FEDERALISM UNDER OBAMA

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  Seth Davis, Abbe Gluck, John McGinnis, Trevor Morrison, and Erin Ryan for their helpful
  comments and to Matthew Huppert, Kristin Olson, and Katherine Terrell for excellent
  research assistance.
INTRODUCTION

At first glance, federalism would seem to have fared poorly under the Obama administration. The administration’s signature achievements to date involve substantial expansions of the federal government’s role, be it through new federal legislation addressing health insurance and financial sector reform or massive injections of federal spending. Such expansions in the federal government’s role frequently translate into restrictions on the states. New federal legislation often preempts prior state regulation, and federal spending often comes with substantial conditions and burdens for the states. Not surprisingly, many state officials have sharply criticized these developments at the federal level, often invoking federalism as their fighting flag.

Yet the story of federalism’s fate under the Obama administration is not so simple. To be sure, these national developments entail some preemption and new state burdens. But each also has brought with it significant regulatory and financial opportunities for the states. States play a pivotal role in implementing the new federal health insurance legislation, with responsibilities ranging from creating and operating the health insurance exchanges to overseeing premium rate increases to running expanded Medicaid pro-


2. The most prominent opposition to the ACA has taken the form of lawsuits, brought by state governors and attorneys general among others, alleging that key provisions exceed Congress’s commerce, spending, and tax powers and violate the Tenth Amendment. See infra note 27. Several Republican governors—most prominently Bobby Jindal of Louisiana, Rick Perry of Texas, and Mark Sanford of South Carolina—also protested the federal government’s use of stimulus funds, both generally and in the context of specific programs such as Race to the Top. See Michael Luo, Jobless Angry at Possibility of Losing Out on Benefits, N.Y. TIMES, Feb. 27, 2009, at A13 (reporting that nine Republican governors protested receipt of federal stimulus funds); Letter from Rick Perry, Gov. of Tex., to Arne Duncan, U.S. Sec’y of Educ. (Jan. 13, 2010), available at http://governor.state.tx.us/files/press-office/O-DuncanArne 201001130344.pdf (“Texas will not be submitting an application for RTTT funds.”).
grams. States also have increased regulatory responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which takes a notably restrictive approach to preemption. Preemption by federal administrative agencies has been further curtailed by President Obama’s Preemption Memorandum, issued early in his administration, instructing agencies that preemption “should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.” Furthermore, a substantial amount of the stimulus funding went to the states, cushioning the effects of the financial crisis on state employment and operations and representing the greatest increase in flexible federal financial aid to the states in thirty years.

Rather than assertions of federal power at the expense of the states, the central dynamic evident under the Obama administration to date is more active government, at both the national and state level. States are given significant room to shape their participation in the new federal initiatives, as well as enhanced regulatory authority and expanded resources to do so. States that are eager to play a greater regulatory role and support the new federal policies therefore have much to gain. But states that choose to stay on the sidelines face the prospect of direct federal intervention or loss of access to substantial federal funds, and their ability to pursue their preferred regulatory (or deregulatory) strategies may be curtailed. Put differently, federalism under the Obama administration is federalism in service of progressive policy, not a general devolution
of power and resources to the states. Some might dispute that granting states a role to play in advancing a policy agenda emanating from Washington represents federalism at all. At a minimum, the Obama administration experience puts front and center the debate over whether federalism has any principled, apolitical basis or is instead simply invoked when it serves to advance a favored political result. Yet this experience also suggests that, even in areas in which the national government has constitutional authority to set policy and federalism operates at best as a second-order concern, the result can still be substantial and potentially lasting protection of state authority.

Equally significant, the experience so far under the Obama administration highlights the central importance of the administrative sphere to modern-day federalism. Critical decisions about the actual scope of state powers and autonomy will be made not in Congress or in the courts, but in the halls of agencies like the Department of Health and Human Services (HHS) and the Department of Education. True, federal administrative agencies have long had substantial power over the shape of nation-state relationships, but the recent regulatory developments expand that power considerably. Indications so far suggest that federal agencies have pulled back from more aggressive preemption practices and are

9. The Obama administration’s affinity with the “progressive federalism” movement was noted early on. See John Schwartz, Obama Seems To Be Open to a Broader Role for the States, N.Y. Times, Jan. 29, 2009, at A16 (describing this movement as one “in which governors and activist state attorneys general have been trying to lead the way on environmental initiatives, consumer protection, and other issues”). See generally Symposium, Progressive Federalism, 3 HARV. L. & POL’Y REV. 1 (2009).

10. See infra text accompanying notes 181-82.

11. For arguments that federalism does not have an apolitical basis, see Frank B. Cross, Realism About Federalism, 74 N.Y.U. L. REV. 1304, 1307 (1999) (“[F]ederalism is consistently (and I contend inherently) employed only derivatively, as a tool to achieve some other ideological end.”); Neal Devins, The-Judicial Safeguards of Federalism, 99 NW. U. L. REV. 131, 137 (2004) (“Elected officials invoke federalism when it comports with their substantive policy preferences, but they otherwise do not care about the federal-state balance.”); see also Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. REV. 903, 914 (1994) (“[M]any standard arguments advanced for federalism are clearly nothing more than policy arguments for decentralization.”).

12. See infra text accompanying notes 190-96.

13. See infra Part II.B.

allowing states to exercise genuine implementation discretion—indeed at times actively soliciting state partnerships.\footnote{15}

A particularly interesting feature of the Obama administration initiatives, moreover, is their use of administrative structures that not only deeply embed the states in federal program implementation but also give the states a role in setting the content of federal regulatory standards and even overseeing federal agency performance.\footnote{16} These structures raise the question of how institutional design can be used to foster greater administrative attentiveness to federalism concerns, as well as underscore the role states can play in reforming federal agencies.\footnote{17} These structures also highlight the important role that administrative law can play in supplementing political and administrative checks on federal overreaching.\footnote{18}

In Part I of what follows, I begin by describing three major legislative initiatives under the Obama administration that have substantial federalism implications: the Patient Protection and Affordable Care Act, Dodd-Frank, and the federal stimulus (officially known as American Reinvestment and Recovery Act), with particular focus on the use of stimulus funds in the Department of Education’s Race to the Top program. I also describe significant moves the administration has made on the preemption front, both restricting and supporting preemption claims. In Part II, I assess the implications of these developments for federalism, emphasizing both the central pro-regulatory dynamic and the critical importance of administrative federalism.

\section*{I. Four Federalism Developments}

The most notable federalism developments under the Obama administration have occurred largely in the legislative sphere. This Part offers a description of three major pieces of legislation—the health insurance and financial sector reform measures and the Recovery Act—that are particularly significant from a federalism perspective. It also details related administrative developments.

\footnote{15. See infra Part II.B.}
\footnote{16. See infra text accompanying notes 201-06, 212-20.}
\footnote{17. See infra text accompanying notes 212-16.}
\footnote{18. See infra text accompanying notes 221-23.}
that have had substantial impact on the states, including the 
Department of Education’s Race to the Top program and the 
administration’s position on preemption.

A. The Affordable Care Act and Health Insurance Reform

Perhaps the signal achievement of the Obama administration to 
date is the Patient Protection and Affordable Care Act of 2010, 
known as the Affordable Care Act or ACA for short. The ACA 
undertakes a major overhaul of health insurance, imposing sub-
stantial new federal requirements and expanding health insurance 
to 32 million of the nation’s 55 million uninsured. Critical features 
of the legislation include: prohibitions on insurance companies 
discriminating against individuals based on preexisting conditions 
or imposing caps on benefits; a requirement that individuals pur-
chase insurance along with premium subsidies for those below cer-
tain income thresholds; regulation of insurance premium increases 
and the amount insurance companies spend on non-medically 
related expenses; expansion of Medicaid to cover all individuals 
under 133 percent of the poverty line; extension of children’s 
eligibility for insurance under their parents until the age of 26;

19. Or as “ObamaCare” by conservatives, which though ideologically laden does convey 
the measure’s importance to the administration. See, e.g., Pam Bondi, Op-Ed., The State 

Pelosi, Speaker, U.S. House of Representatives 9-10 (Mar. 20, 2010) [hereinafter CBO Pelosi 
estimating ACA’s effect on insurance coverage).

codified at 42 U.S.C. §§ 300gg, 300gg-1, and 300gg-3) (coverage for preexisting conditions, 
mandating guaranteed issue of insurance, and limiting factors on which premium can be set 
to family size, age, tobacco use, and community rating); id. sec. 1001, § 2711, 124 Stat. at 131 
(prohibiting “lifetime limits” and “unreasonable annual limits” on dollar value of benefits).

22. See id. sec. 1501, 124 Stat. at 242-49 (to be codified in scattered sections of 26 and 42 
U.S.C.) (individual mandate); id. secs. 1401, 1402, 124 Stat. at 213-24 (tax credits and reduced 
cost-sharing).

(prohibiting discriminatory premium rates); id. sec. 1001, § 2718, 124 Stat. at 136-37 
(requiring insurance companies to spend less than 20-25 percent of premium revenue on “non-
claims costs”).


and the creation of new health exchanges that the states will run.\textsuperscript{26} Of these, the requirement that individuals obtain a minimum level of health insurance—popularly referred to as the individual mandate—has generated the most attention and attack. Based on health insurance reforms adopted by Massachusetts in 2006, this requirement has provoked numerous lawsuits, including one by Virginia and another by a group of twenty-six states filed in Florida, all alleging that it exceeds the scope of Congress’s constitutional authority.\textsuperscript{27}

Despite this attention and constitutional federalism focus, the minimum coverage requirement is not the ACA provision that on its face is of greatest significance to the states.\textsuperscript{28} Although it preempts state legislation stipulating that individuals should not have to obtain insurance,\textsuperscript{29} the requirement applies to individuals rather


\textsuperscript{27} See Virginia v. Sebelius, 656 F.3d 253 (4th Cir. 2011) (concluding Virginia lacks standing to challenge the mandate and dismissing Virginia’s suit); Florida v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1306, 1320 (11th Cir. 2011) (holding that the individual mandate exceeds Congress’s commerce and tax powers); see also Liberty Univ. v. Geithner, No. 10-2347, 2011 WL 2962915, at *1 (4th Cir. Sept. 8, 2011) (dismissing challenge to the mandate as exceeding Congress’s powers after concluding challenge was a pre-enforcement action seeking to restrain assessment of a tax and barred by the Anti-Injunction Act); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 534 (6th Cir. 2011) (holding the mandate is a valid exercise of the commerce power). I have argued elsewhere that the mandate is a constitutional exercise of Congress’s tax, commerce, and necessary and proper powers. See, e.g., Brief of Constitutional Law Professors as Amici Curiae Supporting Defendants-Appellees, Thomas More Law Ctr., 651 F.3d 529 (No. 10-2388), 2011 WL 1653754; Gillian Metzger, Our Pending National Debate: Is Healthcare Reform Constitutional? Remarks at the Hot Topic Panel Discussion for the AALS Annual Meeting (Jan. 7, 2011), in 62 Mercer L. Rev. 633, 633-38 (2011).

\textsuperscript{28} Indeed, the challenge to the requirement individuals must purchase insurance as being outside of Congress’s enumerated powers appears at base animated by individual liberty concerns. See Thomas More Law Ctr., 651 F.3d at 565 (Sutton, J., concurring in the judgment) (suggesting that limitations on Congress’s power to compel activities are better rooted in due process); see also Bond v. United States, 131 S. Ct. 2355, 2364 (2011) (emphasizing the connection between federalism and individual liberty).

\textsuperscript{29} As of July 2011, eleven states have adopted such measures, either in anticipation of the ACA or in response to it. See Richard Cauchi, State Legislation and Actions Challenging Certain Health Reforms, 2011, Nat’l Conference of State Legislatures, http://www.ncsl.org/?tabid=18906#New_laws (last updated July 12, 2011).
than to the states themselves. Instead, the ACA provisions with
greatest direct impact on the states are the substantial expansion
of Medicaid and the creation of the health exchanges.\textsuperscript{30} The
expansion of those eligible for Medicaid will add 16 million to the
Medicaid rolls.\textsuperscript{31} Ordinarily, states are required to pay a substantial
part of Medicaid costs, with the federal-matching percentage
varying by state. But the federal government will pay the vast
majority of the costs attributable to the ACA’s expansion of the
Medicaid rolls, starting at 100 percent in 2014 and declining to 90
percent in 2020 and subsequent years.\textsuperscript{32} The federal government’s
covering of these costs represents a significant legislative victory for
the states.\textsuperscript{33} However, states still face greater administrative costs
as well as eventually 10 percent of new coverage costs. Furthermore,

\textsuperscript{30} As employers with more than fifty employees, states must provide qualifying health
insurance to their employees or pay an amount per employee, but that requirement is
generally true of employers of that size and is not specific to the states. \textit{See ACA sec. 1513,
124 Stat. at 253-56} (to be codified in scattered sections of 26 U.S.C.); \textit{see also id. sec. 1511, 124
Stat. at 252} (to be codified at 29 U.S.C. § 218A) (requiring employers of two hundred or more
employees to automatically enroll new employees in health insurance if the employers offer
health insurance to existing employees).

\textsuperscript{31} \textit{See KAISER COMM’N ON MEDICAID \\& THE UNINSURED, HENRY J. KAISER FAMILY FOUND.,
MEDICAID COVERAGE AND SPENDING IN HEALTH REFORM: NATIONAL AND STATE BY STATE
RESULTS FOR ADULTS AT OR BELOW 133% FPL 2 (2010), available at http://www.kff.org/
healthreform/upload/Medicaid-Coverage-and-Spending-in-Health-Reform-National-and-State-
By-State-Results-for-Adults-at-or-Below-133-FPL.pdf; Benjamin D. Sommers \\& Arnold M.
Epstein, Medicaid Expansion—The Soft Underbelly of Health Care Reform?, 363 NEW ENG.
J. MED. 2085, 2085 (2010); CBO Pelosi Letter, supra note 20, at 9.

\textsuperscript{32} States that had previously extended coverage to include individuals and families up
to 133 percent of the poverty line also get substantial subsidization of their efforts, though
slightly less than those states that had not previously expanded; their rate will be 93 percent
in 2014 and will similarly decline to 90 percent in 2020. \textit{See HENRY J. KAISER FAMILY FOUND.,
SUMMARY OF NEW HEALTH REFORM LAW 1-2} (Mar. 26, 2010) [hereinafter KFF HEALTH LAW
SUMMARY], available at http://www.kff.org/healthreform/upload/8061.pdf; \textit{see also THE HENRY
J. KAISER FAMILY FOUND., FINANCING NEW MEDICAID COVERAGE UNDER HEALTH REFORM: THE
healthreform/upload/8072.pdf (estimating that, in practice, the federal government will pay
for 96 percent of Medicaid expansion over the next ten years). The ACA also extends the state
Children’s Health Insurance Program (CHIP) and expands the federal contribution rate by
23 percent in 2015. \textit{See ACA sec. 2101, 124 Stat. at 286-88} (to be codified in scattered sections
of 42 U.S.C.); KFF HEALTH LAW SUMMARY, supra, at 2.

\textsuperscript{33} \textit{See John Dinan, State Government Influence in the Congressional Policy Process: The
Case of Health Care Legislation in the 111th Congress 6-8, 16-18, 26-32} (2010) (unpublished
clearest and most significant instance of state officials’ influence was their success in securing
more federal funding for individuals who were made eligible by the expansion of Medicaid.”).
they are required to maintain their existing Medicaid and Children’s Health Insurance Program (CHIP) eligibility and benefit levels as a condition of receiving Medicaid funding. Concerns about these additional costs have led some state legislators to raise the possibility of leaving Medicaid, and the Florida litigation challenged the Medicaid expansion as unconstitutionally coercive.

The health exchanges—formally, American Health Benefit Exchanges—are a centerpiece of the ACA’s effort to expand access to health insurance. The exchanges are initially aimed at people employed by small businesses or purchasing insurance individually, with the goal of making insurance more affordable and accessible by grouping together larger groups of enrollees. The Act envisions that states will run the exchanges but provides for the federal government to operate the exchange in a state if the state fails to do so. Alternatively, a group of states can opt to operate a regional exchange, or a state can choose to operate different exchanges in

34. See ACA sec. 2001(b)(2), 124 Stat. at 275-76 (to be codified at 42 U.S.C. § 1396a); id. sec. 2101(b)(1), 124 Stat. at 286-87 (to be codified at 42 U.S.C. 1397ee(d)) (requiring “maintenance of effort” in Medicaid and CHIP coverage for states to receive federal subsidies); EVELYNE BAUMRUCKER & BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., MEMORANDUM REGARDING VARIATION IN ANALYSES OF ACA’S FISCAL IMPACT ON STATES 4-7 (2010), available at http://www.docstoc.com/docs/58319559/crs-state-impact-of-PPACA (summarizing ACA provisions with potential state cost implications); see also Elizabeth Weeks Leonard, Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform, 39 HOFSTRA L. REV. 111, 137 (2010) (“States also face additional administrative requirements under ACA to coordinate Medicaid enrollment with other government and private health insurance plans.”).


38. See ACA sec. 1311(b), 124 Stat. at 173-74 (to be codified at 42 U.S.C. § 18031) (requiring states to establish health benefit exchanges). If HHS determines by January 1, 2013, that a state has failed to take necessary steps to create an exchange, HHS must create an exchange itself or contract with a nonprofit to do so. See id. sec. 1321(c), 124 Stat. at 186-87 (to be codified at 42 U.S.C. § 18041).
different parts of the state.\footnote{39} HHS’s proposed regulations also offer states the option of partnering with the federal government to run the exchange.\footnote{40} This reliance on state-run exchanges marks a significant difference between the Senate bill that became the ACA and the earlier House version.\footnote{41} The latter had assigned primary responsibility for operating a national uniform exchange to the federal government, with states allowed to opt in to operate state-based exchanges if they met federal requirements.\footnote{42} State officials lobbied strongly for state-based exchanges and for states to retain broad regulatory authority over insurance.\footnote{43}

The ACA stipulates some features of how the exchanges will function: it requires exchanges to offer four tiers of insurance plans and a catastrophic plan;\footnote{44} certify health plans for participation based on federal criteria;\footnote{45} run call centers and maintain a website that provides comparative data on plans and a calculator by which consumers can calculate actual costs;\footnote{46} determine eligibility for

\footnote{39. \textit{See id.} sec. 1311(f)(1), 124 Stat. at 174 (to be codified at 42 U.S.C. § 18031) (allowing states to establish “[r]egional or other interstate exchanges”); \textit{id.} sec. 1333(a), 124 Stat. at 206-07 (to be codified at 42 U.S.C. § 18053) (providing for “health care choice compacts” whereby states may agree to offer “1 or more qualified health plans ... in the individual markets in all such States”).}


\footnote{41. \textit{See Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009).}}

\footnote{42. \textit{See id.} § 301 (proposing a national health insurance exchange run by the newly created Health Choices Administration); \textit{id.} § 308 (proposing optional operation of state-based health insurance exchanges); \textit{see also} America’s Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. §§ 201, 208 (2009) (making the same proposals); Dinan, \textit{supra} note 33, at 35 (noting that state officials persuaded lawmakers to allow state-run exchanges “due largely to congress members’ recognition of state experience and expertise in this area”).}

\footnote{43. Dinan, \textit{supra} note 33, at 9, 12-13, 35; \textit{see also} Reed Abelson, \textit{Proposals Clash on States’ Roles in Health Plans}, N.Y. TIMES, Jan. 14, 2010, at B1 (“State regulators, too, argue that their role [in establishing exchanges] is essential.”); Abbe R. Gluck, \textit{A Federalism Agenda for the Age of Statutes: Intrastatutory Federalism in Health Reform and Beyond}, 121 YALE L.J. (forthcoming 2011) (manuscript at 29) (on file with author) (“[T]he state/federal implementation balance ... was the key question that divided the House and Senate versions of the legislation, and ultimately giving the states the leadership role was the ‘deal breaker.’”).}

\footnote{44. \textit{See KFF Health Law Summary, supra note 32, at 5.}}

\footnote{45. \textit{See ACA sec. 1311(d)(4)(A), (e), 124 Stat. at 176-79 (to be codified at 42 U.S.C. §18031).}}

\footnote{46. \textit{See id. sec. 1311(d)(4)(B)-(C),(G), 124 Stat. at 176-77 (to be codified at 42 U.S.C. §}}
public support, such as Medicaid and premium subsidies, as well as enroll eligible individuals;\textsuperscript{47} and certify if individuals are eligible for exemptions from the coverage requirement.\textsuperscript{48} But it also leaves many details about how the exchanges will operate up to HHS and the states.\textsuperscript{49} One critical feature in the states’ control concerns the form that health plan certification takes. States can use certification as a mechanism by which to negotiate prices and benefits with insurers, as Massachusetts currently does. Alternatively, following Utah’s lead, they could broadly certify any plan providing the minimum benefits required, leaving price and benefit coverage to be determined by the market. They can also choose an approach somewhere between these extremes.\textsuperscript{50} States can also choose the governance structure the exchange will take, in particular whether to create the exchange as a governmental agency or as a nonprofit organization.\textsuperscript{51} States can apply for funding from HHS to help cover the substantial costs involved in getting the exchanges operational, but the exchanges are required to be financially self-sustaining by 2015.\textsuperscript{52}

\textsuperscript{47} See id. sec. 1311(d)(4)(F), 124 Stat. at 177 (to be codified at 42 U.S.C. § 18031).

\textsuperscript{48} See id. sec. 1311(d)(4)(H), 124 Stat. at 177 (to be codified at 42 U.S.C. § 18031); see generally id. secs. 1302(b), 1321 (to be codified in scattered sections of 42 U.S.C.); Planning and Establishment of State-Level Exchanges, Request for Comments, 75 Fed. Reg. 45,584, 45,585-86 (Aug. 3, 2010) (to be codified at 45 C.F.R. pt. 170) (outlining statutory requirements of health exchanges); Dep’t of Health & Human Servs., supra note 37 (providing policy guidance for implementation of exchanges).


\textsuperscript{52} ACA sec. 1311(a), (d)(5)(A), 124 Stat. at 173, 178 (to be codified at 42 U.S.C. § 18031).
As a result of their control over health exchanges, the states will have substantial influence over the shape that the ACA takes on the ground. States and state officials play important roles in other respects as well.\textsuperscript{53} Along with HHS, state insurance commissioners and the exchanges are charged with enforcing substantive protections contained in the ACA and HHS regulations against insurance companies, such as prohibitions on discriminating against preexisting conditions and on unreasonable premium increases.\textsuperscript{54} In some states, such enforcement may require changes in state law to ensure that state commissioners are authorized to enforce federal requirements.\textsuperscript{55} An organization of state officials, the National Association of Insurance Commissioners (NAIC), is also assigned significant responsibilities under the Act. In particular, NAIC determines what expenses count as medically related for purposes of deciding whether insurers are failing to spend an adequate amount on health care and, as a result, owe policyholders rebates.\textsuperscript{56}


\textsuperscript{55} See Letter from Jane Cline, President, Nat’l Ass’n of Ins. Comm’rs, to Kathleen Sebelius, Sec’y, U.S. Dep’t of Health & Human Servs. (Aug. 5, 2010), available at http://www.naic.org/documents/index_health_reform_section_letter_kathleen_sebelius.pdf (reporting NAIC survey indicating that half of states had the general ability to enforce federal law and almost all states could hold insurers accountable for compliance with federal requirements by other means, such as their power to approve insurance forms).

\textsuperscript{56} See ACA sec. 1001, § 2718(d), 124 Stat. at 137 (to be codified at 42 U.S.C. § 300gg-18) (requiring Secretary to define what costs are medically related “in consultation with the National Association of Insurance Commissioners”). HHS recently issued an interim final rule largely deferring to NAIC’s determinations. See Robert Pear, \textit{New Rules Tell Insurers: Spend More on Care}, \textit{N.Y. Times}, Nov. 23, 2010, at A22 ("The rules generally follow recommendations from the [NAIC]."). For the text of the interim final rule, see generally Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the
HHS is instructed to consult with NAIC and other state stakeholders on a variety of issues central to the ACA’s implementation and has undertaken weekly phone calls open to all the states as well as numerous meetings with state officials. 57

The Act also grants states significant flexibility and freedom to experiment. Starting in 2017, they can apply for a waiver from many of the ACA’s requirements, and legislation is pending that would move up the availability of waivers to 2014, when many of the ACA’s requirements for the states go into effect. 58 The ACA pre-empts state laws only to the extent they prevent application of the ACA’s requirements, and thus states are free to add additional protections for consumers. 59 States can also choose to require plans to provide additional benefits beyond the essential health benefits specified by HHS, but if they do so they must cover the cost of those additional benefits for those individuals participating in the exchanges. 60 How much flexibility the states actually have in practice will depend to a large degree on HHS, which has authority to issue regulations on a number of issues of particular importance to the states—such as requirements that state health exchanges must meet to be deemed adequate and the content of essential health


59. See ACA sec. 1321(d), 124 Stat. at 187 (to be codified at 42 U.S.C. § 18041); NAIC, PREEMPTION, supra note 58, at 1 (“If a state already has a requirement that at least meets the federal standards, or adopts one in the future, then it would retain the authority to enforce it.”).

benefits—which will determine the amount states must pay to subsidize any additional state mandates.\footnote{61. See id. sec. 1302(b), 124 Stat. at 163-65 (to be codified at 42 U.S.C. § 18022) (requiring Secretary to define essential health benefits); id. sec. 1311(c), 124 Stat. at 174-75 (to be codified at 42 U.S.C. § 18031) (requiring Secretary to set standards for certification of health plans); id. sec. 1311(d)(3), 124 Stat. at 196 (requiring the states to cover cost of mandated benefits above essential benefits).}

States’ responses to the ACA to date have varied tremendously. A number of states have joined the litigation challenging its constitutionality,\footnote{62. Or more accurately, a number of state attorneys general and governors have brought challenges; in several states, the Attorney General and Governor disagree on the Act’s constitutionality, and only one official is participating. See, e.g., Tim Hoover, Ritter Among Dem Governors in Battle over Health Care Law, DENVER POST, Oct. 16, 2010, at B1 (noting this disagreement in Colorado, Michigan, Pennsylvania, and Washington); Josh Goodman, Health Care Tests the Independence of Attorneys General, GOVERNING POLITICS BLOG (Mar. 25, 2010), http://www.governing.com/blogs/politics/Health-Care-Tests-the.html (comparing disagreement in Michigan between pro-lawsuit Attorney General and anti-lawsuit Governor with disagreement in Georgia between pro-lawsuit Governor and anti-lawsuit Attorney General).} but until recently most states appeared to be preparing to implement at least some of the ACA’s requirements.\footnote{63. See Kenen, supra note 53, at A15 (“There is an understanding that opposition does not equal no one getting to work on this.” (quoting Alan Weil, Exec. Dir., Nat’l Acad. for State Health Policy)). According to HHS, by July 2011 forty-nine states had accepted federal grants to help plan and operate health exchanges and over half had taken additional implementing action. See U.S. Dep’t of Health & Human Servs., Newsroom, Affordable Insurance Exchanges: States Are Leading the Way, HEALTHCARE.GOV (July 11, 2011), http://www.healthcare.gov/news/factsheets/exchanges07112011d.html. Yet resistance to taking federal funding for ACA implementation efforts appears to be growing. See Thomas Kaplan, G.O.P. Senators in Albany Block Federal Aid To Fulfill Part of Health Law, N.Y. TIMES, Sept. 11, 2011, at A18.} States are most engaged with preparing for the Medicaid expansion, which can start in 2011 but must occur by 2014.\footnote{64. See ACA sec. 2001(a)(1), 124 Stat. at 271 (to be codified at 42 U.S.C. § 1396) (requiring expansion by January 1, 2014); id. sec. 2001(a)(4), 124 Stat. at 274 (to be codified at 42 U.S.C. § 1396(a)) (allowing state expansion as early as January 1, 2011).} Some states are also taking a lead on developing health exchanges and implementing other features of the Act, such as the high-risk insurance pools that have already gone into effect.\footnote{65. See Walecia Konrad, High-Risk Insurance Pools To Begin Next Month, N.Y. TIMES, June 26, 2010, at B6 (noting thirty states had opted to run high-risk insurance pools); Jessica B. Mulholland, A National Model?, GOVERNING, Nov. 2010 (noting California’s pioneering efforts in establishing its health exchange).} Others, however, are significantly less active. Twenty-three states, for example, declined to set up a high-risk pool, leaving HHS with the task of administer-
ing the pool for residents of these states. In addition, suggestions of increased resistance to implementation are surfacing. Several states have indicated they will not operate health exchanges, and by mid-2011 only twelve states have legislation in place authorizing a state exchange. Some others are now taking a much slower approach toward implementation and are favoring a more minimalist exchange model. By contrast, Vermont recently adopted legislation adopting a single-payer health system.

B. Dodd-Frank and Financial Sector Reform

States are less critical to direct implementation of financial sector reforms enacted under the Dodd-Frank Act. The primary focus of Dodd-Frank is on reforming the structure and authority of federal financial regulators. For example, Dodd-Frank creates a Financial Stability Oversight Council (FSOC), charged with identifying and responding to risks to the stability of the nation’s financial system.


67. See Robert Pear, Obama Administration Rolls Out Standards for Health Insurance Marketplaces, N.Y. TIMES, July 12, 2011, at A12 (reporting that measures to create exchanges failed in another nine states, based on data from the National Conference of State Legislatures); Jennifer Haberkorn & Sarah Kliff, Jindal: No Exchange Here—E&C To Move on Med-Mal Bill-Pro-Reformers: Senior Day-NGA Move on Medicaid Flexibility Task Force, POLITICO (Apr. 7, 2011, 11:28 AM), http://www.politico.com/politicopulse/0311/politicopulse 461.html (stating that Louisiana and Florida definitely do not plan on implementing health insurance exchanges and that Montana, Georgia, and Alaska are likely to follow suit); see also Kaplan, supra note 63, at A18 (noting several states are returning or rejecting federal funds to assist with setting up exchanges).

68. See Joe Carlson, Minnesota Work-Around, MODERN HEALTHCARE (Oct. 18, 2010), http://www.modernhealthcare.com/article/20101018/MAGAZINE/101019978 (chronicling effort by Minnesota trade associations and state agencies to circumvent Governor Tim Pawlenty’s opposition and send a comment letter to HHS regarding structure of health exchanges); Kevin Sack, Republicans Rise to Power, With Enmity for Health Law, N.Y. TIMES, Nov. 18, 2010, at A13 (“[I]n the 20 states that will have a unified Republican government, up from only nine today, Republicans can be expected to embrace a less regulatory and more market-driven approach.”).

69. See David Goodman, Vermont Passes Single Payer Care, World Doesn’t End, MOTHER JONES, May 30, 2011, http://motherjones.com/politics/2011/05/vermont-single-payer-healthcare. For the single-payer system to go into effect, HHS will need to grant Vermont a waiver from the ACA’s requirements. See id.

and provides federal regulators with resolution authority for systemically important firms in danger of defaulting. Yet even in these contexts state officials are given a role to play. The Secretary of the Treasury chairs the FSOC, which consists of the chair or leader of the main federal financial agencies, such as the Federal Reserve, the Securities and Exchange Commission, and the Office of the Comptroller of the Currency (OCC). However, three state officials—a banking supervisor, an insurance commissioner, and a securities commissioner—are nonvoting members of the FSOC and must be allowed to participate in its meetings and deliberations unless a majority of the FSOC votes to exclude them to safeguard confidential information and the Secretary of Treasury, as chair, agrees.

The states are particularly important in two substantive areas Dodd-Frank addresses—consumer financial protection and insurance regulation. Both of these are areas of traditional state regulation. See id. secs. 203-205, 210, 124 Stat. at 1450-56, 1460 (to be codified in scattered sections of 12 U.S.C.).


See id. sec. 111(b)(2)-(3), 124 Stat. at 1393 (to be codified at 12 U.S.C. § 5321). The Act leaves the process of selecting a single representative to serve on the council to the state banking supervisors, insurance commissioners, and securities commissioners, id., and sets their terms at two years. Id. sec. 111(c), 124 Stat. at 1393 (to be codified at 12 U.S.C. § 5321). A question might arise as to whether this process of selection raises Appointments Clause problems, but the state officials’ status as nonvoting members may preclude their being considered either principal or inferior officers. See U.S. CONST. art. II, § 2, cl. 2 (providing that principal officers must be nominated by the President and confirmed by the Senate, whereas Congress may vest appointment of inferior officers in the President, courts of law, or heads of departments). The Conference of State Bank Supervisors, the National Association of Insurance Commissioners, and the North American Securities Administrators’ Association recently chose state representatives for the Council. See Press Release, Nat’l Ass’n of Ins. Comm’rs, State Regulators Announce Choices for the Financial Stability Oversight Council (Sept. 23, 2010), available at http://www.naic.org/Releases/2010_docs/huff_appointed_fsoc.htm.

Dodd-Frank affects other areas of traditional state regulation as well, such as corporate governance and regulation of credit agencies. See Dodd-Frank Act secs. 971-972, 124 Stat. at 1915 (to be codified in scattered sections of 15 U.S.C.); see also 2010-2011 Policies for the Jurisdiction of the Communications, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?TabID=773&tab=854,15,690 (last visited Oct. 5, 2011) (“Corporate governance, securities regulation and enforcement of securities laws are areas where the federal government and the states traditionally share regulatory authority.”). Additionally, states may be significantly affected by federal regulation of the municipal fund industry authorized by Dodd-Frank, such as new restrictions the SEC has imposed on pay-to-play practices in that context. See Rules Implementing Amendments to the Investment
involvement, with Congress going so far as to delegate primary responsibility for regulating insurance to the states in the McCarran-Ferguson Act of 1945. 75 States have been particularly active on the consumer protection front in recent years, especially on issues related to mortgage abuses, and have clashed repeatedly with the OCC over enforcement of state consumer protection laws against national banks and their subsidiaries. 76 Two of these clashes reached the Supreme Court, with mixed results: in Watters v. Wachovia Bank, N.A., the Court held that the National Bank Act (NBA) preempted state efforts to undertake oversight of state-chartered subsidiaries of national banks engaging in real estate lending activities, 77 whereas in Cuomo v. Clearing House Ass’n it rejected the OCC’s effort to read the NBA as preempting states’ efforts to judicially enforce state banking laws against national banks. 78 Dodd-Frank clearly sides with the states on these issues, enacting provisions codifying the result in Cuomo and overturning Watters. 79 More generally, the Act takes a restrictive approach toward preemption, providing that only inconsistent state law is preempted; providing that state laws offering greater protection to consumers are not inconsistent for that reason; and requiring that a state consumer financial law must be preempted only if the state law discriminates against national banks or “prevents or significantly interferes with the exercise by a national bank of its powers” as

77. 550 U.S. 1, 21 (2007).
determined by a court or by the OCC "on a case-by-case basis." 80 In addition, the OCC may not make a preemption determination unless "substantial evidence, made on the record of the proceeding, supports the specific finding regarding ... preemption," and courts are to assess the thoroughness and consistency of OCC preemption determinations—as well as other factors the court deems relevant—in assessing the validity of preemption determinations. 81 Although the OCC retains the power to preempt inconsistent state laws by regulation, these restrictions make clear that Congress intended to cut back on the OCC's preemption authority. 82

Equally significant are Dodd-Frank's provisions with respect to the ability of states to enforce federal consumer protection requirements. Concerns that prudential financial regulators had repeatedly failed to enforce consumer protection laws against financial institutions—and that they would continue to do so, given their prime focus on preserving institutions' financial stability and potential capture by the institutions they regulate—led to calls for creation of an independent federal regulator focused solely on consumer protection. 83 Dodd-Frank ultimately created the new Bureau of

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82. See, e.g., id. sec. 1044, § 5136C(b)(3)(B), 124 Stat. at 2015 (to be codified at 12 U.S.C. § 25b) (requiring that the OCC consult with, and take account of the views of, the new Federal Consumer Financial Protection Bureau before preempting state law); id. sec. 1044, § 5136C(d)(1), 124 Stat. at 2016 (to be codified at 12 U.S.C. § 25b) (requiring that the OCC review its preemption determinations at least every five years). The OCC recently issued final regulations that some attack as at odds with Dodd-Frank's limits on preemption. See Dodd-Frank Implementation, 76 Fed. Reg. 43,549-01 (July 21, 2011); Arthur E. Wilmarth, OCC Gets It Wrong on Preemption, Again, AM. BANKER, July 29, 2011, at 8 (arguing that OCC's rules "blatantly violate the Dodd-Frank Act").

83. See, e.g., Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the H. Comm. on Fin. Servs., 111th Cong. 35 (2009) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) (stating that consumer groups strongly support proposed Consumer Financial Protection Agency); id. at 51 (statement of Travis Plunkett, Legislative Director, Consumer Federation of America) ("CFA strongly supports creating a Federal consumer protection agency focused on credit and payment products because it targets the most significant underlying causes of
Consumer Financial Protection (CFPB). The CFPB is located in the Federal Reserve (Fed) but headed by a Director who has removal and term of office protection, and the CFPB is guaranteed a certain percentage of the Fed’s budget. In addition, the Fed lacks power to oversee CFPB proceedings or review the CFPB’s rules and orders; instead, CFPB regulations can only be stayed or set aside by the FSOC on a two-thirds vote. The states, however, are granted some authority to force the CFPB to act: “The Bureau shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau.” Moreover, although the states are not allowed to enforce the consumer protection provisions of Dodd-Frank directly against national banks and federal savings associations, they are expressly granted power to enforce regulations issued by the CFPB and to enforce the Act against state-chartered entities. In addition, Elizabeth Warren, who was charged with getting the new CFPB up and running, actively encouraged state attorneys general to be involved in enforcement, and President Obama recently nominated a former Ohio Attorney General as the CFPB Director.
Insurance regulation is another area in which Dodd-Frank preserved an important state role. During the financial crisis, failure of the insurance giant AIG and several financial guarantee insurers like Ambac raised questions about whether insurance regulation should be federalized. States lobbied largely successfully for preservation of their traditional oversight of insurance. Although the Act creates a new Federal Insurance Office (FIO) within the Federal Reserve to monitor the insurance industry and report to Congress on how to modernize and improve insurance regulation—including whether state regulation leads to gaps in consumer protection and issues of uniformity—the FIO has very limited regulatory authority. It can preempt state insurance measures that are inconsistent with international agreements and result in less favorable treatment of foreign insurers, and it can recommend that the FSOC designate an insurer subject to regulation as a systemically important nonbank financial company. But Dodd-Frank expressly preserves other state insurance measures and denies both the FIO and the Treasury Department any “general supervisory or regulatory authority” over insurance. The inclusion of a state


91. See, e.g., Memorandum from Leah Campbell, Willkie Farr & Gallagher LLP, to Clients 8 (Aug. 26, 2010), available at http://www.willkie.com/files/tbl_s29Publications%5CFile Upload5686%5C3483%5CInsurance-Industry-Implications-of-Dodd-Frank-Act.pdf (“Determinations of an inconsistency will be subject to de novo judicial review, a provision favored by such groups as ... [NAIC] and the Property Casualty Insurers Association of America and initially rejected by Senate conferees.”); Letter from Nat’l Ass’n of Ins. Comm’rs to Barney Frank, Chairman, House Fin. Servs. Comm. (June 3, 2010), available at http://www.naic.org/documents/testimony_100603_officers_letter_fin_reg_reform.pdf (“We thank you for working with ... [NAIC] to include several necessary safeguards to ensure state insurance supervision is preserved, and not unintentionally undermined, within the framework of the legislation.”).

92. Dodd-Frank Act sec. 502(a), § 313(c), (p), 124 Stat. at 1580, 1585-87.

93. Id. sec. 502(a), § 313(c)(1), (p), 124 Stat. at 1580-81, 1585-87.

94. Id. sec. 502(a), § 313(k), 124 Stat. at 1585. Congress’s choice of the FIO in lieu of a more powerful Office of National Insurance contained in the Senate version also reflected state influence. S. 3217, 111th Cong. § 502 (2010) (proposing establishment of Office of National Insurance). State groups were mixed on the FIO, with the NAIC in particular supporting its creation and the National Conference of Insurance Legislators opposed. See Letter from Nat’l Ass’n of Ins. Comm’rs to Senators (Apr. 20, 2010), available at http://www.naic.org/documents/testimony_100420_rafsa.pdf (“The NAIC strongly urges the Senate to strike the Office of National Insurance language and replace it with the House-
insurance commissioner and the Director of the FIO as nonvoting members of the FSOC—as well as inclusion of the other state financial regulatory officials as nonvoting members—represented a conference compromise between the Senate and House versions of the proposed bill.  

C. The Recovery Act, Fiscal Federalism, and Race to the Top

Despite the substantive regulatory import of the ACA and Dodd-Frank, the measure that has had the greatest impact on the states under the Obama administration to date is the Recovery Act, the economic stimulus legislation that was enacted shortly after President Obama’s inauguration. A little over a third, or $282 billion, of the $787 billion in stimulus funds went to or through the states, more than any previous stimulus measure. The Recovery Act also included substantial amounts of local government funding, and many of the funds states received, such as money for transpor-

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95. As passed by the House on December 11, 2009, the bill included state insurance, banking, and securities regulators as nonvoting members, as well as the Director of the Federal Insurance Office. H.R. 4173, 111th Cong., § 111(b)(2) (2009). The version that the Senate introduced, as well as that which passed on May 20, 2010, as an amendment to H.R. 4173, provided only for the Director of the Office of Financial Research as a nonvoting member who could not be excluded from Council meetings. S. 3217, 111th Cong. § 111(b)(2) (2010); H.R. 4173, 111th Cong. § 111(b)(2) (as amended by the Senate, May 20, 2010). The Senate language formed the conference base text, but the version reported out of conference contained all three state officials as nonvoting members, as well as the Directors of the Office of Financial Research and the Federal Insurance Office. H. R. REP. NO. 111-517, sec. 111(b)(2), at 18 (2010).


97. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-199, RECOVERY ACT: OPPORTUNITIES TO IMPROVE MANAGEMENT AND STRENGTHEN ACCOUNTABILITY OVER STATES’ AND LOCALITIES’ USES OF FUNDS 4 (2010) [hereinafter RECOVERY ACT REPORT] (identifying $282 billion of Recovery Act funds for programs administered by states and localities); see also Erin Ryan, Negotiating Federalism, 52 B.C. L. REV. 1, 29-30 (2011) (discussing the strong state lobbying for stimulus funds); Gais, supra note 6, at 6-9 (identifying amount as $246 billion and a greater percentage of GDP than any previous stimulus).
These funds proved critical to states and localities facing huge budget deficits during the recent economic crisis, with $160 billion aimed at helping states cover health and education costs, the two largest components of state budgets. In particular, the Recovery Act included additional Medicaid funding and new State Fiscal Stabilization Funds for education, which together totaled almost $141 billion.\textsuperscript{99} The net effect was to increase the federal share of total state budgets significantly, up to 34.7 percent in fiscal 2010 from 26.3 percent in fiscal 2008.\textsuperscript{100}

As significant, the Recovery Act included a substantial amount in flexible aid to states. According to Timothy Conlan and Paul Posner, “[f]ederal aid as a percentage of state-local spending was estimated to be ... [at] a level not seen since 1980.”\textsuperscript{101} Although states were

\textsuperscript{98} See, e.g., ARRA, div. A, tit. VIII, 123 Stat. at 182 (requiring the state to subgrant funds to local education agencies for school improvement programs); id. sec. 807(a)(2), 123 Stat. at 190 (authorizing Secretary of Education to require states to make fast payments to local educational agencies); id. div. A, tit. XII, 123 Stat. at 206-07 (providing that states must allocate 30 percent of the amounts they receive in highway funding to localities).

\textsuperscript{99} See NAT’L GOVERNORS ASS’N, STATE IMPLEMENTATION OF THE AMERICAN RECOVERY AND REINVESTMENT ACT 4 app. A (2009) [hereinafter NAT’L GOVERNORS ASS’N, STATE IMPLEMENTATION] (on file with author) (“States will receive approximately $87 billion in funding through enhancements of the Federal Medical Assistance Percentage (FMAP), [and] $53.6 billion through a new State Fiscal Stabilization Fund for education.”); Olatunde C. A. Johnson, Stimulus and Civil Rights, 111 COLUM. L. REV. 154, 172-79 (2011) (describing different categories of stimulus funding). This funding included $87 billion in Medicaid funds; $53.6 billion in State Fiscal Stabilization Funds, of which $39.5 billion was for K-12 education; and an additional $26 billion in Title I and special education funds. See NAT’L GOVERNORS ASS’N, ANALYSIS OF AMERICAN RECOVERY AND REINVESTMENT ACT 1 (2009) [hereinafter NGA, ANALYSIS], available at [http://web.archive.org/web/20110317001900/http://www.nga.org/files/pdf/ARRAANALYSIS.pdf; NAT’L GOVERNORS ASS’N, STATE IMPLEMENTATION, supra. An additional $25.6 billion went to fund highway projects, resulting in the now-common sight of road construction identified by signs as paid for by the American Recovery and Reinvestment Act; $8.76 billion to transit projects; and $8.2 billion for energy efficiency and weatherization projects. See RECOVERY ACT REPORT, supra note 97, at 56, 79, 100.

\textsuperscript{100} NAT’L GOVERNORS ASS’N & NAT’L ASS’N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, at viii (2010), available at http://nasbo.org/LinkClick.aspx?fileticket =C6q1M3kxXEY%3D&ticketid=83. States stand to gain substantial additional funding through other initiatives, such as the Affordability Act, Medicaid expansion, and CHIP reauthorization. See Gais, supra note 6, at 10.

\textsuperscript{101} Conlan & Posner, supra note 6, at 424. On Medicaid MOE and other requirements, see NGA, ANALYSIS, supra note 99, at 15-16. But see Gais, supra note 6, at 11 (noting that ARRA funds came with strings attached, including an expectation to use the funds in ways “agreeable to Congress and the Administration”).
subject to maintenance of effort (MOE) requirements for many of these funds, the economic recession resulted in expanded demand for Medicaid, and the effect of increased federal funding was thus to free states from having to devote additional resources to meeting this new demand.102 Similarly, the education funds were aimed at making up shortfalls in state revenues, and the law provided that the Department of Education could waive or modify the MOE requirements unless the state reduced the proportion of total state revenues going to K-12 education.103 The Act contained immediate obligation demands, with states required to use the funds given or lose them.104 It also imposed extensive transparency and accountability requirements on fund recipients, with monitoring by a new Recovery Accountability and Transparency Board, the Government Accountability Office, and agency inspectors general.105 Eager to encourage quick spending of stimulus funds, top administration officials undertook unusual efforts to assist the states with administrative issues. Office of Management and Budget (OMB) officials conducted weekly conference calls with representatives of state and local government associations, and Vice President Biden’s office assumed responsibility for resolving intergovernmental conflicts.106

Much of these Recovery Act funds were allocated based on existing formulas, with some adjustment to take into account those

102. Conlan & Posner, supra note 6, at 428 (“FMAP funding was particularly fungible. The principal rationale was to assist states with their growing Medicaid caseloads, which expand during recessions as unemployed workers and their dependents become eligible for benefits. By precluding the need for states to redirect resources from elsewhere in their budgets in order to meet their Medicaid obligations, FMAP freed up state resources for other needs.”). But see Alan Greenblatt, Federalism in the Age of Obama, ST. LEGISLATURES, July/August 2010, at 27-28 (arguing that MOE requirements for Medicaid and education funds substantially limited state governments).

103. See NGA, ANALYSIS, supra note 99, at 2 (“The Secretary may waive or modify any requirement related to maintaining fiscal effort for a state or school district .... The Secretary may not approve a waiver for a state or school district that decreases the proportionate share of total revenue that is available to elementary and secondary education.”); see also Conlan & Posner, supra note 6, at 428-29 (noting MOE requirements and the need for many states to seek clarification and waivers).


105. See id. div. A, tit. XI, sec. 1512, 123 Stat. at 287 (guaranteeing GAO involvement and instituting inspector general reviews); id. §§ 1521-1530, 123 Stat. at 289-94 (establishing the Recovery Accountability and Transparency Board); see also Conlan & Posner, supra note 6, at 429.

106. Conlan & Posner, supra note 6, at 430.
states that were particularly hard hit by the recession. Yet some funds were instead allocated competitively based on applications by states and others, with the goal of encouraging greater innovation in line with the administration’s policy priorities. Perhaps the most notable of these efforts, and one that had a dramatic impact on the states, was the Department of Education’s Race to the Top program. Race to the Top was a competitive grant program involving $4.35 billion in Recovery Act funds, aimed at encouraging states to improve K-12 education in four core areas: teacher effectiveness and equity in teacher distribution, data systems, standards and student assessment, and lowest-performing schools. Under the program, states submitted applications that were scored by outside experts and then ranked, with only a certain number of top-ranked applications receiving funding. Points were awarded for specific state measures, and states were not eligible to receive a grant if they prohibited linking student performance data to teacher and principal assessment. Recognizing the central role that local education agencies play, a high priority was put on ensuring that local agencies were committed to the states’ proposed reforms.

The net effect of Race to the Top was to spur significant changes in state education laws across the country, with numerous states overhauling teacher evaluation methods, lifting limits on charter schools, and adopting common standards developed by the National

107. See id. at 429 (noting the Recovery Act’s reliance on established federal aid programs as a means of efficient distribution); NGA, ANALYSIS, supra note 99, at 14-15 (noting the extent that Medicaid funds are tied in part to state unemployment rates). In the case of the Act’s education funding, for example, $39.5 billion of the $53.6 billion provided in State Fiscal Stabilization Funds was distributed through existing state and federal formulas. See ARRA, div. A, tit. XIV, sec. 14002, 123 Stat. at 279-281; NGA, ANALYSIS, supra note 99, at 1.

108. These four areas were also central to the State Fiscal Stabilization Fund’s $48.6 billion in formula grants, with states being required to provide assurances that they would adopt reforms in these areas and with distribution of the final third of these grants to states being contingent on states providing publicly available data on their progress in these areas. See State Fiscal Stabilization Program, 74 Fed. Reg. 37,837, 37,837-41 (July 29, 2009); Johnson, supra note 99, at 178-79.


110. See id. at 4 (identifying LEA participation and commitment as an absolute priority for grant awards); see also Sam Dillon, States Skeptical About ‘Race to Top’ School Aid Contest, N.Y. TIMES, Apr. 5, 2010, at A1 (“Officials from several states criticized the scoring of the contest, which favored states able to gain support from 100 percent of school districts and local teachers’ unions.”).
Governors Association and the Council of Chief State School Officers. The program caused some controversy: in addition to teacher union protests, some states complained that the program intruded too far on state control of education policy and was stacked in favor of more urban eastern states, and civil rights groups complained that a minimal amount of Race to the Top funds went to minority children. Nonetheless, the administration views Race to the Top as a substantial success and has proposed both continuing the program for school districts and using components of it as a model for reauthorization of the Elementary and Secondary Education Act (ESEA), better known today as No Child Left Behind.

A particularly interesting feature of Race to the Top is the extent to which the requirements for grant awards, and thus the instigation for state policy changes, were developed in the executive branch. The Recovery Act reserved $5 billion for competitive grants and an innovation fund and further stipulated four core areas for

111. See Stephanie Banchero & Neil King, Jr., Nine States, D.C. Win Race for Aid to Schools, WALL ST. J., Aug. 25, 2010, at A2; Sam Dillon, States Create a Flood of Education Bills, N.Y. TIMES, June 1, 2010, at A14. But see Stephanie Banchero, Race to the Top Leaves Some School Reformers Weary, WALL ST. J., June 1, 2010, at A6 (reporting complaints by some school reformers that changes spurred by Race to the Top were not that significant).

112. See LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., FRAMEWORK FOR PROVIDING ALL STUDENTS AN OPPORTUNITY TO LEARN THROUGH REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY SCHOOL ACT 4 (2010), available at http://naacpldf.org/files/case_issue/Framework%20for%20Providing%20All%20Students%20an%20Opportunity%20to%20Learn%202.pdf (recommending that ESEA changes should include incentives for all states over only a few); Dillon, supra note 111, at A14 (reporting state intrusion complaints from Texas, Alaska, and Kansas, which refused to compete for grants); Sam Dillon, Eastern States Dominate in Winning School Grants, N.Y. TIMES, Aug. 25, 2010, at A3 (noting that other than Hawaii, all of the twelve grant winners were states located east of the Mississippi River); Gerry Shih, Educators Are Opposed to Obama’s School Plan, N.Y. TIMES, June 6, 2010, http://www.nytimes.com/2010/06/06/education/06bceducation.html (reporting on opposition to provisions in Race to the Top from the California Teachers Union and some California education officials).

improvement. But the Act left the specifics of how funds were allotted to the Secretary of Education’s discretion, with the Secretary expressly allowed to assess applications based on “such other criteria as the Secretary determines appropriate, which may include a State’s need for assistance.” As a result, the Department of Education established the particular emphases of the program, which led to many of the changes in state education laws and reflected education policy goals of the Obama administration. Such executive branch discretion is a predictable result of greater reliance on project or competitive grants to the states over formula grants. Despite the dominance of formula funding in the Recovery Act, increased reliance on competitive and project grants is a notable characteristic of state funding under the Obama administration—including much of the ACA’s non-Medicaid state grants and the proposed ESEA Reauthorization in addition to Race to the Top.

Another notable characteristic—true not just of Race to the Top but also of the Recovery Act generally—is the extent to which these programs break open state governments. President Obama’s proposed budget recently highlighted Race to the Top’s emphasis on localities by including $900 million in Race to the Top funds for local

115. Id. div. A, tit. XIV, sec. 14006(b), 123 Stat. at 283.
116. These emphases included the requirement that states were not eligible for Race to the Top funds if they had prohibited linking student performance data to teacher and principal assessment and the assignment of a large number of available points to states adopting common standards, fostering charter schools, and reforming teacher and principal evaluation and tenure systems. See Race to the Top Fund, 74 Fed. Reg. 59,688, 56,989-91 (Nov. 18, 2009); U.S. DEP’T OF EDUC., supra note 109, at 7, 9, 11.
117. See President Barack Obama, Remarks by the President on Education Reform at the National Urban League Centennial Conference (July 29, 2010), available at http://www.whitehouse.gov/the-press-office/remarks-president-education-reform-national-urban-league-centennial-conference (terming Race to the Top the “most important thing” his administration had done).
119. See Gais, supra note 6, at 12-13, 15; see also Johnson, supra note 99, at 176 & n.100 (detailing competitive and formula funds available under the Recovery Act for public housing authorities and the administration’s changes in competitive grant criteria to respond to complaints).
school districts rather than states. This change would allow districts like Houston to apply for grants notwithstanding the refusal of their states to do so.\textsuperscript{120} The Recovery Act similarly targeted localities, at times requiring that certain funds be granted to local governments.\textsuperscript{121} Even more striking, however, was the Act’s bypass provision, which authorizes state legislatures to overrule governors’ decisions to reject stimulus funds.\textsuperscript{122} To be sure, federal-local interactions are quite common, and localities play a central role in many federal programs in areas as diverse as homeland security, transportation, and environmental protection as well as education.\textsuperscript{123} Yet instances of the federal government authorizing localities or other state-created entities to act in ways that violate state law are more infrequent and more fraught from a federalism perspective, raising concerns of federal commandeering of state institutions and undermining the integrity and sovereignty of state governments.\textsuperscript{124} Although the Court has recently signaled that such federal authorization of local violations of state law may raise federalism concerns, in the past it has sustained federal power to preempt state-law limits on actions by localities.\textsuperscript{125}

\textsuperscript{120} Sam Dillon & Tamar Lewin, \textit{Obama Budget Raises School Spending and Keeps Pell Grant Maximum}, N.Y. TIMES, Feb. 15, 2011, at A19; \textit{see supra} text accompanying note 113.

\textsuperscript{121} \textit{See supra} note 83 and accompanying text. A prime example of this is the Recovery Act provision that provided the basis for Race to the Top, which required that 50 percent of funds go to local school districts. \textit{See ARRA, Pub. L. No. 111-5, div. A, tit. XIV, sec. 14006(c), 123 Stat. 115, 284 (2009).}


\textsuperscript{125} \textit{Compare Nixon v. Miss. Mun. League, 541 U.S. 125, 140-41 (2004) (“[O]ur working assumption [is] that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power.”), with Lawrence Cnty. v. Lead-
D. Preemption Under the Obama Administration

A final key federalism issue is preemption. Preemption was a central federalism battleground during the Bush administration, in large part due to efforts by administrative agencies to preempt state tort suits.126By contrast, the Obama administration has taken a more restrictive approach to preemption. In an important early move, President Obama issued a presidential memorandum emphasizing that agencies should preempt state law “only with full consideration of the legitimate prerogatives of the States[,] ... with a sufficient legal basis for preemption” and if “justified under legal principles governing preemption,” including the restrictions on preemption imposed under Executive Order 13132.127 The Obama administration further instructed agencies to cease including preemption statements in regulatory preambles that were not included in codified regulations and to conduct a review of all regulations in the last ten years that included preemptive statements and provisions to determine if preemption is justified under governing legal principles.128 More recently, President Obama issued another memorandum instructing agencies to work closely with state, local, and tribal governments to achieve greater administrative flexibility and lower administrative burdens from federal requirements, directing the OMB to lead the process.129

The Obama Preemption Memorandum appears to have had an effect. A study that Catherine Sharkey conducted for the Adminis-
trative Conference of the United States found that in a majority of agencies surveyed, the Memorandum “led to serious internal review.”\footnote{130} Two agencies, the National Highway Traffic Safety Administration (NHTSA) in the Department of Transportation and the independent Consumer Products Safety Commission, adopted notably more cautious positions on preemption, with NHTSA going so far as to remove preemptive language in a couple of earlier rulemakings.\footnote{131} In another early antipreemption move, in January 2009 President Obama directed the EPA to reconsider that agency’s denial, under the Bush administration, of California’s request for a Clean Air Act waiver to allow it to impose tighter greenhouse gas emission restrictions on new cars.\footnote{132} EPA subsequently granted the California waiver and issued a finding that greenhouse gases endanger public health and welfare; EPA also reached an agreement with the auto industry, the state of California, and other stakeholders to impose the first national greenhouse gas emission limits on cars and trucks.\footnote{133} The Obama administration also took a narrow approach to preemption in both the ACA and Dodd-Frank. As noted, both measures limit preemption to state measures that conflict with their requirements, and Dodd-Frank additionally adopts procedural and evidentiary requirements to further restrict


\footnote{131. Id. at 12-28, 45-53. The study found that the effect on the Food and Drug Administration, another agency that undertook prominent efforts at administrative preemption during the Bush administration, was less clear, although many of the preemption efforts of the OCC were addressed by Dodd-Frank. See id. at 12, 28-44.

132. See Memorandum, State of California Request for Waiver Under 42 U.S.C. 7543(b), the Clean Air Act, 74 Fed. Reg. 4905 (Jan. 26, 2009) (directing, six days after President Obama’s inauguration, the EPA Administrator to reassess the Bush administration’s decision to deny California’s waiver request).

the preemptive power of federal financial regulators. In making clear that states can impose additional requirements, both measures thus come down firmly on the side of federal law serving as a regulatory floor, rather than as a regulatory ceiling.

The Obama administration’s preemption stance in court, however, has been more equivocal. In some contexts, the administration has reversed Bush era positions and taken an antipreemption stance. Two examples are the administration’s opposition to preemption from a federal vehicle safety standard and label restrictions for generic drugs in cases before the Court last term. But the administration also urged preemption in other cases pending before the Court, including a suit involving the Vaccine Act and one addressing an Arizona measure targeting employment of illegal immigrants. Indeed, the administration has taken a strongly pro-preemption position in the immigration context, filing suit in district court to have another Arizonan immigration measure declared preempted.

134. See supra text accompanying notes 59, 77-82.


Moreover, in that suit the administration asserted potentially broad claims of federal exclusivity and field preemption and not simply that the state measure at issue conflicted with federal laws and administrative determinations.139

II. ASSESSING THE OBAMA ADMINISTRATION’S FEDERALISM RECORD

The measures just detailed represent major developments at the national level, with the federal government in short order undertaking substantial new regulatory responsibilities and funding commitments. These measures also stand out for the significant effect they will have on the states and the relationship between federal and state governments. Assessing their impact on federalism is complicated by the numerous ways the states are incorporated into the new federal regimes and the expanded power and funding they can receive in return. Nonetheless, two key points emerge. First, the central dynamic at play in these instances is not nation versus state, but rather greater regulation versus more limited government, along with broader disputes over substantive policy. Federalism thus operates largely as a second-order concern. Second, the broad powers these measures delegate underscore the importance of administrative federalism. Despite Congress’s central role in enacting these measures, the administrative arena will be where the metes and bounds of modern day federalism are determined. Combined with recognition of the minimal protection the current federalism doctrine offers the states, this suggests that the greatest federalism benefits may lie in details of institutional design or non-federalism-specific legal constraints, such as administrative law.

139. See, e.g., id. at 986, 991-92 (“The United States argues principally that the power to regulate immigration is vested exclusively with the federal government, and the provisions of S.B. 1070 are therefore preempted by federal law” and also that it “interferes and conflicts with federal immigration law, foreign relations, and foreign policy.”); Brief for Appellee at 32, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) (No. 10-16645) [hereinafter Arizona Appellee Brief] (arguing Arizona immigration law “substantially infringe[s] on the exclusive federal regulation of immigration and the conditions placed on the presence of foreign nationals in the United States”).
A. Nation Versus State, or Activist Government Versus Laissez-Faire?

Although the preemption restrictions that President Obama has imposed are important, the clear trend of the developments discussed above is toward expansion of federal power. This trend is perhaps most evident with respect to health care reform. To be sure, the ACA was not the federal government’s first sortie into regulation of health care or health insurance; Medicare, Medicaid, ERISA, and HIPAA are preexisting federal measures in these contexts.140 Even so, the ACA represents an expansion of federal regulation to address issues previously left to state control, such as the reasonableness of premium increases or substantive coverage requirements for individual health insurance policies.141 Similarly, despite already expansive federal financial regulation, Dodd-Frank also extended the federal government’s reach to contexts, for instance the sale of derivatives or executive compensation, in which it had been largely absent. It also granted federal regulators new powers, with the FDIC’s new liquidation authority over systemically important financial institutions as a prime example.142 And the

140. See Leonard, supra note 34, at 143-44 (discussing ERISA and HIPAA); Catherine Hoffman, Kaiser Family Found., Focus on Health Reform, National Health Insurance — A Brief History of Reform Efforts in the U.S. (2009), available at http://www.kff.org/healthreform/upload/7871.pdf (providing history of Medicare and Medicaid as part of effort to obtain national health insurance).


Recovery Act’s additional federal funding for states came with new conditions and strings attached.143 Yet it is also clear that these measures do not represent a pure assertion of federal power at the expense of the states. Instead, a striking feature of all of these reforms is the extent to which the states are offered central roles to play in the new federal regimes, with broad grants of authority and federal funds to entice their participation. Abbe Gluck has recently described the variety of roles for the states evident in the ACA, with some provisions authorizing either exclusive federal or exclusive state control and others representing an amalgam of cooperative or parallel federal and state responsibilities.144 Dodd-Frank also constitutes a significant expansion of state regulatory authority, with states granted power to enforce new federal requirements and also enjoying broadened authority to enforce state law against national banks.145 The Recovery Act is a prime example of this dual federal- and state-enhancing character: the vast majority of state funds were made available under preexisting formulas with the states being allowed a fair amount of flexibility in spending at the same time as the government also expanded its use of competitive project grants to change state programs.

Moreover, these new federal measures also appear to preserve a good deal of room for state innovation and regulatory flexibility. Under the ACA, states have discretion over key issues such as how health exchanges will operate, whether they will impose additional requirements on insurers, and, through NAIC, the criteria for premium increases and rebates.146 States can also seek waivers to

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143. See supra notes 101-05, 121 (describing conditions on federal funds in Recovery Act); infra text accompanying notes 223-26 (discussing general constitutionality of conditional federal funding).

144. See Gluck, supra note 43, at 34-35 (discussing “parallel federalism” in ACA provisions regarding temporary high-risk pools and health insurance exchanges).

145. See supra text accompanying notes 76-87.

operate programs that deviate from the ACA's requirements. 147 In the financial context, Dodd-Frank allows states to impose greater consumer protections without fear of federal preemption and to enforce federal requirements. 148 Although Race to the Top created a strong incentive for states to adopt particular reforms of their education systems, such as common assessment standards and teacher performance accountability, even here states had flexibility over how to incorporate the new features into their K-12 programs. 149

Why these federal initiatives give the states such central responsibilities is an interesting question, and several factors are likely at work. One is the fact that the areas addressed—health insurance, consumer protection, and education—are traditional areas of state authority and control. 150 As a result, states already have extensive experience and expertise in these areas plus existing administrative structures that could be used to implement new regulatory programs and requirements. Moreover, in areas like health and education, prior federal interventions have often taken the form of cooperative federal-state programs. 151 To some degree,

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147. See ACA sec. 1332, 124 Stat. at 203-06 (allowing states to apply to the Secretary of HHS for a waiver of certain ACA provisions).
148. See supra text accompanying notes 79-80.
149. See supra text accompanying notes 108-12.
150. Insurance was left for state control under McCarran-Ferguson even after the Court held insurance fell within the scope of the Commerce Clause power. See McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (2006) (providing exclusive power to regulate and tax “the business of insurance” to states); see also Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427-31 (1946) (upholding state regulation of insurance, post-McCarran-Ferguson); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 552-53 (1944) (holding that the federal government may regulate insurance under its Commerce Clause power), superseded by statute, Pub. L. No. 79-15, 59 Stat. 33 (1945). Similarly, states have long played a central role in consumer protection through state tort law, statutes, and enforcement actions by state attorneys general. See DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW §§ 2-7 (detailing the state role in consumer protection law). The states’ centrality in education is often acknowledged. See, e.g., United States v. Lopez, 514 U.S. 549, 564 (1995) (noting that education is an area “where States historically have been sovereign”); Milliken v. Bradley, 418 U.S. 717, 741 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools.”).
then, the new federal initiatives followed a familiar and expected administrative structure in their reliance on the states, though the extent of authority delegated and some of the responsibilities assigned are still unusual. Reliance on the states also served to deflect political opposition from state government organizations anxious about displacement of state authority. Indeed, that the expansions in state responsibilities occurred during the legislative debate over the ACA and Dodd-Frank suggests that the roles given to the states were important to the ultimate passage of both measures. In addition, delegating to the states provided a mechanism to foster experimentation in policies and implementation, a traditional justification for federalism that also underlies arguments for restrictions on preemption.

152. For example, in several instances the ACA assigns primary regulatory and enforcement responsibilities to NAIC and the states, with HHS accorded a secondary role. See, e.g., ACA, Pub. L. No. 111-148, sec. 1001, §§ 2711-2719, 124 Stat. 119, 130-38 (2010) (amending the Public Health Services Act), amended by Health Care and Education Reconciliation Act, Pub. L. No. 111-152, sec. 2301(b), 124 Stat. 1029, 1081-82 (2010) (striking “who is not married”); ACA sec. 10101, § 2718(c), 124 Stat. at 887 (amending the Public Health Services Act and authorizing NAIC to issue definitions of what counts as medical services); ACA sec. 1003, § 2794, 124 Stat. at 139 (amending the Public Health Services Act, which provided for concomitant review of premium increases by states and the Secretary of HHS and required state approval of increases when authorized by state law); ACA sec. 1311, 124 Stat. at 173 (creating health benefit exchanges to be implemented by the states unless the Secretary determines state implementation is inadequate). The states’ power to force the Consumers Bureau to issue a notice of proposed rulemaking is also a new innovation. See supra text accompanying note 86; see also NAT’L ASS’N OF ATT’YS GEN., WALL STREET REFORM AND CONSUMER PROTECTION ACT 4 (2010) (terming it “apparently unique”).


154. See supra text accompanying notes 41-43, 95.

155. For identification of ACA and Race to the Top in experimentalist terms, see JULIETTE FORESTENZER ESPINOSA, ACADEMYHEALTH, REIMAGINING FEDERAL AND STATE ROLES FOR HEALTH REFORM UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 1, 5 (2010), available at http://www.academyhealth.org/files/publications/ReInsightsReformRoles.pdf; Charles F. Sabel & William H. Simon, Minimalism and Experimentalism in the Administrative State, GEO. L. J. (forthcoming) (manuscript at 32), available at http://www2.law.columbia.edu/sabel/Min.2.3.docx (describing Race to the Top as an example of the “incentive design” variation of experimentalist governance); see also New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a
Equally important was the recent history of the states as progressive policy reformers. During the Bush administration, progressive regulatory and enforcement initiatives occurred largely at the state and local level.\textsuperscript{156} For example, Massachusetts’s 2006 reform provided a forerunner to the ACA’s approach of relying on private health insurance, health exchanges, an individual coverage mandate, subsidies, and substantive insurance regulation.\textsuperscript{157} States were also more aggressive at addressing financial sector abuses and global warming, often in the face of federal resistance.\textsuperscript{158} The effect was to transform many advocates of progressive policies and more aggressive regulation into defenders of state prerogatives.\textsuperscript{159} This defense of state regulation is most clearly evident in the new limits on preemption but also seems likely to have contributed to a greater willingness to have states play key implementation roles in federal regulatory schemes. The fact that many Cabinet officers and high-level officials in the Obama administration came directly from jobs in state government may also have contributed to their willingness to delegate broad responsibilities to the states.\textsuperscript{160}


\textsuperscript{159} See Schapiro, \textit{supra} note 156, at 33 (arguing the “trend of state-level reform represents a kind of return to the early Progressive movement ... when state-sponsored programs constituted the core of the Progressive agenda”); see also Ernest A. Young, \textit{Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror}, 69 BROOK. L. REV. 1277, 1277-78, 1302-08 (2004) (noting and encouraging such a move by liberals toward the states in response to the Bush administration’s national security policies).

\textsuperscript{160} For example, prior to joining the Obama administration, seven of the sixteen members of President Obama’s cabinet were former state governors or high-level state and local officials: Shaun Donovan, Arne Duncan, Gary Locke, Janet Napolitano, Kathleen Sebelius, Ken Salazar, and Tom Vilsack. \textit{See The New Team}, N.Y. TIMES, http://projects.nytimes.com/44th_president/new_team/ (last visited Oct. 5, 2011).
Whatever the reason, the central roles the states play mean that portraying these new federal measures as a zero-sum contest that the national government won and the states lost is false. Several scholars have argued that conceptualizing federalism in zero-sum terms, with the states and the federal government fighting over who gets to exercise authority in any given area, fundamentally misunderstands the overlapping and negotiated character of contemporary federal-state relations. The recent initiatives demonstrate this point, as their central characteristic is expanded authority at both the national and state levels. For many states the measures are empowering, granting them the authority and resources they need to undertake more effective reform and more aggressive enforcement. Perhaps as important, the imposition of minimum federal requirements protects states from having their regulatory initiatives undermined by interstate mobility and other states’ more limited oversight. Undoubtedly, for those states that would prefer not to participate in the new federal initiatives, such as states that oppose the Medicaid expansion or assessing teachers based on student performance, the story is quite different. But the constraints these states feel is more a result of their disagreement with the administration’s substantive policies and their reluctance to assume the new governance responsibilities being offered than an

161. See Robert A. Schapiro, Polyphonic Federalism: Toward the Protection of Fundamental Rights (2009) (emphasizing that federalism today means concurrent and overlapping authority); Ryan, supra note 97, at 3-6 (arguing that federalism is best understood as an iterative process of negotiated bargaining between state and federal actors).

inherent characterization of these initiatives as assertions of national power.\textsuperscript{163}

Indeed, the central dynamic evident in these initiatives is not nation versus state but instead greater governmental intervention versus laissez-faire reliance on the market. The ACA and Dodd-Frank stand as testaments to the belief that the government needs to play a more active regulatory role and the powers granted to states are geared to producing greater oversight of the health insurance market and the financial sector. The ACA encourages greater state regulation by mandating direct federal implementation if state efforts prove inadequate, whereas Dodd-Frank creates a federal regulatory floor but protects states’ abilities to impose additional requirements.\textsuperscript{164} The limits placed on administrative pre-emption, and administrative moves such as the approval of California’s request to regulate greenhouse gas auto emissions,\textsuperscript{165} are of a piece with this overall activist government stance. The stimulus measure as a whole similarly reflects this thrust toward more activist government, as it represented a massive fiscal intervention in hopes of sparking economic recovery.\textsuperscript{166} The substantial increase in state Medicaid rolls is yet another example of an expanded governmental role.\textsuperscript{167} Not surprisingly, therefore, the federalism dimension of the administration’s initiatives has accrued more to the benefit of states desirous of playing an activist role than states that prefer a more antiregulatory approach.

To be sure, this pro-regulatory emphasis is not universal. The Obama administration will not support every effort by states to play a greater regulatory role, as demonstrated by its effort to prohibit Arizona from undertaking additional immigration enforcement.\textsuperscript{168} Nor does the pro-regulatory-antiregulatory divide map as well in the

\textsuperscript{163} Support for this view comes from the Florida ACA litigation. There, although twenty-six states challenged the Medicaid expansion as coercive, another five states filed an amicus brief rejecting that characterization and asserting that the expansion would lower their healthcare costs. See Brief of the States of Oregon, Iowa, Vermont, Maryland, and Kentucky as Amici Curiae at 2, McCollum, 716 F. Supp. 2d 1120 (No. 10-CV-91-RV-EMT) (“Absent national reform, state-level health care costs will rise dramatically over the next 10 years.”).

\textsuperscript{164} See supra notes 80, 92-94, 135 and accompanying text.

\textsuperscript{165} See supra text accompanying notes 132-33.

\textsuperscript{166} See supra text accompanying notes 97-100.

\textsuperscript{167} See supra text accompanying notes 30-32.

\textsuperscript{168} See supra notes 137-39 and accompanying text.
education context, in which one goal of Race to the Top was to encourage states to repeal existing regulations viewed as inhibiting educational improvement. Moreover, a lack of federal action need not mean similar regulatory quietude on the part of the states; far from it. During the Bush administration many states sought to fill the regulatory gaps that federal inaction created, and some states continue to push greater state regulation on issues that are not being addressed—or they believe are not being addressed adequately—at the federal level.169 Nonetheless, the overwhelming thrust of federalism under the Obama administration, as these four initiatives reveal, has been toward encouraging greater state regulatory efforts.

Put slightly differently, the federalism-supportive features of these initiatives are inextricably linked to the administration’s progressive policy goals and activist government stance.170 Most obviously, assigning the states a significant role was at times strategically necessary to secure passage of these initiatives.171 But the connection to the administration’s political agenda went deeper. Empowering the states provided a mechanism for enhanced enforcement and regulatory oversight in line with the administration’s policy. The administration’s resistance to independent state efforts on immigration also showcases this point, as this resistance appears driven in part by concerns that such state efforts will lead to discrimination and harassment of lawfully present aliens as well as undermine the administration’s immigration policy.172 Incorporating the states also creates the potential for greater policy entrenchment over time as state officials become

169. See supra text accompanying notes 156-57; see also Vivian E. Thompson & Vicki Arroyo, Upside-Down Cooperative Federalism: Climate Change Policymaking and the States, 29 Va. Envtl. L.J. 1, 6-10 (2011) (describing past and ongoing state efforts to lower greenhouse gas emissions).

170. See Greenblatt, supra note 102, at 28 (“Washington needs states to carry out its grand visions on the ground, but the administration also fully intends to give them numerous pushes in its preferred direction.”).

171. See supra notes 43, 95 and accompanying text.

172. See Whiting Amicus Brief, supra note 137, at 17-18; Arizona Appellee Brief, supra note 139, at 24-29, 30-34, 37-39. Correspondingly, the administration has also limited local governments’ immigration enforcement authority under agreements with the federal government in response to concerns about overly aggressive enforcement. See Ryan, supra note 97, at 34-35.
more invested in the new federal programs. Moreover, in the current political climate, relying on the states may provide the administration with an avenue for pushing its policy agenda despite increased resistance to aggressive regulatory enforcement at the federal level.

Such reliance on the states also comes with policy risks, in particular the possibility that resistance at the state level may undermine successful implementation of the new policies. But that risk is mitigated to some degree by two features of these initiatives: first, that implementation of the new policies is a required condition of substantial federal funding and, second, that the federal government is authorized to step in and replace underperforming states. Moreover, the federal government may not face the same practical obstacles to taking over implementation in the health insurance context as it sometimes has encountered in other areas. It not only already has substantial experience

173. See Gluck, supra note 43, at 36-38 (identifying this entrenching dynamic in the context of the ACA); see also supra notes 156-57 and accompanying text. In the terms of positive political theory, incorporating states in federal programs and federal administration thus appears as a structural protection against legislative and bureaucratic drift. See generally McNollgast, Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies, 75 VA. L. REV. 431 (1989).

174. See Wyatt, supra note 142, at B4 (noting Republican opposition to and delay of Dodd-Frank provisions).

175. See Kevin Sack, Republicans Rise to Power, with Enmity for Health Law, N.Y. TIMES, Nov. 19, 2010, at A13 (“The tectonic movement in state politics across the country after the Nov. 2 election has left the health care law in hostile hands in many places, just as responsibility for carrying out the law begins to fall most heavily on the states.”). Such resistance has occurred in the past in other contexts. See NUGENT, supra note 126, at 65-67, 193-200 (noting state resistance to implementing federal education requirements and REAL ID); Denise Scheberle, The Evolving Matrix of Environmental Federalism and Intergovernmental Relationships, 35 PUBLIUS 69, 77 (2005) (noting examples of states “challenging the EPA’s ability to enforce tighter standards under the Clean Air Act”).

176. In some instances, however, HHS’s ability to enforce ACA’s requirements when a state has failed to do so is not clear. Concern that HHS lacks power to enforce ACA’s limitations on unreasonable premium increases has led to proposals for enhanced HHS authority. See Health Insurance Rate Authority Act of 2011, S. 3078, 111th Cong. § 2 (2011) (proposing the establishment of a Health Insurance Rate Authority and centralized authority for HHS to review and correct unreasonable premium increases); Ann Mills, Carolyn L. Engelhard & Patricia M. Tereskerz, Truth and Consequences—Insurance-Premium Rate Regulation and the ACA, 363 NEW ENG. J. MED. 899, 900 (2010) (noting a “lack of regulatory teeth in the ACA” and supporting additional powers for HHS in premium increase regulation).

177. See NUGENT, supra note 126, at 172-78 (arguing that federal officials’ dependence on state implementers often means they lack ability to sanction state noncompliance); DENISE
running the Federal Employees’ Health Benefits program,\textsuperscript{178} the military’s TRICARE system,\textsuperscript{179} as well as Medicare, but also can use the same health exchange model in a number of states.\textsuperscript{180}

The question remains, however, whether these measures represent federalism. Some might dispute that description, arguing that the very fact that states must adhere to an overall policy agenda emanating from Washington precludes understanding these measures in federalism terms. Others might view these initiatives more as decentralized programmatic implementation than federalism, given that the scope of the states’ authority is set by federal statute and the presence of federal minimum standards to which they must adhere.\textsuperscript{181} Underlying these arguments is an insistence on federalism as necessitating freedom on the part of the states to pursue policies of their own choosing, even at—perhaps especially at—the expense of national goals.\textsuperscript{182}

But demanding such policy or enforcement independence represents too narrow a definition of federalism. To begin with, broad federal power is a given of our national modern administrative state, one that the Supreme Court may tinker with at the edges but is not going to fundamentally alter.\textsuperscript{183} As a result, equating federalism with independence from national policy would render it largely irrelevant in a vast array of governance contexts. In addition, such a definition is not constitutionally mandated.\textsuperscript{184} Indeed, although

\begin{footnotesize}
\textsuperscript{178} See Federal Employees Health Benefits Program, 5 C.F.R. § 890 (2011).
\textsuperscript{179} See TRICARE Program, 32 C.F.R. § 199.17 (2011).
\textsuperscript{180} Gluck, supra note 43, at 40 (“Running insurance exchanges in a small number of states will enable the federal government to build expertise in this area of traditional state control.”).
\textsuperscript{181} See Rubin & Feeley, supra note 11, at 910-14 (distinguishing federalism and decentralization).
\textsuperscript{182} Id. at 913 (“Federalism ... is the right of states to act independently, in furtherance of goals the national government does not share.”).
\textsuperscript{183} See Gillian E. Metzger, Administrative Law as the New Federalism, 57 DUKE L.J. 2023, 2048 (2008) (emphasizing “the Court’s unwillingness to curb congressional regulatory authority on constitutional federalism grounds”).
\textsuperscript{184} Scholars have recently articulated accounts of federalism that emphasize concurrent
\end{footnotesize}
the Court has at times identified federalism with state independence, it has also sanctioned federal-state cooperation and treated federalism as a more general value to be applied within federal regulatory schemes, and not simply to set these schemes’ boundaries. Nor does a definition of federalism in terms of independence accord with our lived experience, which is dominated by federalism in the form of negotiated, cooperative, and sometimes uncooperative federal-state relationships. Lastly, although characterizing initiatives like the ACA as decentralized administration is certainly plausible, viewing them solely in decentralization terms misses an important part of the story. In particular, pressure to ensure a role for the states per se is a main reason why these initiatives have a decentralized form and were enacted at all.

An alternative approach, one I find more appealing, sees federalism as encompassing instances in which state authority and state


187. See supra notes 43, 82, 95, 101 and accompanying text; see also Barry Friedman, Valuing Federalism, 82 Minn. L. Rev. 317, 381-82 (1997) (noting states are a fundamental aspect of American federalism and that “we do not now have a choice between the federalism we have and a system of unitary national authority, with the latter having the option to decentralize when it makes sense”).
interests surface within federal administration. On this account, whether the Obama initiatives actually represent instances of federalism will depend on whether states are granted meaningful authority over the content of the programs they administer or instead have their discretion substantially limited. This view of federalism lacks clear lines and risks obscuring substantial inroads on state authority in a wealth of programmatic detail. It may also raise concerns about confused accountability and the extent to which states will be able to serve federalism’s oft-invoked benefit of checking federal overreaching—although a strong case can be made that states may have their greatest influence on the shape of federal policy when arguing from within. These issues are unavoidable, however, once we acknowledge that the intermingling of federal and state authority is a basic feature of federalism in the context of modern governance.

The Obama administration experience thus demonstrates that federalism can be alive and well in a context of expanding national regulation. But this experience also lends support to the skeptical view that “federalism is destined to be a second order concern.” Even if qualifying as instances of federalism, the measures described here represent deployment of federalism to achieve progressive policy goals rather than “as a principled end in and of itself.” Nor is federalism’s second-order status unique to liberals and progressives; conservative support for federalism is often just as instrumental.

188. See, e.g., Metzger, supra note 183, at 2047-2109 (describing ways in which administrative structure and administrative law can serve as federalism surrogates by protecting state interests in the context of federal agency decision making); see also Metzger, supra note 126, at 67-75 (describing use of states and federalism to police federal administration).


190. Samuel R. Bagenstos, Spending Clause Litigation in the Roberts Court, 58 Duke L.J. 345, 353 n.38 (2008); Devins, supra note 11, at 137; see also Cross, supra note 11, at 1307-12 (noting that federalism is most often deployed derivatively to achieve some other ideological end).

191. Cross, supra note 11, at 1307.

192. For recent prominent examples of how conservatives’ traditional support for the states is contingent on substantive policy, note the Bush administration’s aggressive preemption
Yet the Obama administration’s record also suggests that federalism’s second-order status should not be a cause for alarm for advocates of a greater state role. It indicates that progressives’ discovery of the policy potential of state and local governments was not simply an opposition strategy to be cast aside once they came into control of the national government.\footnote{See Barron, supra note 156, at 4-7 (discussing the danger that progressives’ ascension to power at the national level might undermine their commitment to federalism and decentralization).} Despite their early twentieth century emphasis on state government as an engine of reform, the New Deal progressives became far more resistant to federalism and assertions of state power, a resistance that was reinforced when federalism and states’ rights became a mantra for protection of segregation and race discrimination.\footnote{See Schapiro, supra note 156, at 34.} To the extent progressives’ commitment to the states has staying power, it represents a potential new force for federalist approaches at the national level.\footnote{See Young, supra note 159, at 1308-11 (discussing the possibility that some liberals fear to embrace federalism at the chance of appearing opportunistic).} At a minimum, the fact that the ACA and Dodd-Frank both became more friendly to state interests as they worked their way through Congress reinforces claims that the political safeguards of federalism can have real effect.\footnote{For discussion and other contemporary examples of the political leverage states can wield, see Nugent, supra note 126, at 115-67.}

\section*{B. The Central Importance of Administrative Federalism}

A consistent theme runs through all four of the federalism measures listed above: the critical importance of federal administrative agencies in determining the terms of state involvement and extent of state authority. For example, HHS must issue regulations specifying standards for how health exchanges can operate and determining what counts as not taking sufficient action toward establishing an exchange such that the federal government must take over implementation; the CFPB and the OCC are expressly
granted power to preempt state consumer protection laws, albeit under restrictive standards, and the states are to consult with the CFPB before bringing suit to enforce its regulations; and the Department of Education had broad authority to determine the criteria on which state applications for Race to the Top funds would be assessed and the weight assigned to factors like teacher performance accountability. Moreover, these agencies' power to set the terms of state involvement are only one manifestation of their responsibilities in implementing these measures, many others of which will likely have a significant impact on the states.\textsuperscript{197}

No doubt, the fact that these statutes on their face incorporate a substantial role for the states matters for how agencies structure state responsibilities and precludes administrative efforts to preempt state authority of the kind that typified the Bush administration.\textsuperscript{198} Even so, the broad powers and responsibilities delegated to federal agencies mean that it will be these agencies, along with their executive branch overseers, who determine whether these measures realize their state-empowering potential. The Obama initiatives thus reinforce the view that administrative agencies are the critical arena for determining the shape of federal-state relations. Recently, a number of federalism scholars have argued further that administrative agencies represent a potentially powerful mechanism for protecting state interests.\textsuperscript{199} The new

\textsuperscript{197} To give an illustration from the ACA, noted above, see supra text accompanying notes 50-55. HHS is charged with determining what counts as essential benefits that health plans must cover as well as the criteria for triggering review of unreasonable premium rate increases, determinations that the state will implement through their decisions about whether a plan can participate in an exchange and through their review of insurers. These determinations will also affect states' abilities to mandate additional benefits, as states will have to cover the cost of such additional mandates for participants in an exchange. See ACA, Pub. L. No. 111-148 sec. 1003, 124 Stat. 119, 139 (2010) (to be codified at 42 U.S.C. § 2794) (providing for premium rate review by the states and HHS); see also id. secs. 1302(b), 1311, 1321, 124 Stat. at 163-65, 173-81, 186-87 (regarding structure of exchanges).

\textsuperscript{198} See Metzger, supra note 126, at 20.

\textsuperscript{199} See Metzger, supra note 183, at 2072-91; see also Bulman-Pozen & Gerken, supra note 186, at 1292 (discussing the “administrative safeguards of federalism”); Brian Galle & Mark Seidenfeld, Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power, 57 DUKE L.J. 1933, 1939, 1948-83 (2008) (arguing that “for the most part, agencies outperform” other federal branches as allocators of policysetting power); SHARKEY, supra note 130, at 49-55 (defending agencies as at least potentially attentive to state interests).
measures provide an opportunity to test whether that claim holds
up in practice and to study the extent to which features such as
presidential involvement or congressional oversight prove important
in determining agency receptivity to state concerns.\textsuperscript{200}

So far, states have fared relatively well in the administrative
arena under President Obama. Perhaps the clearest evidence of
increased sensitivity to state interests is the President’s Preemption
Memo and resultant pullback in administrative preemption.\textsuperscript{201}
Moreover, the record to date suggests some effort by agencies to
allow the states substantial flexibility and actively incorporate
them into the new federal regulatory schemes. In particular, HHS
defered substantially to NAIC on some issues, such as setting
medical-loss ratios and the process for rate review, and has also
proposed allowing states to choose between more active and more
minimalist approaches to running the health exchanges.\textsuperscript{202} HHS has
granted numerous waivers of the ACA’s requirements to both states
and private entities.\textsuperscript{203} It has also signaled a willingness to work
with states that are not ready to operate an exchange by the stat-
utory deadline of January 1, 2013, proposing the possibility of
conditional approval and allowing states to seek to take over
federally-operated exchanges.\textsuperscript{204} Also notable are Elizabeth Warren’s
efforts to foster a strong relationship between the CFPB and state
attorneys general.\textsuperscript{205} On the education front, the Department of
Education has signaled its willingness to waive accountability
requirements of No Child Left Behind that have triggered strong
state resistance if Congress does not address the issue, though such

\textsuperscript{200} For a recent analysis of the role the President plays in shaping administrative
preemption, see Michele E. Gilman, Presidents, Preemption, and the States, 26 Const.
Comment. 339 (2010).

\textsuperscript{201} See supra notes 127-28 and accompanying text.

\textsuperscript{202} See Proposed Exchange Rule, supra note 40, at 41,867, 41,891-92 (proposed July 15,
2011) (to be codified at 45 C.F.R. pts. 155-156) (“The intent of this proposed rule is to allow
the States substantial discretion in the design and operation of an Exchange.”); Medical Loss
at 45 C.F.R. pt. 158) (“This interim final regulation certifies and adopts the NAIC’s model
regulation in full.”)

\textsuperscript{203} See Robert Pear, Making Exceptions in Obama’s Health Care Act Draws Kudos, and
Criticism, N.Y. Times, Mar. 20, 2011, at A21 (noting 94 percent of waiver applications have
been granted).

\textsuperscript{204} See Proposed Exchange Rule, supra note 40, at 41,871-72.

\textsuperscript{205} See supra text accompanying note 88.
waivers would be contingent on states’ agreeing to federal policy priorities as in Race to the Top.\(^{206}\)

To be sure, this administrative responsiveness to the states has limits. HHS has so far resisted Republican governors’ calls to waive the Medicaid maintenance of effort requirements in light of state budget deficits,\(^{207}\) and at least one state organization has complained about being sidelined from FSOC deliberations.\(^{208}\) In addition, such administrative responsiveness is no doubt fueled in part by political realities: this is hardly a juncture in which HHS wants to foster greater state resistance to the ACA by taking an unduly restrictive approach to state enforcement, and state AGs may represent the best chance for aggressive consumer protection enforcement in the face of congressional Republican opposition to Dodd-Frank.\(^{209}\) Further, despite being structured as an optional program under which states could propose different approaches, Race to the Top was more directive of the states, with states having to adopt certain reforms to have a realistic chance of winning a grant. Again, therefore, agencies’ commitment to federalism appears at least derivative of the Obama administration’s underlying policy goals. Yet the states may still have real and lasting influence, to the extent agency officials see them as crucial partners in achieving progressive aims.\(^{210}\) The presence of former elected state officials in high-level agency positions, in particular former Kansas Governor and Insurance Commissioner Kathleen Sebelius as Secretary of HHS, may also lead to greater administrative attentiveness to some state concerns.\(^{211}\)

209. See Wyatt, supra note 142, at B4.
210. See NUGENT, supra note 126, at 117; Metzger, supra note 183, at 2075 (describing the many ties that give states leverage in federal decision making); see also Bulman-Pozen & Gerken, supra note 186, at 1263 (explaining that the states’ role as federal servants also allows the states to challenge federal government).
Moreover, a striking feature of the recent federalism initiatives is their use of structural mechanisms that give state officials a direct role in federal administrative decisionmaking and potentially limit agencies’ abilities to prevent state involvement. Perhaps the most unusual are the provisions in Dodd-Frank for state financial regulators to serve as non-voting members on the new FSOC and, in addition, requiring that the CFPB issue a notice of proposed rulemaking on a proposed consumer protection standard if a majority of states pass a resolution supporting the measure. Also notable is Dodd-Frank’s express grant of power to the states to enforce the CFPB’s regulations; although the states are precluded from enforcing the statute directly, this provision gives them some independent authority over federal consumer financial protection requirements. To similar effect is the ACA’s grant of primary responsibility to set the terms of medical-loss ratios to NAIC, an association of state insurance officials. Other examples are the Obama Preemption Memo’s specific instruction that agencies undertake a ten-year review of preemptive regulations and its reinforcement of Executive Order 13132, a long-standing order that imposes certain requirements and procedures on federal agencies when they are taking actions that affect state interests. President Obama’s directive instructing OMB to lead an administration-wide process of consulting with states and localities and streamlining their regulatory burdens is simply the most recent instance in which states were formally incorporated into the regulatory process. Additionally, the administration has employed a number of informal mechanisms aimed at ensuring coordination and communication between federal and state officials, such as OMB’s ad hoc committee to oversee implementation of the federal stimulus.

and recommending new approaches for state flexibility and creativity).

212. See supra note 73 and accompanying text.


216. See supra text accompanying note 131.

217. See supra text accompanying note 108.
It remains to be seen how effective these mechanisms will be in protecting state interests, but they represent potentially significant means for incorporating federalism into the administrative level.218 A particularly interesting aspect of these mechanisms is that they provide a means by which states not only can assert their own interests in the administrative arena, but further can directly police federal agency performance. A comparison of the state-supportive mechanisms in the ACA and Dodd-Frank highlights this feature. The ACA mechanisms, such as the incorporation of NAIC and reliance on states to implement health exchanges and review insurance rates, appear primarily focused on providing a sphere for state discretion and benefitting from preexisting state expertise. By contrast, the mechanisms in Dodd-Frank, in particular the states' ability to prod action from the CFPB and independently enforce the CFPB's regulations, appear more centered on using the states to guard against federal agency failure. This difference in focus likely reflects the fact that ACA represents an expansion of the federal government's role into areas previously left to the states, whereas Dodd-Frank represents an effort to strengthen existing federal financial regulation against a background in which states had proved the more energetic prosecutors. A similar effort to empower states to guard against federal agency failure is evident in other recent legislation and in the Supreme Court's preemption jurisprudence.219 Such recognition that the states can play a role in policing

218. These mechanisms accord with recent scholarship in both the administrative law and federalism arenas that has focused on the importance of institutional design in controlling agency behavior and interagency interactions. See, e.g., Rachel E. Barkow, Insulating Agencies: Avoiding Capture Through Institutional Design, 89 TEX. L. REV. 15 (2010); Jody Freeman & Jim Rossi, Agency Coordination in Shared Regulatory Space, 125 HARV. L. REV. (forthcoming 2012); Sharkey, supra note 215, at 2172-73.

federal administrative inaction as well as federal overreaching represents an important broadening in approaches to administrative federalism.\textsuperscript{220}

The dominance of administrative agencies in setting the scope of state authority under these initiatives suggests another important protection for state interests: administrative law. Although constitutional federalism doctrines had an effect on these initiatives, it was largely an effect at the margin.\textsuperscript{221} Anticommandeering prohibitions underlie the use of spending and conditional preemption to obtain state participation in the ACA or Race to the Top.\textsuperscript{222} In addition, the Court’s recent preemption jurisprudence gave additional impetus to the Obama Preemption Memo and was an obvious foil against which the preemption provisions of Dodd-Frank were drafted. But what these initiatives really showcase is the limited effectiveness of federalism doctrines in protecting the states from substantial federal impositions.\textsuperscript{223} The Court has indicated that it will give broad deference to comprehensive congressional regulation of economic activity, even if it preempts state legislation, and has rejected efforts to impose subject matter constraints on federal

\textsuperscript{220} See Metzger, supra note 126, at 70-75 (discussing justifications for such a state role and explaining that the value of having use of the states in this fashion originates in the political branches).

\textsuperscript{221} See Metzger, supra note 183, at 2048-50 (discussing the Court’s reluctance to curb congressional regulatory authority on constitutional federalism grounds).


\textsuperscript{223} Courts have split over the constitutionality of the ACA’s individual mandate. See supra note 27 (collecting decisions). Whatever the ultimate outcome of the individual mandate litigation, however, it seems unlikely to affect the parts of the ACA with the most direct impact on the states. So far, only the Northern District of Florida has held the individual mandate was not severable and therefore invalidated the ACA as a whole, and the Eleventh Circuit reversed on this point on appeal. Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs., 780 F. Supp. 2d 1307, 1320 (N.D. Fla. Mar. 3, 2011), rev’d in part, Florida v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1326-28 (11th Cir. 2011) (severing the individual mandate from the remainder of the Act). The Florida district court’s ruling was an exceptionally broad approach to severability at odds with recent Supreme Court precedent. See, e.g., Free Enter. Fund v. PCAOB, 130 S. Ct. 3138, 3161-62 (2010) (holding that unconstitutional provisions of Sarbanes-Oxley Act were severable).
spending. In particular, the Court has routinely upheld clearly stated funding conditions that violate no independent constitutional bar, no matter the amount of funds involved or the tangential relationship a funding condition may bear to the federal program of which it is part. As a result, provisions such as the ACA’s expansion of the Medicaid rolls or creation of state health exchanges are based on solid constitutional ground, notwithstanding their substantial impact on the states, and the same is true of Dodd-Frank and the Recovery Act.

Race to the Top is an especially stark example of the power of spending conditions and of the difficulty courts face in policing this area of federal-state relations. The grant amounts at issue were substantial but not astronomical, totaling $4.35 billion, compared to the $75 billion provided to the states for K-12 education by other provisions of the Recovery Act. Yet numerous states dramatically altered their laws and approach to elementary and secondary education in the hope of winning a Race to the Top grant. Perhaps this was a reflection of the economic recession and the profound need states and localities have for any significant additional education funding. Or perhaps it signals underlying state interest in many of the educational reforms at issue, with Race to the Top providing mainly impetus and political cover. Courts are unlikely to

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224. See Gonzales v. Raich, 545 U.S. 1, 10-33 (2005) (deferring to Congress’s creation of a comprehensive economic regime and rejecting limits based on state law); South Dakota v. Dole, 483 U.S. 203, 205-12 (1987) (emphasizing that determinations of the general welfare are for Congress and rejecting claim that Congress can only spend money in the areas identified by its enumerated Article I powers).


228. See supra note 111 and accompanying text.
be able to determine which of these scenarios occurred, and more
generally to distinguish instances of coercion from “hard political
choices” that states face, including not wanting to raise taxes to
make up for lost federal funds.229

The limited effectiveness of constitutional federalism doctrines
does not mean, of course, that there are no meaningful constraints
on federal power. An important lesson from the Obama adminis-
tration initiatives concerns the way that political and administra-
tive institutional checks can curb federal overreaching at the
expense of the states. But if judicial constraints are desired, it
seems necessary to look beyond traditional constitutional doctrine
—and in particular to administrative law. I have argued elsewhere
that the Supreme Court is using administrative law as a federalism
surrogate, subjecting administrative decisions affecting state
interests to at times searching scrutiny and enforcing even ordinary
administrative law requirements in ways that benefit the states.230

The Obama administration measures provide a number of opportu-
nities for courts to employ administrative law in this fashion to
advance federalism concerns. Agency decisions that fail to fully
address state concerns or that fail to grant states sufficient dis-
cretion as suggested in the governing statutes could be set aside as
unreasoned and exceeding agency authority. Waiver denials or other
determinations with particular impact on the states, such as
decisions to preclude state enforcement or to have the federal
government operate programs in lieu of the states, could be subject
to particularly searching review.231 By thus working through
administrative law, courts may have greater ability to influence how

229. Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989); see Defendants’ Memorandum
in Opposition to Plaintiffs’ Motion for Summary Judgment at 29-30, McCollum, 716 F. Supp.
2d 1120 (No. 3:10-cv-00091-RV/EMT) (noting that Florida, one of the plaintiff states asserting
that the Medicaid expansion was coercive, lacks a state income tax).

230. Metzger, supra note 183, at 2025-29 (arguing administrative law is the new
federalism). Others have made similar arguments. See William W. Buzbee, Preemption Hard
Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational
Equity, 77 GEO. WASH. L. REV. 1521 (2009); Galle & Seidenfeld, supra note 199, at 1933-41
(critiquing use of administrative law in the name of federalism); Sharkey, supra note 215, at
2180 (commenting upon hard look and Skidmore review of preemption). For a more skeptical
view of administrative federalism, see Wayne A. Logan, The Adam Walsh Act and the Failed
Promise of Administrative Federalism, 78 GEO. WASH. L. REV. 993 (2010).

231. See Metzger, supra note 183, at 2107 (discussing review of waiver denials).
federal agencies engage and relate to the states and achieve more lasting protection of state interests than if they approach federal-state relationships through the limited prism of constitutional federalism.

CONCLUSION

The early months and years of the Obama administration were characterized by a burst of legislative and administrative activity, culminating in the enactment of several major new national regulatory initiatives. But this expansion of federal regulation also represented an expansion of state power, as state governments were granted substantial additional funding and important roles in the new regulatory regimes. The two key features of these initiatives are their proregulatory character and the central role of federal agencies in setting the scope of state authority. As a result, whether states ultimately end up significantly empowered will depend on particular states’ interest in playing a greater regulatory role as well as federal administrative support for substantial state discretion. What seems clear so far, however, is that federalism under Obama is federalism in service to progressive policy.