

## FEDERALISM UNDER OBAMA

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## 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.<sup>1</sup> 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.<sup>2</sup>

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-

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1. See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (2010) (to be codified in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.); Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified in scattered sections of 25, 26, 29, and 42 U.S.C.); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (to be codified in scattered sections of 6, 19, 26, 42, and 47 U.S.C.).

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-DuncanArne201001130344.pdf> ("Texas will not be submitting an application for RTTT funds.").

grams.<sup>3</sup> 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.<sup>4</sup> 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."<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> Put differently, federalism under the Obama administration is federalism in service of progressive policy, not a general devolution

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3. See *infra* Part I.A.

4. See *infra* Part I.B.

5. See Memorandum for the Heads of Executive Departments and Agencies Regarding Preemption, 74 Fed. Reg. 24,693, 24,693 (May 20, 2009) [hereinafter Obama Preemption Memo]. Although more cautious about preemption generally, the Obama administration has supported claims of preemption in several contexts. See *infra* Part I.D.

6. See Timothy J. Conlan & Paul L. Posner, *Inflection Point? Federalism and the Obama Administration*, 41 PUBLIUS 421, 426 (2011) (describing how ARRA's "principal initiatives ... were designed in large part to help cushion state budgets" and "minimize layoffs"); Thomas L. Gais, *Federalism During the Obama Administration* 6 (May 7, 2010) (unpublished PowerPoint presentation), available at [http://www.rockinst.org/pdf/federalism/2010-05-07-federalism\\_during\\_obama\\_administration.pdf](http://www.rockinst.org/pdf/federalism/2010-05-07-federalism_during_obama_administration.pdf) (describing financial aid to states).

7. See *infra* Part II.A.

8. See *infra* Part II.A.

of power and resources to the states.<sup>9</sup> Some might dispute that granting states a role to play in advancing a policy agenda emanating from Washington represents federalism at all.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> Indications so far suggest that federal agencies have pulled back from more aggressive preemption practices and are

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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.

14. See *infra* text accompanying notes 198-200.

allowing states to exercise genuine implementation discretion—indeed at times actively soliciting state partnerships.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> These structures also highlight the important role that administrative law can play in supplementing political and administrative checks on federal overreaching.<sup>18</sup>

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.

## 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

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15. *See infra* Part II.B.

16. *See infra* text accompanying notes 201-06, 212-20.

17. *See infra* text accompanying notes 212-16.

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.<sup>19</sup> The ACA undertakes a major overhaul of health insurance, imposing substantial new federal requirements and expanding health insurance to 32 million of the nation's 55 million uninsured.<sup>20</sup> Critical features of the legislation include: prohibitions on insurance companies discriminating against individuals based on preexisting conditions or imposing caps on benefits;<sup>21</sup> a requirement that individuals purchase insurance along with premium subsidies for those below certain income thresholds;<sup>22</sup> regulation of insurance premium increases and the amount insurance companies spend on non-medically related expenses;<sup>23</sup> expansion of Medicaid to cover all individuals under 133 percent of the poverty line;<sup>24</sup> extension of children's eligibility for insurance under their parents until the age of 26;<sup>25</sup>

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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 Versus ObamaCare*, WALL ST. J., Jan. 5, 2011, at A15.

20. *See, e.g.*, Letter from Douglas W. Elmendorf, Dir., Cong. Budget Office, to Nancy Pelosi, Speaker, U.S. House of Representatives 9-10 (Mar. 20, 2010) [hereinafter CBO Pelosi Letter], available at <http://www.cbo.gov/ftpdocs/113xx/doc11379/AmendReconProp.pdf> (estimating ACA's effect on insurance coverage).

21. *See* ACA, Pub. L. No. 111-148, sec. 1201, § 2704, 124 Stat. 119, 154-55 (2010) (to be 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).

23. *See id.* sec. 1201, § 2701, 124 Stat. at 155-56 (to be codified in 42 U.S.C. § 300gg) (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").

24. *See id.* sec. 2001(a)(1)(C), 124 Stat. at 271 (to be codified at 42 U.S.C. § 1396a).

25. *See id.* sec. 1001, § 2714, 124 Stat. at 132 (to be codified at 42 U.S.C. § 300gg-14).

and the creation of new health exchanges that the states will run.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> Although it preempts state legislation stipulating that individuals should not have to obtain insurance,<sup>29</sup> the requirement applies to individuals rather

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26. See *id.* secs. 1311-1313, 124 Stat. at 173-85 (to be codified in scattered sections of 42 U.S.C.). For more information on health benefit exchanges and their implementation, see generally ROBERT CAREY, PUB. CONSULTING GRP., HEALTH INSURANCE EXCHANGES: KEY ISSUES FOR STATE IMPLEMENTATION (2010), available at <http://www.rwjf.org/files/research/70388.pdf>; HENRY J. KAISER FAMILY FOUND., EXPLAINING HEALTH CARE REFORM: WHAT ARE HEALTH INSURANCE EXCHANGES? (2009), available at <http://www.kff.org/healthreform/upload/7908.pdf>.

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 3962915, 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).

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).

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](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.<sup>30</sup> The expansion of those eligible for Medicaid will add 16 million to the Medicaid rolls.<sup>31</sup> 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.<sup>32</sup> The federal government's covering of these costs represents a significant legislative victory for the states.<sup>33</sup> However, states still face greater administrative costs as well as eventually 10 percent of new coverage costs. Furthermore,

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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. *See* ACA sec. 1513, 124 Stat. at 253-56 (to be codified in scattered sections of 26 U.S.C.); *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).

31. *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.

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. *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>; *see also* THE HENRY J. KAISER FAMILY FOUND., FINANCING NEW MEDICAID COVERAGE UNDER HEALTH REFORM: THE ROLE OF THE FEDERAL GOVERNMENT AND STATES 1 (2010), *available at* <http://www.kff.org/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. *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.

33. *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 manuscript), *available at* [http://papers.ssrn.com/so13/papers.cfra?abstract\\_id=1643301](http://papers.ssrn.com/so13/papers.cfra?abstract_id=1643301) ("The 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.<sup>34</sup> 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.<sup>35</sup>

The health exchanges—formally, American Health Benefit Exchanges—are a centerpiece of the ACA's effort to expand access to health insurance.<sup>36</sup> 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.<sup>37</sup> 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.<sup>38</sup> Alternatively, a group of states can opt to operate a regional exchange, or a state can choose to operate different exchanges in

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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.").

35. See *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1266-67, 1270 (N.D. Fla. 2011) (describing and rejecting this claim), *aff'd in part*, *Florida v. U.S. Dep't of Health & Human Servs.*, Nos. 11-11021, 11-11067, 2011 WL 3519178, at \*23-24 (11th Cir. Aug. 12, 2011) (rejecting coercion argument); Emily Ramshaw, *Texas Considers Medicaid Withdrawal*, N.Y. TIMES, Nov. 7, 2010, <http://www.nytimes.com/2010/11/07/us/politics/07ttmedicaid.html> (reporting that Texas legislators are discussing possibility of withdrawing from Medicaid "more seriously than ever").

36. See, e.g., ACA sec. 1311, 124 Stat. at 173-81 (to be codified at 42 U.S.C. § 18031).

37. See, e.g., Dep't of Health & Human Servs., *Initial Guidance to States on Exchanges*, [http://cciio.cms.gov/resources/files/guidance\\_to\\_states\\_on\\_exchanges.html](http://cciio.cms.gov/resources/files/guidance_to_states_on_exchanges.html) (last visited Nov. 14, 2011).

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.<sup>39</sup> HHS's proposed regulations also offer states the option of partnering with the federal government to run the exchange.<sup>40</sup> This reliance on state-run exchanges marks a significant difference between the Senate bill that became the ACA and the earlier House version.<sup>41</sup> 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.<sup>42</sup> State officials lobbied strongly for state-based exchanges and for states to retain broad regulatory authority over insurance.<sup>43</sup>

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;<sup>44</sup> certify health plans for participation based on federal criteria;<sup>45</sup> run call centers and maintain a website that provides comparative data on plans and a calculator by which consumers can calculate actual costs;<sup>46</sup> determine eligibility for

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39. 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”); *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”).

40. See Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, 76 Fed. Reg. 41,866, 41,870, 41,872 (proposed July 15, 2011) (to be codified at 45 C.F.R. pts. 155-156) [hereinafter Proposed Exchange Rule]; see also U.S. DEPT OF HEALTH & HUMAN SERVS., NEWSROOM, AFFORDABLE INSURANCE EXCHANGES: CHOICES, COMPETITION AND CLOUT FOR STATES 2-3 (July 11, 2011) (factsheet detailing elements of the proposed exchange rule).

41. See Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009).

42. See *id.* § 301 (proposing a national health insurance exchange run by the newly created Health Choices Administration); *id.* § 308 (proposing optional operation of state-based health insurance exchanges); see also America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. §§ 201, 208 (2009) (making the same proposals); Dinan, *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”).

43. Dinan, *supra* note 33, at 9, 12-13, 35; see also Reed Abelson, *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, *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.’”).

44. See KFF HEALTH LAW SUMMARY, *supra* note 32, at 5.

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

46. 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;<sup>47</sup> and certify if individuals are eligible for exemptions from the coverage requirement.<sup>48</sup> But it also leaves many details about how the exchanges will operate up to HHS and the states.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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.<sup>52</sup>

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18031).

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

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).

49. See Timothy Stoltzfus Jost, *Health Insurance Exchanges and the Affordable Care Act: Key Policy Issues*, COMMONWEALTH FUND, 8, 10, 16, 20, 25-26 (2010), [http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2010/Jul/1426\\_Jost\\_hlt\\_insurance\\_exchanges\\_ACA.pdf](http://www.commonwealthfund.org/~media/Files/Publications/Fund%20Report/2010/Jul/1426_Jost_hlt_insurance_exchanges_ACA.pdf) (noting flexibility for states in operating exchanges); Alan Weil, *State Policymakers' Priorities for Successful Implementation of Health Reform*, BRIEFING (Nat'l Acad. for State Health Policy, Portland, Me.), May 2010, at 2 ("States have many choices with respect to the exchange.").

50. See Proposed Exchange Rule, *supra* note 40, 76 Fed. Reg. at 41891-92; Robert Pear, *Health Care Overhaul Depends on States' Insurance Exchanges*, N.Y. TIMES, Oct. 24, 2010, at A23; see also U.S. Dep't of Health & Human Servs., *Initial Guidance to States on Exchanges*, HEALTHCARE.GOV, [http://www.healthcare.gov/center/regulations/guidance\\_to\\_states\\_on\\_exchanges.html](http://www.healthcare.gov/center/regulations/guidance_to_states_on_exchanges.html) (last visited Oct. 5, 2011) (initial HHS guidance indicating states would have discretion in structuring exchanges).

51. See ACA sec. 1311(d)(1), 124 Stat. at 176 (to be codified at 42 U.S.C. § 18031); Proposed Exchange Rule, *supra* note 40, 76 Fed. Reg. at 41,827.

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.<sup>53</sup> 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.<sup>54</sup> In some states, such enforcement may require changes in state law to ensure that state commissioners are authorized to enforce federal requirements.<sup>55</sup> 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.<sup>56</sup>

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53. See Christopher C. Jennings & Katherine J. Hayes, *Health Insurance Reform and the Tensions of Federalism*, 362 NEW ENG. J. MED. 2244, 2244 (2010) (“[States] new responsibilities include securing immediate access to high-risk pools for all eligible Americans, implementing an array of insurance-market reforms on an ongoing basis, and eventually establishing health insurance exchanges.”); Alan Weil & Raymond Scheppach, *New Roles for States in Health Reform Implementation*, 29 HEALTH AFF. 1178, 1178-79 (2010) (noting that states must establish new Medicaid eligibility rules, modify insurance regulations, and seek grants in implementing health reform, in addition to operating exchanges); Joanne Kenen, *National Reform Meets Politics in the States*, AM. PROSPECT, Sept. 2010, at A11 (describing state roles and different types of state responses).

54. See, e.g., ACA sec. 1001, § 2718(b), 124 Stat. at 137 (to be codified at 42 U.S.C. § 300gg-18) (enforcing rebates for non-claims costs over state-determined percentages); *id.* sec. 1003, § 2794, 124 Stat. at 139-40 (to be codified at 42 U.S.C. § 300gg-94) (requiring state review of premium increases and reporting on trends); *id.* sec. 1311(c), 124 Stat. at 174 (to be codified at 42 U.S.C. § 18031) (requiring certification of health plans).

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](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).

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 Commissions”). HHS recently issued an interim final rule largely deferring to NAIC’s determinations. See Robert Pear, *New Rules Tell Insurers: Spend More on Care*, 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.<sup>57</sup>

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.<sup>58</sup> The ACA preempts 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.<sup>59</sup> 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.<sup>60</sup> 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

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Patient Protection and Affordable Care Act, 75 Fed. Reg. 74,864 (Dec. 1, 2010) (to be codified at 45 C.F.R. pt. 158) [hereinafter Medical Loss Ratio Interim Rule].

57. See, e.g., ACA sec. 1321(a)(2), 124 Stat. at 186 (to be codified at 42 U.S.C. § 18041); *id.* sec. 1333(a)(1), 124 Stat. at 206 (to be codified at 42 U.S.C. § 18053); Telephone Interview with Alan Weil, Exec. Dir., Nat'l Acad. for State Health Policy (Feb. 4, 2011).

58. See ACA sec. 1332, 124 Stat. at 203-06 (to be codified at 42 U.S.C. § 18052); see also Application, Review, and Reporting Process for Waivers for State Innovation, 76 Fed. Reg. 13,553 (proposed Mar. 14, 2011) (proposed procedures for section 1332 waiver process). States can also provide "Basic Health Programs" for individuals with incomes between 133 and 200 percent of the poverty level, in lieu of their obtaining health care through an exchange. See ACA sec. 1331, 124 Stat. at 199-203 (to be codified at 42 U.S.C. § 18051); NAT'L ASS'N OF INS. COMM'RS, PREEMPTION AND STATE FLEXIBILITY IN ACA 2 (2010), available at [http://www.naic.org/documents/index\\_health\\_reform\\_general\\_preemption\\_and\\_state\\_flex\\_ppaca.pdf](http://www.naic.org/documents/index_health_reform_general_preemption_and_state_flex_ppaca.pdf) [hereinafter NAIC, PREEMPTION]. President Obama recently endorsed a bipartisan bill currently pending in Congress that would allow waivers to be granted in 2014, but it is not clear that House Republicans will be willing to amend rather than repeal the law. See Empowering States to Innovate Act, S. 3958, 111th Cong. § 2 (2010); Sheryl Gay Stolberg & Kevin Sack, *Altering Stand on Health Law, Obama Offers Waiver Option*, N.Y. TIMES, Mar. 1, 2011, at A1.

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.").

60. See ACA sec. 1323(b)(3), 124 Stat. at 193-94 (to be codified at 42 U.S.C. § 18043).

benefits—which will determine the amount states must pay to subsidize any additional state mandates.<sup>61</sup>

States' responses to the ACA to date have varied tremendously. A number of states have joined the litigation challenging its constitutionality,<sup>62</sup> but until recently most states appeared to be preparing to implement at least some of the ACA's requirements.<sup>63</sup> States are most engaged with preparing for the Medicaid expansion, which can start in 2011 but must occur by 2014.<sup>64</sup> 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.<sup>65</sup> 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-

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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).

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).

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.

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).

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).

ing the pool for residents of these states.<sup>66</sup> 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.<sup>67</sup> Some others are now taking a much slower approach toward implementation and are favoring a more minimalist exchange model.<sup>68</sup> By contrast, Vermont recently adopted legislation adopting a single-payer health system.<sup>69</sup>

### *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,<sup>70</sup>

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66. See Kevin Sack, *High-Risk Insurance Pools Are Attracting Far Fewer Takers than Projected*, N.Y. TIMES, Nov. 4, 2010, at A19.

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/politicopulse461.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-health-care>. For the single-payer system to go into effect, HHS will need to grant Vermont a waiver from the ACA's requirements. See *id.*

70. See Dodd-Frank Act, Pub. L. No. 111-203, secs. 111-112, 124 Stat. 1376, 1392-98 (2010) (to be codified at 12 U.S.C. §§ 5321-5322).

and provides federal regulators with resolution authority for systemically important firms in danger of defaulting.<sup>71</sup> 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).<sup>72</sup> 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.<sup>73</sup>

The states are particularly important in two substantive areas Dodd-Frank addresses—consumer financial protection and insurance regulation.<sup>74</sup> Both of these are areas of traditional state

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71. *See id.* secs. 203-205, 210, 124 Stat. at 1450-56, 1460 (to be codified in scattered sections of 12 U.S.C.).

72. *See id.* sec. 111(b)(1), 124 Stat. at 1392-93 (to be codified at 12 U.S.C. § 5321).

73. *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](http://www.naic.org/Releases/2010_docs/huff_appointed_fsoc.htm).

74. 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&tabs=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.<sup>75</sup> 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.<sup>76</sup> 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,<sup>77</sup> 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.<sup>78</sup> Dodd-Frank clearly sides with the states on these issues, enacting provisions codifying the result in *Cuomo* and overturning *Watters*.<sup>79</sup> 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

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Advisers Act of 1940, 75 Fed. Reg. 77,052, 77,070 (proposed Dec. 10, 2010).

75. 15 U.S.C. §§ 1011-1015 (2006).

76. See Arthur E. Wilmarth, Jr., *Cuomo v. Clearing House: The Supreme Court Responds to the Subprime Financial Crisis, and Delivers a Major Victory for the Dual Banking System and Consumer Protection*, in *THE PANIC OF 2008: CAUSES, CONSEQUENCES AND IMPLICATIONS FOR REFORM* 295, 307-10 (Lawrence E. Mitchell & Arthur E. Wilmarth, Jr. eds., 2010) [hereinafter Wilmarth, *Supreme Court Responds*] ("Despite these initiatives by the states, the OCC's actions seriously obstructed the states' ability to protect consumers from predatory lending practices."); Christopher L. Peterson, *Federalism and Predatory Lending: Unmasking the Deregulatory Agenda*, 78 TEMP. L. REV. 1, 70-80 (2005) (describing conflict between states and OCC); see also Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004) (detailing broad preemption efforts by the OCC).

77. 550 U.S. 1, 21 (2007).

78. 129 S. Ct. 2710, 2721-22 (2009).

79. Dodd-Frank Act, Pub L. No. 111-203, sec. 1042(a), (d)(1), 124 Stat. 1376, 2012 (to be codified at 12 U.S.C. § 5552); *id.* sec. 1044(a), § 5136C, 124 Stat. at 2014-15 (to be codified at 12 U.S.C. § 25b).

determined by a court or by the OCC “on a case-by-case basis.”<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> Dodd-Frank ultimately created the new Bureau of

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80. *Id.* sec. 1044, § 5136C(b)(1), (3), 124 Stat. at 2014-15 (to be codified at 12 U.S.C. § 25b); *see also id.* sec. 1041(a), 124 Stat. at 2011-12 (to be codified at 12 U.S.C. § 5551) (providing that only inconsistent state laws are preempted and greater state consumer protection does not create inconsistency). This general preemption standard is intended to codify the preemption standard contained in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996). *See* Dodd-Frank Act, sec. 1044, § 5136C(b)(1)(B), 124 Stat. at 2015 (to be codified at 12 U.S.C. § 25b).

81. Dodd-Frank Act sec. 1044, § 5136C(c), 124 Stat. at 2016 (to be codified at 12 U.S.C. § 25b).

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 Mierzwinsky, 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.<sup>84</sup> 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.<sup>85</sup> 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."<sup>86</sup> 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.<sup>87</sup> 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,<sup>88</sup> and President Obama recently nominated a former Ohio Attorney General as the CFPB Director.<sup>89</sup>

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the massive regulatory failures that have harmed millions of Americans."); *id.* (statement of Elizabeth Warren, Professor, Harvard Law School) (proposing new Consumer Financial Protection Agency).

84. Dodd-Frank Act sec. 1011(a), (c), 124 Stat. at 1964 (to be codified at 12 U.S.C. § 5491); *id.* sec. 1017, 124 Stat. at 1975-76 (to be codified at 12 U.S.C. § 5497).

85. *Id.* sec. 1012(c), 124 Stat. at 1965 (to be codified at 12 U.S.C. § 5492); *id.* sec. 1023(a), 124 Stat. at 1985 (to be codified at 12 U.S.C. § 5513).

86. *Id.* sec. 1041(c), 124 Stat. at 2011-12 (to be codified at 12 U.S.C. § 5551). The Act also specifies factors that the CFPB is to consider and discuss in deciding whether to adopt such a standard and requires that if it decides not to adopt a final regulation, it publish that determination in the Federal Register; and further requires that it notify Congress and the requesting states of its determination. *Id.* A report by the National Association of Attorneys General reads the requirement that states must have "enacted a resolution" as indicating that "the process is triggered only by official legislative action from a majority of States" and as suggesting "the states must actually submit a joint request to the Bureau." NAT'L ASS'N OF ATTORNEYS GEN., WALL STREET REFORM AND CONSUMER PROTECTION ACT: SUMMARY FOR ATTORNEYS GENERAL 4 (2010), available at <http://www.naag.org/assets/files/pdf/pubs/wall-street-reform-UB.pdf>.

87. Dodd-Frank Act sec. 1042, 124 Stat. at 2012-14 (to be codified at 12 U.S.C. § 5552).

88. Carter Dougherty, *Warren Recruits Dodd-Frank Enforcers from 50 States*, BLOOMBERG BUSINESSWEEK, Dec. 2, 2010, <http://www.businessweek.com/news/2010-12-02/elizabeth-warren-recruits-dodd-frank-enforcers-from-50-states.html>.

89. Binyamin Appelbaum, *Former Ohio Attorney General To Head New Consumer Agency*,

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.<sup>90</sup> States lobbied largely successfully for preservation of their traditional oversight of insurance.<sup>91</sup> 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.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> The inclusion of a state

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N.Y. TIMES, July 18, 2011, at B1.

90. See BAIRD WEBEL, CONG. RESEARCH SERV., R41372, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: INSURANCE PROVISIONS 1 (2010).

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%5CFileUpload5686%5C3483%5CInsurance-Industry-Implications-of-Dodd-Frank-Act.pdf](http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%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](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\\_rafssa.pdf](http://www.naic.org/documents/testimony_100420_rafssa.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.<sup>95</sup>

### *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.<sup>96</sup> 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.<sup>97</sup> 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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passed Federal Insurance Office (FIO) language.”); Letter from Nat'l Conference of Ins. Legislators to Barney Frank, Chairman, House Fin. Servs. Comm. (Oct. 23, 2009), *available at* <http://www.ncoil.org/HomePage/2009/10272009October23Letter.pdf> (“We continue to disagree with the necessity for such an office and question its accountability and effectiveness. We believe that state regulation is successfully guiding insurers through the current economic downturn.”).

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).

96. American Recovery and Reinvestment Act (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009).

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).

tation or education assistance, were passed through to localities.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup>

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.”<sup>101</sup> Although states were

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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).

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.

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=C6q1M3kxaEY%3D&tabid=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.

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.<sup>102</sup> 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.<sup>103</sup> The Act contained immediate obligation demands, with states required to use the funds given or lose them.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup>

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

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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).

104. *See, e.g.*, ARRA, Pub. L. No. 111-5, div. A, tit. XI, 123 Stat. 115, 206 (2009).

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.<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

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

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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.

109. See U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2-4 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

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

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111. See Stephanie Banchemo & 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 Banchemo, *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](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).

113. See OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012, at 67 (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/budget.pdf>; U.S. DEPT OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 6 (2010), available at <http://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf> (detailing new federal goals of the ESEA, including building on Race to the Top's success); see also Arne Duncan, U.S. Sec'y of Educ., Remarks at the National Press Club (July 27, 2010), available at <http://www.ed.gov/news/speeches/quiet-revolution-secretary-arne-duncans-remarks-national-press-club> (describing failures of NCLB and detailing new innovation under the new administration).

improvement.<sup>114</sup> 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."<sup>115</sup> 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<sup>116</sup> and reflected education policy goals of the Obama administration.<sup>117</sup> Such executive branch discretion is a predictable result of greater reliance on project or competitive grants to the states over formula grants.<sup>118</sup> 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.<sup>119</sup>

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

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114. See ARRA, Pub. L. No. 111-5, div. A, tit. XIV, secs. 14001(c), 14005(c), 14006-14007, 123 Stat. 115, 279, 282-84 (2009).

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).

118. See Paul Manna, *Education Stimulus Watch, Competitive Grant Making and Education Reform: Assessing Race to the Top's Current Impact and Future Prospects 4-5* (Am. Enter. Inst., Working Paper No. 5, 2010).

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.<sup>120</sup> The Recovery Act similarly targeted localities, at times requiring that certain funds be granted to local governments.<sup>121</sup> Even more striking, however, was the Act's bypass provision, which authorizes state legislatures to overrule governors' decisions to reject stimulus funds.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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

121. 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. See ARRA, Pub. L. No. 111-5, div. A, tit. XIV, sec. 14006(c), 123 Stat. 115, 284 (2009).

122. ARRA div. A, tit. XVI, sec. 1607(b), 123 Stat. at 303-04. Two states appear to have overridden their governors' refusal to accept stimulus funds: South Carolina and Alaska. See *Edwards v. State*, 678 S.E.2d 412, 419-20 (S.C. 2009); Sean Cockerham, *Legislature Overrides Palin's Stimulus Veto*, ANCHORAGE DAILY NEWS, Aug. 10, 2009, <http://www.adn.com/2009/08/10/893955/legislature-overrides-palins-stimulus.html>.

123. See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 971-75 (2007) (listing examples).

124. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1206-25 (1999) (noting and critiquing arguments against such federal authorization); see also D. Cody Huffaker, Comment, *A New Type of Commandeering: The Bypass Clause of the American Recovery and Reinvestment Act of 2009*, 42 ARIZ. ST. L.J. 1055, 1057 (2010) (arguing that the Recovery Act's authorization of a state legislature to accept stimulus funds over a governor's opposition violates the anticommandeering doctrine).

125. *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.<sup>126</sup> By 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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup>

The Obama Preemption Memorandum appears to have had an effect. A study that Catherine Sharkey conducted for the Adminis-

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Deadwood Sch. Dist. No. 40-I, 469 U.S. 256, 270 (1985) (holding that state statute requiring local governments to distribute federal payments in lieu of taxes in same way as general tax revenues was preempted by federal statute authorizing such payments). *See generally* Davidson, *supra* note 123, at 986-1000 (discussing tension between *Nixon* and prior precedent); Hills, *supra* note 124, at 1207-16 (arguing that precedent does not support a prohibition on such federal authorizations).

126. *See* Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 COLUM. L. REV. 1, 2-3 (2011) (describing major preemption decisions from the 2008-09 term). In surveys, state officials express frustration over perceived increases in federal preemption. *See* JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 37, 48 (2009) (listing opposition to preemption as second most common NGA and NCSL policy statement).

127. Obama Preemption Memo, *supra* note 5, at 24, 693-94.

128. *Id.*

129. President Barack Obama, Government Reform for Competitiveness and Innovation, 76 Fed. Reg. 14,273, 14,273 (Mar. 11, 2011).

trative Conference of the United States found that in a majority of agencies surveyed, the Memorandum “led to serious internal review.”<sup>130</sup> 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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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

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130. CATHERINE M. SHARKEY, *FEDERAL AGENCY PREEMPTION OF STATE LAW* 11 (2010), available at [http://www.acus.gov/wp-content/uploads/downloads/2010/12/Sharkey\\_Draft\\_ACUS\\_Report\\_2010\\_11\\_271.pdf](http://www.acus.gov/wp-content/uploads/downloads/2010/12/Sharkey_Draft_ACUS_Report_2010_11_271.pdf).

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).

133. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. D); U.S. Envtl. Prot. Agency, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, <http://www.epa.gov/climatechange/endangerment.html> (last visited Oct. 11, 2011); U.S. Envtl. Prot. Agency, EPA Will Propose Historic Greenhouse Gas Emissions Standards for Light-Duty Vehicles (May 2009), <http://www.epa.gov/otaq/climate/regulations/420f09028.pdf>. California agreed to defer to the national standards through 2016. News Release, U.S. Envtl. Prot. Agency, EPA Grants California GHG Waiver (June 30, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/5E448236DE5FB369852575E500568E1B>.

the preemptive power of federal financial regulators.<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

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

135. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1585-99 (2007) (discussing floor/ceiling distinction in preemption).

136. Brief for the United States as Amicus Curiae Supporting Petitioners at 8-9, *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011) (No. 08-1314); Brief for the United States as Amicus Curiae Supporting Respondents at 22-30, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (No. 09-993), 2011 WL 741927; see also Letter from Sharon Swingle, Appellate Staff, U.S. Dep't of Justice, to Marcia M. Waldron, Clerk, U.S. Court of Appeals for the Third Circuit (Apr. 28, 2009) (withdrawing a previously submitted amicus brief supporting preemption of state failure to warn claims based on drug labeling in *Colaccio v. Apotex, Inc.*, 129 S. Ct. 1578 (2009)). The Supreme Court agreed and rejected preemption in *Williamson*, but upheld the claim of preemption in *PLIVA*, 131 S. Ct. at 2582.

137. Brief for the United States as Amicus Curiae Supporting Respondents at 6-9, *Bruesewitz v. Wyeth, Inc.*, 131 S. Ct. 1068 (2011) (No. 09-152) [hereinafter *Bruesewitz* Amicus Brief]; Brief for the United States as Amicus Curiae Supporting Petitioners at 8-10, *Chamber of Commerce of the U.S. v. Whiting*, 131 S. Ct. 1968 (2011) (No. 09-115) [hereinafter *Whiting* Amicus Brief]. Again, the administration had a 50 percent success rate with its preemption arguments. See *Whiting*, 131 S. Ct. at 1987 (rejecting preemption); *Bruesewitz*, 131 S. Ct. at 1082 (upholding preemption). Also worthy of note is the Obama administration's opposition to a suit brought by eight states challenging power plants' greenhouse gas emissions as a public nuisance, but that case focused displacement of federal common law nuisance claims rather than preemption of state law. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537, 2540 (2011) (holding federal common law claims displaced and remanding for consideration of whether state common law claims were preempted); Brief for the Tennessee Valley Authority as Respondent Supporting Petitioners at 3, 42-53, *Am. Elec. Power Co.*, 131 S. Ct. 2527 (No. 10-174) [hereinafter *TVA Brief*] (addressing only federal common law issue).

138. See *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

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.<sup>139</sup>

## 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.

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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.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> And the

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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).

141. See Robert Pear, *Health Insurers to Be Required To Justify Rate Increases over 10 Percent*, N.Y. TIMES, Dec. 22, 2010, at A21 (describing new regulations on premium increases as "a major expansion of federal authority in an area long regulated by states"); Amy B. Monahan, *Initial Thoughts on Essential Health Benefits* 3-4 (Univ. of Minn. Legal Studies Research Paper Series, Research Paper No. 10-36, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1646723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646723) ("For the first time, the federal government is taking the primary role in regulating the substance of health insurance coverage.").

142. See Dodd-Frank Act, Pub. L. No. 111-203, secs. 203-205, 124 Stat. 1376, 1450-58 (2010) (empowering the Treasury "to liquidate failing financial companies that pose a significant risk to the financial stability of the United States"); *id.* secs. 721-754, 124 Stat. 1658-1754 (authorizing regulation of derivatives and other "swap markets"); *id.* secs. 951-957, 124 Stat. 1899-1907 (requiring new executive compensation regulation); see also Damian Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL ST. J., July 16, 2010, at A1 (calling Dodd-Frank "the biggest expansion of government power over banking and markets since the Depression," including "expansive new authority over derivatives"); Edward Wyatt, *A Scale-Back Is Possible in Financial Overhaul Law*, N.Y. TIMES, Nov. 4, 2010, at B4 (noting SEC's "100 [new] rulemaking provisions" and CFTC's "30 broad areas of new rulemaking").

Recovery Act's additional federal funding for states came with new conditions and strings attached.<sup>143</sup>

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.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> 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.

146. See ACA, Pub. L. No. 111-148, sec. 1001, § 2718, 124 Stat. 119, 136-37 (2010) (to be codified at 42 U.S.C. § 300gg-18) (allowing states to regulate rebate percentages); *id.* sec. 1201, § 2701, 124 Stat. at 155-56 (to be codified at 42 U.S.C. 300gg) (allowing states to regulate rating areas for premium increases); *id.* secs. 1321-1324, 124 Stat. at 186-199 (providing flexibility to states in operation of exchanges); *id.* sec. 1323(b)(3), 124 Stat. at 192-94 (allowing states to require additional benefits); see also *supra* notes 51-62 and accompanying text (describing areas of state flexibility and control in the ACA).

operate programs that deviate from the ACA's requirements.<sup>147</sup> In the financial context, Dodd-Frank allows states to impose greater consumer protections without fear of federal preemption and to enforce federal requirements.<sup>148</sup> 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.<sup>149</sup>

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.<sup>150</sup> 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.<sup>151</sup> 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.”).

151. See, e.g., No Child Left Behind Act, 20 U.S.C. § 6311 (2006) (requiring states to submit plans to improve education but allowing flexibility in details of education standards); 42 U.S.C. §§ 1397bb-1397gg (2006) (requiring a general state child health plan for states to receive federal funds under the State Children’s Health Insurance Program but allowing flexibility in implementation); Clean Air Act, 42 U.S.C. §§ 7410, 7416 (2006) (requiring states

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.<sup>152</sup> Reliance on the states also served to deflect political opposition from state government organizations anxious about displacement of state authority.<sup>153</sup> 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.<sup>154</sup> 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.<sup>155</sup>

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to submit implementation plans but retaining state authority to regulate emissions and air pollution).

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”).

153. STANDING COMM. ON COMMC’NS, FIN. SERVS. & INTERSTATE COMMERCE, NAT’L CONFERENCE OF STATE LEGISLATURES, DRAFT POLICY STATEMENT: STATE SOVEREIGNTY IN FINANCIAL SERVICES, *available at* <http://www.ncsl.org/documents/standcomm/scomfc/StateSovereigntyAM.pdf>.

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/ResInsightsReformRoles.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.<sup>156</sup> 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.<sup>157</sup> States were also more aggressive at addressing financial sector abuses and global warming, often in the face of federal resistance.<sup>158</sup> The effect was to transform many advocates of progressive policies and more aggressive regulation into defenders of state prerogatives.<sup>159</sup> 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.<sup>160</sup>

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laboratory; and try novel social and economic experiments without risk to the rest of the country."); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130 (2004) ("The whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation.").

156. See David J. Barron, Foreword, *Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1, 1-2 (2009); see also Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 33-34, 40-51 (2009).

157. See Stephen M. Weiner, *Payment Reform After PPACA: Is Massachusetts Leading the Way Again?*, 11 YALE J. HEALTH POL'Y L. & ETHICS 33, 33 & n.3 (2011).

158. See Kirsten H. Engel, *Mitigating Global Climate Change in the United States: A Regional Approach*, 14 N.Y.U. ENVTL. L.J. 54, 60 (2005) (noting "the multitude of greenhouse gas reduction activities occurring on the state and local level"); Schapiro, *supra* note 156, at 40-43; Wilmarth, *Supreme Court Responds*, *supra* note 76, at 3, 19-22, 26.

159. See Schapiro, *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, *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).

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. See *The New Team*, N.Y. TIMES, [http://projects.nytimes.com/44th\\_president/new\\_team/](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.<sup>161</sup> 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.<sup>162</sup> 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

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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).

162. Substantial literature exists on the question of whether interstate mobility and state variation leads to a regulatory race to the bottom. Compare, e.g., Richard J. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535, 538-40 (1997) (discussing the logic of why "race-to-the-bottom justification" for centralized federal environmental regulation is unpersuasive), with Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 351-54 (1997) (arguing that empirical evidence "provide[s] prima facie evidence that states are indeed engaged in a race-to-the-bottom"). Interstate mobility and the ability of insurers to leave a state's individual policy market undermined earlier state efforts to prohibit health insurers from discriminating against preexisting conditions. See, e.g., Amicus Brief on Behalf of the Governors of Washington, Colorado, Michigan, and Pennsylvania in Support of Defendant's Motion for Summary Judgment at 5, *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 10-CV-91-RV-EMT) (describing the "death spiral" that can occur in the insurance market when coverage for preexisting conditions is required without universal coverage").

inherent characterization of these initiatives as assertions of national power.<sup>163</sup>

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.<sup>164</sup> The limits placed on administrative preemption, and administrative moves such as the approval of California's request to regulate greenhouse gas auto emissions,<sup>165</sup> 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.<sup>166</sup> The substantial increase in state Medicaid rolls is yet another example of an expanded governmental role.<sup>167</sup> 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.<sup>168</sup> Nor does the pro-regulatory-antiregulatory divide map as well in the

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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.").

164. See *supra* notes 80, 92-94, 135 and accompanying text.

165. See *supra* text accompanying notes 132-33.

166. See *supra* text accompanying notes 97-100.

167. See *supra* text accompanying notes 30-32.

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.<sup>169</sup> 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.<sup>170</sup> Most obviously, assigning the states a significant role was at times strategically necessary to secure passage of these initiatives.<sup>171</sup> 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.<sup>172</sup> Incorporating the states also creates the potential for greater policy entrenchment over time as state officials become

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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.<sup>173</sup> 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.<sup>174</sup>

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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> It not only already has substantial experience

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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,<sup>178</sup> the military's TRICARE system,<sup>179</sup> as well as Medicare, but also can use the same health exchange model in a number of states.<sup>180</sup>

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.<sup>181</sup> 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.<sup>182</sup>

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.<sup>183</sup> 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.<sup>184</sup> Indeed, although

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SCHEBERLE, *FEDERALISM AND ENVIRONMENTAL POLICY: TRUST AND THE POLITICS OF IMPLEMENTATION* 187-88 (1997) (noting that the federal government lacks the fiscal or organizational capacity to take over responsibility for state-level environmental implementation); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1544 (1994) (“Realistically speaking, Congress can neither abandon these programs nor ‘fire’ the states and have federal bureaucrats assume full responsibility for them.”).

178. See Federal Employees Health Benefits Program, 5 C.F.R. § 890 (2011).

179. See TRICARE Program, 32 C.F.R. § 199.17 (2011).

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.”).

181. See Rubin & Feeley, *supra* note 11, at 910-14 (distinguishing federalism and decentralization).

182. *Id.* at 913 (“[F]ederalism ... is the right of states to act independently, in furtherance of goals the national government does not share.”).

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”).

184. Scholars have recently articulated accounts of federalism that emphasize concurrent

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.<sup>185</sup> 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.<sup>186</sup> 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.<sup>187</sup>

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

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authority, multilevel empowerment, and shared problem solving capacity. See ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008); SCHAPIRO, *supra* note 161; Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007); see also Gillian E. Metzger, *The Constitutional Legitimacy of Free Standing Federalism*, 122 HARV. L. REV. F. 98 (2009) (defending extrapolation of broad constitutional federalism principles and values). For a contrary view of constitutional federalism as encompassing solely the specific federal-state compromises incorporated into the Constitution, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040 (2009).

185. See, e.g., *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295-96 (2006) (applying a federalism-based clear statement rule to determine state obligations as a result of participation in federal programs); *New York v. United States*, 505 U.S. 144, 160-68 (1992) (emphasizing the importance of federal and state governments' independent relationships with individuals and therefore condemning federal commandeering of state legislatures while upholding federal spending conditions on the states).

186. See Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1271-84 (2009) (describing instances of state resistance from within federal programs); Ryan, *supra* note 97, at 24-73 (identifying ways in which state and federal actors bargain over collaborative governance); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665, 668-73 (2001) (emphasizing the political reality of cooperative federalism). Identification of federalism in these partnership terms is of longstanding duration, with the classic exposition being DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 2, 51-80 (3d ed. 1984).

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.<sup>188</sup> 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.<sup>189</sup> 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.”<sup>190</sup> 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.”<sup>191</sup> Nor is federalism's second-order status unique to liberals and progressives; conservative support for federalism is often just as instrumental.<sup>192</sup>

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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).

189. See Bulman-Pozen & Gerken, *supra* note 186, at 1265-71, 1285-92; see also Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (listing greater governmental diversity, citizen involvement, innovation and experimentation, responsiveness, and protection against governmental “tyranny and abuse” as federalism's benefits).

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.<sup>193</sup> 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.<sup>194</sup> To the extent progressives' commitment to the states has staying power, it represents a potential new force for federalist approaches at the national level.<sup>195</sup> 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.<sup>196</sup>

### *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

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efforts, see Metzger, *supra* note 126, at 2, 20, and conservative advocacy of a constitutional amendment banning same-sex marriage in response to state authorization, see Shailagh Murray, *Gay Marriage Amendment Fails in the Senate*, WASH. POST, June 8, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700830.html>.

193. 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).

194. See Schapiro, *supra* note 156, at 34.

195. See Young, *supra* note 159, at 1308-11 (discussing the possibility that some liberals fear to embrace federalism at the chance of appearing opportunistic).

196. For discussion and other contemporary examples of the political leverage states can wield, see NUGENT, *supra* note 126, at 115-67.

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.<sup>197</sup>

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.<sup>198</sup> 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.<sup>199</sup> The new

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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).

198. See Metzger, *supra* note 126, at 20.

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 policymaking 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.<sup>200</sup>

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.<sup>201</sup> 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 deferred 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.<sup>202</sup> HHS has granted numerous waivers of the ACA's requirements to both states and private entities.<sup>203</sup> It has also signaled a willingness to work with states that are not ready to operate an exchange by the statutory deadline of January 1, 2013, proposing the possibility of conditional approval and allowing states to seek to take over federally-operated exchanges.<sup>204</sup> Also notable are Elizabeth Warren's efforts to foster a strong relationship between the CFPB and state attorneys general.<sup>205</sup> 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

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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).

201. See *supra* notes 127-28 and accompanying text.

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 Ratio Interim Final Rule, *supra* note 56, 75 Fed. Reg. at 74,866 (Dec. 1, 2010) (to be codified at 45 C.F.R. pt. 158) ("This interim final regulation certifies and adopts the NAIC's model regulation in full.").

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).

204. See Proposed Exchange Rule, *supra* note 40, at 41,871-72.

205. See *supra* text accompanying note 88.

waivers would be contingent on states' agreeing to federal policy priorities as in *Race to the Top*.<sup>206</sup>

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,<sup>207</sup> and at least one state organization has complained about being sidelined from FSOC deliberations.<sup>208</sup> 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.<sup>209</sup> 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.<sup>210</sup> 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.<sup>211</sup>

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206. See Sam Dillon, *Education Secretary May Agree to Waivers on 'No Child' Law Requirements*, N.Y. TIMES, June 12, 2011, at A25.

207. Robert Pear, *Governors Get Advice for Saving on Medicaid*, N.Y. TIMES, Feb. 3, 2011, at A11.

208. See Letter from Susan E. Voss, NAIC President, to Timothy Geithner, U.S. Sec'y of the Treasury (Feb. 9, 2011), available at [http://www.naic.org/documents/testimony\\_letter\\_110209\\_fsoc\\_geithner.pdf](http://www.naic.org/documents/testimony_letter_110209_fsoc_geithner.pdf).

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).

211. See Kathleen Sebelius & Ned Sebelius, *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, 3 HARV. L. & POL'Y REV. 9 (2009) (considering the practical realities of state-federal interaction).

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<sup>212</sup> and, in addition, requiring that the CFPB issue a notice of proposed rule-making on a proposed consumer protection standard if a majority of states pass a resolution supporting the measure.<sup>213</sup> 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.<sup>214</sup> 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.<sup>215</sup> 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.<sup>216</sup> 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.<sup>217</sup>

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and recommending new approaches for state flexibility and creativity).

212. See *supra* note 73 and accompanying text.

213. Dodd-Frank Act, Pub. L. No. 111-203, sec. 111, 124 Stat. 1376, 1392 (2010) (to be codified at 12 U.S.C. § 5321).

214. For discussion of state enforcement of federal law, see generally Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698 (2011).

215. Obama Preemption Memo, *supra* note 5, at 24,693, 24,693-94; see Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2156-57 (2009).

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.<sup>218</sup> 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.<sup>219</sup> Such recognition that the states can play a role in policing

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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.

219. *See* Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, secs. 207, 218, 122 Stat. 3016, 3044-46, 3060-62 (to be codified in scattered sections of 15 U.S.C.) (allowing sharing of information with state agencies and allowing state attorneys general to bring suit to enforce provisions of Consumer Product Safety Act); Metzger, *supra* note 126, at 25-34 (arguing that the Court's recent preemption decisions are best understood as reflecting a concern with federal agency failure); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 184-91 (2010) (observing "massive regulatory failure" as impetus for passage of the Act and concluding that involving states in regulation "can help overcome some of [the] collective action problems" associated with large-scale regulatory efforts).

federal administrative inaction as well as federal overreaching represents an important broadening in approaches to administrative federalism.<sup>220</sup>

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.<sup>221</sup> Anticommandeering prohibitions underlie the use of spending and conditional preemption to obtain state participation in the ACA or Race to the Top.<sup>222</sup> 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.<sup>223</sup> 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

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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).

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

222. See *New York v. United States*, 505 U.S. 144, 161-69, 188 (1992) (distinguishing commandeering from conditional spending and conditional preemption and prohibiting federal commandeering of state legislatures); see also *Printz v. United States*, 521 U.S. 898, 907, 924-30 (2007) (prohibiting federal commandeering of state executive officials); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998) (explaining that the effect of commandeering prohibition is to give states leverage in demanding funds).

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.<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup>

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.<sup>227</sup> 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.<sup>228</sup> 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).

225. See Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 464-69 (2003) ("[L]ower courts have had little difficulty upholding a wide range of funding conditions without a clearly explained relationship to the underlying legislation.").

226. See, e.g., *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1266-70 (N.D. Fla. 2011) (noting that plaintiffs did not challenge the Medicaid expansion on the basis of *Dole's* four general spending restrictions initially and any such challenge would fail); *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120, 1154 (N.D. Fla. 2010) (dismissing challenge to health exchanges for failure to state a claim).

227. *Total Recovery Act: \$787 Billion*, EDUC. WEEK, Jan. 13, 2011, at 12, available at <http://www.edweek.org/ew/articles/2011/01/13/16stimulus.h30.html> (providing a detailed breakdown of Recovery Act education funds).

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.<sup>229</sup>

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 administration initiatives concerns the way that political and administrative 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.<sup>230</sup> The Obama administration measures provide a number of opportunities 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 discretion 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.<sup>231</sup> By thus working through administrative law, courts may have greater ability to influence how

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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.