's implementation story and past experience with climate regulations also teach that lawsuits, heel-dragging, and non-cooperation should be expected on the part of states, no matter what program is used. Nevertheless, the ACA's experience with Medicare expansion suggests that the *relative* amount of state pushback—and the possibility of repeal during subsequent administrations—might be lessened by using a familiar vehicle for delivering decarbonization.[245] Despite a partisan divide over climate change, Americans like clean air and appreciate what the Clean Air Act has done in delivering it.[246] Similarly, Renewable Portfolio Standards have proven to be a policy capable of crossing red–blue lines, drawing on widespread American support for renewable energy.[247] If patterns hold for climate as they did in health care, then crafting a rapid decarbonization mandate as an extension of one of these programs is likely to enhance popular support, as compared to starting from scratch. Indeed, states leading on climate policy may be more supportive of a GND if they see it as building upon, rather than threatening, their climate leadership.[248]

The ACA's lessons with respect to administrative entrenchment—that is, the programmatic and administrative benefits of building upon an existing program—suggest that the framers of

*to Liberate the Future*, 94 CORNELL L. REV. 1153, 1157, 1159 (2009) (similar).

245. *Cf.* Buzbee, *supra* note 220, at 1053 (arguing that cooperative federalism is particularly useful "[w]here a market, regulation, and regulatory progress are interdependent—as they long have been in utility and energy regulation and are today with climate regulation").

246. *See* David Roberts, *New Poll: The Public Trusts EPA, Loves the Clean Air Act, and Wants Congress to Butt Out*, GRIST (Feb. 17, 2011), https://grist.org/climate-policy/2011-02-16-public-trusts-epa-loves-clean-air-act-wants-congress-to-butt-out/ [https://perma.cc/XPT3-PPGR]; Alan H. Lockwood, *How the Clean Air Act Has Saved $22 Trillion in Health-Care Costs*, ATLANTIC (Sept. 7, 2012), https://www.theatlantic.com/health/archive/2012/09/how-the-clean-air-act-has-saved-22-trillion-in-health-care-costs/262071/ [https://perma.cc/4748-7NDM].

247. *See* STEPHEN ANSOLABEHERE & DAVID M. KONISKY, CHEAP AND CLEAN: HOW AMERICANS THINK ABOUT ENERGY IN THE AGE OF GLOBAL WARMING 1–6, 9 (2014) (documenting Americans' widespread preference for clean energy across political parties and geographies).

248. *See* Gabriel Pacyniak, *Making the Most of Cooperative Federalism: What the Clean Power Plan Has Already Achieved*, 29 GEO. ENVTL. L. REV. 301, 332 (2017) (describing how states pushed to ensure that the Obama administration's Clean Power Plan, created to tackle climate change under the Clean Air Act, meshed with preexisting state decarbonization strategies).

the GND might reap the most benefit by requiring state decarbonization plans. As with the ACA's experience of Medicaid expansion, under the Clean Air Act each state already has an agency that is adept at designing and enforcing state implementation plans for air quality.[249] To be sure, it may be more of a stretch to ask these state administrators to extend their expertise to climate change than it was to ask state Medicaid administrators to extend coverage to an additional population. But the novelty of designing climate change regulation is tempered by the fact that most states at least began planning for compliance with the Obama administration's now-defunct Clean Power Plan to address climate change[250]—a process that exposed these state regulators to the options and challenges for designing state-level decarbonization policy.

A Clean Energy Standard would have fewer, but still some, administrative entrenchment benefits. Given that twenty-nine states already have implementation experience, there would be readily transferable lessons and models to guide implementation in the remaining twenty-one states. Moreover, many of these programs track compliance through regional technology platforms, which might easily be extended to include other states within the same regional energy markets.[251] For all of these reasons, theories of administrative entrenchment—verified under hyperpartisan conditions by the ACA's experience—provide modest support for structuring the GND's decarbonization mandate as an outgrowth of the Clean Air Act's state implementation plans or state renewable portfolio standards. Especially given the stringent implementation timelines contemplated by the GND, a ready-made administrative apparatus operating at the state level might provide real benefits for rapid decarbonization.

There are also implementation risks to using state carbon plans or a Clean Energy Standard structure as a cornerstone, similar to those Medicaid expansion has faced through the creative use of

249. *See Find a State or Local Agency*, NACAA, http://www.4cleanair.org/agencies [https://perma.cc/9ESY-4HFH].

250. *See* Pacyniak, *supra* note 248, at 348 (noting that most states that opposed the Clean Power Plan in court still began planning for eventual state-level implementation—although, of course, we cannot know if they ultimately would have filed the requisite state implementation plans).

251. *See* ROBIN QUARRIER & DAVID FARNSWORTH, CTR. FOR RES. SOL'NS, TRACKING RENEWABLE ENERGY FOR THE U.S. EPA'S CLEAN POWER PLAN 5–8 (2014).

waivers. One risk comes from the flexibility that these programs might give to states in crafting their compliance strategies. Under state-level portfolio standards, certain states have chosen to leniently define what counts as "renewable" in order to favor local industries—even though researchers have raised questions about the sustainability of certain "clean" energy sources, including hog waste, poultry waste, and forest products.[252] Drafters of the GND would thus want to think carefully about what bounds to place on states' discretion in designing decarbonization plans. It can be tricky to parse "good" state experimentation from "bad,"[253] but the ACA's experience of waivers shows how many efforts to "experiment" may in fact be efforts to water down federal mandates. Accordingly, drafters of a federal decarbonization scheme that utilizes state implementation plans or state-determined portfolios should define with some rigor at the federal level the criteria that allow a resource to count as "clean," and should establish robust monitoring and verification schemes to ensure that claimed carbon pollution reduction efforts translate into reductions in practice.[254]

252. *See* Davies, *State Renewable Portfolio Standards*, *supra* note 243, at 14, 24–26 (describing divergences among state standards); Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1361 (2010); *see also* MD. CODE ANN., PUB. UTIL. § 7-701(j), (l) (defining poultry litter, which is used in thermal biomass systems); N.C. GEN. STAT. § 62-133.8(e) (establishing a specific requirement for swine waste); David Anderson, *Harford Environmental Advocates Push to Remove Chicken Waste as Alternative Energy Source*, BALT. SUN (Nov. 24, 2015, 5:19 PM), https://www.baltimoresun.com/maryland/harford/aegis/ph-ag-chicken-manure-energy-protest-1127-20151124-story.html [https://perma.cc/RV2M-SY5H]; Andrew Steer & Craig Hanson, *Biofuels Are Not a Green Alternative to Fossil Fuels*, GUARDIAN (Jan. 29, 2015. 9:06 AM), https://www.theguardian.com/environment/2015/jan/29/biofuels-are-not-the-green-alternative-to-fossil-fuels-they-are-sold-as [https://perma.cc/Y4MM-TS8T]; Elizabeth Ouzts, *Hog Waste-to-Gas: Renewable Energy or More Hot Air?*, ENVTL. HEALTH NEWS (Nov. 16, 2017), https://www.ehn.org/turning-pig-and-hog-farms-waste-into-biogas-2505936626.html [https://perma.cc/VK9Y-GK6U]; Sara Peach, *What to Do About Pig Poop? North Carolina Fights a Rising Tide*, NAT'L GEOGRAPHIC (Oct. 30, 2014), https://www.nationalgeographic.com/news/2014/10/141028-hog-farms-waste-pollution-methane-north-carolina-environment/ [https://perma.cc/D49Q-6JM8].

253. *See* Livermore, *supra* note 228, at 638 (illustrating how decentralized policy experimentation "can be a mixed blessing that brings mischief along with insight," such that "policy learning is not an unalloyed advantage of decentralization"); *see also* Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1121–22 (2018) (arguing that experimentation does and should occur at the federal level as well).

254. *See* Michael Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, 55 UCLA L. REV. 1759, 1781 (2008) (explaining how the international climate regime has suffered from "strategic manipulation"); Holly Doremus, *Adapting to Climate Change with Law That Bends Without Breaking*, 2 SAN DIEGO J. CLIMATE & ENERGY L. 45, 54 (2010) ("The most powerful way to combat slippage is to erect sturdy, inflexible oak-like mandates.").

Alternatively, these risks may counsel in favor of designing an entirely federalized Clean Energy Standard, which might harness the political popularity of similar state-level policies without the costs of allowing continued state implementation.

There is, however, a deeper political risk to building the GND upon one of these entrenched programs that must be acknowledged, and is absent in the health care context. The ACA's Medicaid expansion was a (seemingly) straightforward extension of preexisting programs to new populations. The GND, in contrast, seeks to accomplish something quite *different* with environmental policy, by integrating it with efforts to combat inequality. Accordingly, there could be supporters of the GND who feel alienated by the choice of building upon preexisting structures that have not previously focused on distributive justice.[255] But the ACA's experience at least suggests real political and administrative benefits from using multiple preexisting structures, including environmental, housing, and health agencies, to tackle these multifaceted goals, rather than designing new programs or agencies from scratch.

These risks could also be mitigated through complementary efforts to broaden existing agencies' missions to more overtly include distributive justice. As an example of what such efforts might resemble, Representative Alexandria Ocasio-Cortez and then-Senator Kamala Harris introduced a "Climate Equity Act" in July 2019, which would require all climate and environmental bills to have an "equity scor[e]," and would create an oversight office to ensure agencies' more intentional consideration of equity in climate and environmental rules and regulations.[256] These kinds of reforms,

255. There is at least a weak environmental justice mandate in federal environmental law, as Executive Order 12,898 instructs agencies to "identif[y] and address[] . . . [the] disproportionately high and adverse human health or environmental effects of [their] . . . activities on minority populations and low-income populations . . . ." Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). But there is an entire field of environmental justice devoted to understanding why environmental law, on the whole, has produced disparate impacts that have not brought as many gains—and in some cases, have concentrated harms—in low-income communities and communities of color. *See, e.g.*, ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (3d ed. 2000); LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001).

256. Valerie Volcovici, *Harris, Ocasio-Cortez Float Plan to Lift Low-Income Communities in Climate Plans*, REUTERS (July 29, 2019, 3:58 PM), https://www.reuters.com/article/us-usa-congress-climatechange/harris-ocasio-cortez-float-plan-to-lift-low-income-communities

which would (if adopted and enforced) percolate through traditional energy and environmental administration, could help alleviate concerns about using entrenched environmental federalist structures to accomplish decarbonization under the GND.

## CONCLUSION

A decade after its passage, the ACA's reach is far from complete and its legal future remains precarious. Yet gains continue to be made on the statute's goal of bringing health insurance to all Americans, as Republican states under mounting internal political pressure slowly creep into the statute's folds. Given its accretive, decidedly nonlinear path to increasing health care coverage, the ACA offers particularly important lessons for modern legislative drafters who want their programs not only to pass, but to succeed throughout implementation. In both its strengths and weaknesses, the ACA's experience is telling with respect to the possibilities and challenges of making federalism work to achieve social justice goals under contemporary hyperpartisan conditions.

We have argued here that the decade of ACA implementation has revealed important lessons for statutory design with respect to federal funding, modern coalition-building strategies, and the benefits and costs of building new programs on the backs of entrenched ones. And we have sketched how these lessons might be applied in other contexts, using the astoundingly ambitious GND agenda as a case study in how to usefully translate the ACA's lessons into other social justice fields.

These lessons may not be enough to achieve progress across many issues in the current gridlocked Congress, or to ensure durability under the vicissitudes of the current Supreme Court. Thoughtful statutory structure cannot cure all woes. But if and when social justice legislation of the scope and scale of the ACA or GND is on the table again, these lessons may help to build new statutory structures that spread as widely as is possible in our current hyperpartisan, federalist climate.

-in-climate-plans-idUSKCN1UO259 [https://perma.cc/GW6E-M9YY]; *Comment Submissions for the Climate Equity Act*, CONGRESSWOMAN ALEXANDRIA OCASIO-CORTEZ, https://ocasio-cortez.house.gov/climateequityact [https://perma.cc/HZ38-7WKG].