American Federalism in an Era of Partisan Polarization: The Intergovernmental Paradox of Obama's "New Nationalism"

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This article examines the growing impact of partisan polarization on intergovernmental relations under the Obama Administration. Increasingly, red and blue states have taken different trajectories in implementing Obama Administration policies, with resistance from many conservative state leaders and enthusiasm from Democrats. To manage these challenges, the Administration has turned to an array of old and new tools for accommodating territorial variations in politics and policy: opt outs for reluctant or resistant states, accommodation for states that wish to go beyond federal standards, aggressive use of waivers, and so forth. This "variable speed federalism" model—marked by increasingly diverse patterns of state implementation of national policies—has been the paradoxical outgrowth of what President Obama once hoped would become a "new nationalism." This article explores these themes in more detail, briefly recapping the principal domestic accomplishments of the Obama Administration, examining emerging patterns of intergovernmental relations, and discussing the increased federal tolerance of state diversity in federal intergovernmental programs.

Near the end of his first term, President Barack Obama laid out a framework for thinking about his administration's array of domestic policy initiatives in a speech in Osawatomie Kansas. In an explicit reference to Teddy Roosevelt's "New Nationalism" speech, which was given in the same small town in 1910, Obama made the case that future American prosperity required an active federal government role in economic regulation, investments in education and infrastructure, and policies to combat growing inequality. Thematically, his speech built upon his economic address at Georgetown University in early 2009, when he identified new regulations of the financial sector, health care reform, entitlement and tax reform, and education and infrastructure spending as major "pillars" of economic progress.

Legislatively, President Obama had considerable success working with Congress to construct these pillars during his first term in office. His economic stimulus

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program—the American Recovery and Reinvestment Act—invested over $100 billion in education, infrastructure, and clean energy development. The Affordable Care Act represented the most significant expansion of the U.S. welfare state since the 1960s. It expanded Medicaid coverage to millions, established a new national infrastructure for the sale of health insurance products via state-based marketplaces, and created new national regulations governing health insurance policies and coverage. The Dodd–Frank Wall Street reform legislation imposed sweeping new federal regulations on the financial sector.

Each of these important measures impacted the U.S. federal system in multiple and significant ways. Collectively, they provided hundreds of billions of additional federal dollars to state and local governments and expanded the federal government's role in setting the direction of policy. At the same time, each relied heavily on intergovernmental processes and structures for implementation. The cumulative potential of these and other Obama Administration policy initiatives in fields like environmental protection were sufficient for us to ask in an earlier analysis whether they represented a new inflection point in American federalism (Conlan and Posner 2011).

We believe that they may, although not in the manner often supposed. Federal systems rarely evolve in a simple straight line process, and changes in our political system have introduced greater volatility than in the past (Conlan 2014). The 2010 midterm elections soon after passage of the Affordable Care Act and Dodd–Frank saw increasingly conservative Republicans capture the House, reduce the Democrats' margin in the Senate, and make major gains in many statehouses and legislatures. The radically altered political landscape stymied new presidential legislative initiatives and established roadblocks for implementing Obama's original victories. The new nationalism had to navigate the treacherous shoals of deepening partisan polarization, not only in Washington, where legislative gridlock has become the norm, but also in intergovernmental relations (Gulasekaram and Ramakrishnan 2015; Rose and Bowling 2015). Strong state resistance arose to many of the administration's federal policies, from portions of the Recovery Act to the Affordable Care Act. Increasingly, red states and blue states set upon different trajectories of implementation and accommodation to President Obama's policies. Conservative governors and legislators began refusing federal money and suing the federal government even as Democrats in other states embraced these policies enthusiastically and sought to take advantage of opportunities to extend them even further within their borders.

Elsewhere we have called this process variable speed federalism, borrowing from research on differential integration in the European Union (Conlan et al. 2014). In the new dialectic of American federalism, the new nationalism helped spawn its antithesis, contributing to increased partisan polarization and creating countervailing pressures from reluctant states. To manage this challenging new

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environment, the Obama Administration has turned increasingly to an array of old and new tools for accommodating territorial variations in politics and policy: opt outs for reluctant or resistant states, one-tailed preemptions—which allow states to exceed but not fall short of national standards—to accommodate the ambitions of progressive states, aggressive use of waivers and negotiated arrangements that allow for modified participation, and so forth.

Given a more polarized federal system, policy implementation under the Obama Administration is increasingly a story of how the new nationalism became partially diverted and redirected into a more state-centric form of intergovernmental relations. The new politics of intergovernmental accommodation partly features use of established tools that scholars like Martha Derthick and others studied forty years ago to show how the policy ambitions of the Great Society were redirected and slowed by a diverse and restive federal system of that era. But deep partisan polarization—not only in Washington but between the federal government and many states—has marked a departure from the technocratic framework of picket fence federalism in favor of one influenced increasingly by partisan, ideological, and regional diversity. Increasingly, this has produced polarized policy outcomes across the states—even in the wake of federal legislation ostensibly designed to level the playing field and establish national standards for equity and access to public services. In short, "variable speed federalism"—increasingly diverse patterns of state implementation of federal intergovernmental policies—has been the paradoxical outgrowth of the President's new nationalism.

In this article, we explore these themes in more detail. We begin by briefly recapping the principal legislative accomplishments of the Obama administration in domestic policy. We also examine emerging patterns of intergovernmental relations in the implementation of those policies, discussing in particular growing federal reliance on tools of federal-state accommodation and increased federal tolerance of state diversity in federal intergovernmental programs.

Federalism and the Obama Policy Agenda

The rise of more coercive, regulatory federalism was one of the signature developments in American intergovernmental relations over the past fifty years (Kincaid 1990; Posner 1998; US Advisory Commission on Intergovernmental Relations 1984). Given President Obama's nationalist policy ambitions and the often overheated political rhetoric about White House "czars" and executive overreach during his tenure, one might be forgiven for assuming that Obama's legislative accomplishments advanced coercive federalism to new heights.

Viewed from an intergovernmental perspective, however, the Obama Administration's legislative accomplishments have been characterized by considerable compromise, accommodations to state diversity, and provision of flexibility.

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This was certainly true of the Administration's first major initiative designed to stimulate a flagging economy, which was focused heavily on providing grants-in-aid—and often very flexible ones—to state and local governments. But even the Administration's signature initiatives in health care reform, financial reform, and climate change policy were notable for accommodations to state diversity and political orientation, both in legislative design and implementation. Tools such as partial preemption, which allow willing states to exceed federal minimum standards, voluntary opt outs for reluctant states, opt-ins for enthusiasts, and waiver provisions were apparent across Obama's policy agenda This laid the groundwork for aggressive utilization of these tools in subsequent implementation. While not always the Administration's first choice in legislative or policy design, they became hallmarks of policy making in the increasingly polarized political environment of the twenty first century.

Flexible Aid and the Recovery Act

Barack Obama came to office facing the worst economic crisis since the Great Depression of the 1930s, and this spurred the new administration to make economic stimulus its first priority. Although some in the administration favored a stimulus package in excess of $1 trillion, opposition from congressional Republicans and reluctance by moderate Democrats dictated a smaller amount (Grunwald 2013). The final version of the American Recovery and Reinvestment Act (ARRA) totaled $787 billion—still very large by historic standards but only enough, in the end, to roughly compensate for declines in state and local government expenditures.[1] Substantively, the final stimulus package was a compromise as well, reflecting considerable contributions from key Congressional Democrats as well as input from a wide variety of interest groups, including the National Governors' Association. In its final form, a little over one-third of ARRA funding—or $285 billion—went to states and localities in the form of grants, roughly another third ($275 billion) was provided in the form of tax cuts, and the remainder was a mix of federal spending for purposes like enhanced information technology in health care, clean energy production and transmission, and improvements to federal facilities and infrastructure.

The large infusion of new grant funding in the Recovery Act—which came on top of existing aid flows—was highlighted by a large dose of flexible emergency assistance to the states, as well as new money for traditional Democratic priorities in education, social services, and infrastructure, and new programs designed to stimulate innovative programs at the state and local levels.

In the area of flexible assistance to state and local governments, the two principal initiatives were a 6.2 percent increase in the federal matching rate for Medicaid (FMAP) and the State Fiscal Stabilization Fund for education and

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government services. Both were designed in large part to help cushion state budgets from the rapid falloff in state tax revenues and, in the process, minimize layoffs of state and local government employees. Together, they provided about $140 billion in flexible funding.

The FMAP funding was extremely fungible. Its surface rationale was to assist states with their growing Medicaid caseloads, which expand during recessions. In reality, however, the added FMAP funding also allowed states to redirect some of their own resources away from Medicaid and towards other pressing budgetary needs, at their own discretion.

The State Fiscal Stabilization Fund (SFSF) was composed of three separate components, with varying degrees of flexibility. About three quarters of all SFSF funds, or about $39 billion, were provided to maintain state education funding and employment during the fiscal downturn. Although confined to education, states had broad discretion within that field over how to utilize the funds. One sixth of the SFSF, or $9 billion, came in the form of a government services fund which could be used to support an even broader range of state functions and activities, including education, law enforcement, infrastructure, and general management. Finally, a competitive project grant program called "Race to the Top" was established to help drive state innovations in educational reform and performance.

The primary constraint on both FMAP and SFSF funds came in the form of maintenance of effort (MOE) requirements. For Medicaid, states could not reduce services covered under Medicaid programs. For education, states were required to maintain their education funding at FY 2006 levels, and governors were required to certify commitment to educational reform goals. These provisions were important for ensuring that federal funds would be used for their intended purposes, but they did create problems for states with the most severe budget crises, such as California, and generated later controversies concerning their MOE performance.

In addition to flexible assistance, other stimulus funding went to existing federal aid programs, such as Title 1 Education grants, federal aid highway grants, Community Development Block Grants, and social services programs. Overall, the ARRA provided funding for over 90 separate federal grant programs. This use of established programs enabled faster state-local spending—one of the chief goals of economic stimulus—by taking advantage of existing administrative procedures and implementation networks, but it did little to advance program innovation and reform.

Thanks largely to ARRA, the Obama administration oversaw the most dramatic increase in federal aid to state and local governments since the 1970s, albeit for a limited period of time. Between FY 2008 and 2010, federal aid exploded from $461 billion to $608 billion; it then fell back to $584 billion in FY 2012 as federal stimulus dollars phased out (see figure 1).[2] The changes in relative terms are equally notable. Federal aid as a percentage of total federal spending rose to 17.6

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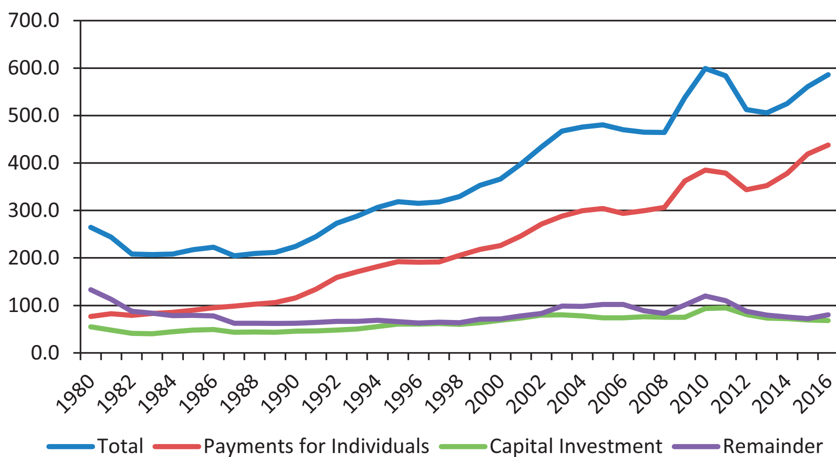

Figure 1 Federal grants to state and local governments: 1980–2012 (in billions of constant (FY2009) dollars)

percent in FY2010, one of the highest levels in history. Federal aid as a percentage of state-local spending was estimated to be 24.5 percent in 2009, a level not seen since 1980. Finally, as a percentage of GDP, federal aid equaled 4.2 percent, the highest level recorded since 1940.[3]

Federal stimulus funds also went into new initiatives and infrastructure enhancements with intergovernmental implications, such as expanding broadband access in underserved areas and developing high speed rail networks. Such infrastructure investments had more potential for enhancing long term economic growth but required additional start up time and longer implementation timeframes (Conlan et al. forthcoming). Hence, while stimulus funds had to be committed within the first two years of the program, the Government Accountability Office (GAO) estimated that some ARRA grants would not be outlayed until 2016.[4]

Implementing the Recovery Act

Administratively, the Recovery Act was noteworthy for unprecedented transparency in the distribution and spending of funds at the state and local levels. This was accompanied by strict accountability provisions and processes, including a newly established Recovery Accountability and Transparency (RAT) Board, intensive GAO

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tracking and evaluation of program implementation, and enhanced monitoring by departmental Inspectors General. The conflicting messages sent by the Obama Administration were to spend stimulus funds quickly, but to do so without mistakes and with unprecedented openness.

One striking feature of ARRA's implementation was a remarkable level of collaboration among top level budget officials from all three levels of government (Conlan et. al forthcoming). The Office of Management and Budget (OMB) and state and local association representatives instituted weekly conference calls to resolve administration questions to expedite program implementation. Signifying the high stakes involved, the Vice President himself, along with a very small staff, became the chief point of contact (or "sheriff" as Vice President Joe Biden called himself) to resolve intergovernmental conflicts and implementation problems. This was the most notable level of collaboration among what Sam Beer once called the "topocrats" —top elected officials in the White House and statehouses, OMB, and state budget officers, etc.—since the 1970s (Beer 1978). The President and OMB relied upon states and local governments as primary agents to save and create new jobs, and it was in their interest to make sure that grants and contracts were spent expeditiously on activities that were beyond reproach. State and local governments also faced heightened levels of scrutiny from federal as well as state and local actors, which accentuated their reliance on federal guidance to immunize themselves from criticisms.

Two other features were noteworthy concerning ARRA's implementation at the state and local levels, and they highlighted a convergence of old and new forms of intergovernmental interaction. As befitting an intergovernmental system built incrementally on a framework of "picket fence" federalism, implementation of Recovery Act grant programs was much smoother and faster in established grant programs with strong professional and multilevel implementation networks in place. New or dramatically expanded programs, such as grants for expanded broadband access or low income home weatherization projects, experienced far more delays and administrative difficulties (Regan forthcoming; Abramson forthcoming). This is precisely what one would expect based on existing implementation literature and the long established conventions of cooperative federalism.

Far less anticipated—either from theory or experience—were the number of high profile cases of Republican governors who rejected federal aid on the basis of political and ideological objections. Several governors and legislatures refused to accept additional federal funds for extending unemployment insurance benefits, for example—something that was previously unheard of in a period of high unemployment and state budget shortfalls. Other prominent Republican governors—John Kasich of Ohio and Rick Scott of Florida, for example—refused hundreds of millions of dollars for developing high speed rail networks within their

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states. Although not wholly unprecedented, such politically and ideologically motivated rejections of federal assistance have become far more prominent and commonplace during the Obama Administration than before (Nicholson-Crotty 2012). These early actions were also a harbinger of the emerging challenges of implementing intergovernmental policies in an era of partisan polarization. They epitomize our transition toward an emerging new framework of intergovernmental relations.

Prescription for Reform: The Affordable Care Act

Enactment of health care reform—the Patient Protection and Affordable Care Act—was the crowning legislative achievement of the Obama Administration and the cornerstone of the President's legacy. It was also the culmination of many previous attempts to enact comprehensive health care reform.

One of the lessons learned from prior unsuccessful reform efforts was the need to accommodate existing interests in the health care delivery system, not only in the private sector but also in the intergovernmental interests as well. Consequently, bold liberal ideas such as replacing the existing system with a single payer scheme were dismissed out of hand. What the Administration and congressional Democrats proposed instead was to extend coverage to the uninsured by building on Medicaid and the existing private health insurance system. Both approaches involved the states in key roles, whether as co-financiers and administrators of Medicaid or as regulators of private insurance products and markets.

As passed, the Affordable Care Act expanded Medicaid to cover individuals with incomes up to 138 percent of the federal poverty line—largely to include low-wage workers whose jobs do not include health insurance coverage. To help provide more affordable coverage to the uninsured with higher incomes, the ACA also established private health insurance exchanges in each state along with federal subsidies that varied by income. Combined, these and other provisions of the law were anticipated to expand health insurance coverage to 34 million previously uninsured individuals.

Thus, both of the core elements of the ACA depended heavily on state cooperation, participation, and implementation. Although Medicaid expansion was dependent on state administration, the federal government would cover most of the cost. The law obligated the federal government to pay 100 percent of the additional cost of expanding Medicaid above the poverty line for the first three years and tapering to 90 percent of the costs by 2020. This was a far higher matching rate than under the existing Medicaid program, where matching rates varied from 50 to 74 percent depending on state per capita income. The private health insurance exchanges were organized on a state by state basis, reflecting the tradition of state regulation of insurance and the resulting differences in state insurance markets.

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Lawmakers presumed that most states would wish to create their own exchanges—and lobbying by state officials during the enactment process seemed to back this up. But as in partial preemption programs, it also included an option for the federal government to operate the exchange in any state that chose not to do so.

As originally passed by Congress, the Medicaid expansion was intended to be mandatory. Theoretically at least, states that declined to expand their Medicaid programs could put at risk the billions of federal dollars and millions of citizens covered under the existing program as a penalty for non-compliance.[5] Nevertheless, the Supreme Court held in *NFIB v Sebelius*, 132 S.Ct. 2566 (2012) that this provision of the law was unconstitutionally coercive and exceeded Congress's authority under the spending power. This made state expansion of Medicaid programs voluntary and thus provided an additional and unanticipated state opt out provision in the law. However, it was still widely assumed that the law's powerful fiscal incentives for state expansion would ultimately encourage most to join. As Matt Salo, executive director of the National Association of Medicaid Directors observed in 2015: "There is movement in every state. They'll get there. Maybe not today and maybe not this year, but they'll get there soon" (quoted in Vestal 2015). This assessment is shared by health policy experts such as Len Nichols: "This is a large and diverse country, and the people of the different states have different priorities and even values.... But math eventually trumps ideology, though at different speeds for different people" (quoted in Vestal 2015).

State Push Back on Health Reform

The Affordable Care Act had a bipartisan heritage, although no Republicans in Congress voted in favor of enactment. The basic framework had clear conceptual roots in a Senate Republican alternative to President Clinton's health reform plan in the 1990s, as well as the program for universal health insurance coverage adopted under Republican Governor Mitt Romney in Massachusetts. Notably, the Massachusetts plan was permitted under a Medicaid waiver approved by the George W. Bush administration. Nonetheless, the ACA passed with only Democratic votes in Congress, and this stark degree of partisan polarization in Congress foretold a similarly polarized pattern of state implementation.

Despite the strong fiscal incentives for state participation, most states with Republican leadership resisted implementing the core features of the ACA, for both substantive and political reasons. Medicaid had been the fastest growing program in many state budgets, and some worried that expansion could accelerate this trend, given the non-trivial state matching share, the "woodwork effect" of currently eligible nonparticipants joining the program, and concerns over future federal budget retrenchment. Although careful empirical analyses rebutted many of these concerns (Dorn et al. 2015), partisan and ideological factors often trumped

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policy analysis as polarized politics overwhelmed traditional patterns of intergovernmental relations.

The state pushback came in two phases. First, Republican state attorneys general sought to have the entire act declared unconstitutional, partly as an infringement of state sovereignty under the Tenth Amendment. Although they failed to have the act thrown out entirely, they did succeed in part as noted above. For virtually the first time, the Court held that a federal grant condition exceeded Congress's authority under the Spending Power and held that the mandatory expansion of Medicaid was unconstitutionally coercive.

Second, once the Court affirmed the overall constitutionality of the law, states at their choosing could elect not to participate in either or both the expansion of Medicaid or the creation of state insurance exchanges. While federal officials can step in to ensure that health exchanges operate in states that refuse to participate, they have no such recourse for Medicaid expansion.

The result has been an increasingly complex patchwork of state implementation of health care reform, shaped in large part by these partisan conflicts between the federal and state governments. As of 2015, only thirteen states were independently operating their own health insurance marketplaces. Another four performed most functions but relied upon the federal IT infrastructure for operation. Seven states participated in so-called "State-Partnership Marketplaces," where states operate resource-intensive customer service functions but the federal government operates the exchange. And a majority of twenty-seven states rely fully upon the federal government to operate their health care marketplace (Kaiser Family Foundation 2016a). While many governors refused to participate in federally mandated health insurance schemes, ironically those states which choose to operate exchanges will have a greater influence in putting the imprint of state interests on these health insurance offerings

Many states continue to resist Medicaid expansion, as well. As of March 2016, nineteen states still refused to expand their Medicaid programs (including the two states—Florida and Texas—with the largest numbers of uninsured), and thirty-two states (including the District of Columbia) were implementing expansion (Kaiser Family Foundation 2016b). However, seven of the states expanding their Medicaid programs, including four with Republican governors, were doing so under special Medicaid waivers, allowing them greater flexibility. Arkansas, for example, received a special federal waiver to expand its Medicaid coverage through private health insurance coverage on the state health care exchange.

Over time, it is possible that more states will expand their Medicaid coverage. It took nearly fifteen years for all states to participate in the original Medicaid program, and conservative Governors such as John Kasich and Jan Brewer (R-AZ) pushed for Medicaid expansion because the stakes are so high. Billions of federal dollars will be left behind in Washington for states renouncing participation,

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leaving potential beneficiaries without coverage and reducing incomes for doctors and hospitals who agreed to lower payments under health reform with the anticipation of gaining additional patients from the ranks of the uninsured. On the other hand, expansion carries budgetary implications for the states. If Texas opted for Medicaid expansion, its rolls would grow from 3.7 million to 6.1 million and, even with the federal government footing most of the bill, it is estimated that the state would still pay an additional $5.7 billion over the next ten years (Holahan et al. 2012).

Notably, the ACA provides for a further form of flexibility for states starting in 2017. Specifically, section 3373 provides a super waiver for states that enables them to radically reshape the implementation of health reform as long as they achieve federal coverage outcomes in a fiscally neutral fashion. The waiver, authored by Senators Ron Wyden (D-OR) and Robert Bennett (R-UT) is already being anticipated by states to enable new forms of private insurance coverage in conservative states and potential single payer systems in progressive states. States could even drop the individual and employer mandates to permit an optional form of participation, as long as comparable outcomes are achieved (Kardish 2014).

Education: The States Blunt National Policy Reforms

The Obama Administration's education blueprint generally continued the basic thrust of the Bush Administration's No Child Left Behind program, with changes in sanctions and certain policy prescriptions. While the Administration was reluctant to walk away from the prescriptive mandates of the Bush era, over time it deployed various strategies to lower the level of intergovernmental conflict. Ultimately, the President signed the Every Student Succeeds Act (ESSA) in December 2015, which provided considerably more flexibility to states in standard setting and evaluation.

Initially, as part of the Recovery act, the Obama administration invested nearly $5 billion in a large competitive grant program—The Race to the Top (RTTT). This program, calling on states to institute wide ranging reforms in teacher compensation, charter school sponsorships, and other education policies, prompted numerous states to make statutory changes to improve their prospective standing in the grant competition. This was coupled to a collaboration with the nation's governors to adopt voluntary "common core" national standards for educational testing. Many states signed on to this endeavor, partly to help them better compete for the Race to the Top dollars.

The Race to the Top offered particular advantages for national officials in bargaining for state engagement during a time of unprecedented state polarization. One saving grace of intergovernmental regulation via grant conditions—at least from the states' perspective—is that grants are technically voluntary

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(*Commonwealth of Massachusetts v. Mellon*. 262 U.S. 447 [1923]). As states have become more polarized ideologically, the grants strategy provided stimulus to fuel the interest of progressive and moderate states in education reform. The competition for limited Race to the Top funds spurred widespread change in state educational standards and approaches, which would enhance the prospects of those states for successful applications. However, the grant competition model also offered a safe haven for conservative states to opt out of ambitious new federal policy ventures, whether they be the new Race to the Top program or extended unemployment insurance. The fact that states have diverged in their participation in new federal grant programs is yet another marker illustrating the ideological polarization that has increasingly characterized our politics at all levels of government.

Polarized states became a greater obstacle to education reform as the Obama years wore on. The Common Core standards, a consensus form of voluntary education standards adopted by the governors in concert with the national business community, became a punching bag for newly mobilized constituencies within the Republican Party. Concerned with an apparent sacrifice of state and local autonomy to national standard setting, these conservative factions caused many governors and state legislatures to reverse their support of this initiative.

Polarization within the Congress and among the states also delayed Congress from reauthorizing and modifying the No Child Left Behind statute. The failure of Congress and the Administration to come to agreement by 2014 left the states responsible for meeting the deadline of the No Child Left Behind Act for full compliance with aspirational testing and accountability standards. The Administration responded with an expansive waiver program to accommodate the numerous states who were unable or unwilling to meet the standards. Forty-three states received Administration approvals for waivers from the regulatory standards of the Act in the absence of congressional reauthorization as of November 2014 (Wong 2015). Kenneth Wong suggests that the Administration conceived of these waivers as a way to balance increased flexibility for states with leverage for national education reform goals and priorities. All told, states had to address compliance with eighteen areas of federal goals.

This temporary fix was ultimately resolved by Congress's passage of the ESSA in late 2015. The new law significantly trimmed federal leverage over states in education policy and granted new flexibility to the states. States are now free to design their own testing and accountability systems and intervention strategies for struggling schools, and it prohibits the. Secretary of Education from requiring states to adopt any specific standards, assessments, teacher evaluation methods. The law also consolidates nearly fifty federal aid programs in education into what *Education Week* called "a giant block grant" (Klein 2016). Overall, the ESSA will enable

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greater variation among the states in education as they pursue policies consistent with their own diverse politics and demographic makeup.

One-tail Devolution: Partial Preemption and the Progressive Agenda

State differences in key regulatory policy areas have grown over time, prompting concerns by national business communities about the burdens faced from having to adapt to differing state standards across the country. The George W. Bush Administration, responding to its business constituency among others, steered preemptions of states through both the Congress and its own agencies. A Republican Congress responded by preempting states in such areas as internet taxation and drivers' license issuance; one progressive group found that there were fifty-seven preemption votes in Congress between 2001 and 2006, including actions preempting states on air pollution, contaminated food and the regulation of internet spam (U.S. House of Representatives Committee on Government Reform 2006). Moreover, federal agencies ranging from Food and Drug Administration (FDA), National Highway Traffic Administration, the Comptroller of the Currency and the Consumer Product Safety Commission (CPSC) issued preemptions covering such areas as banking safety and soundness, medical warnings, and product liability. The FDA, for instance, announced that its approval of a drug's label immunizes manufacturers from state tort claims while the CPSC warned that their regulations also preempted rights to sue under state law.

In May 2009, President Obama issued a memorandum to federal agencies that sought to reverse the momentum established under Bush by instructing agencies to proceed with caution before preempting states. The new Obama memo fell short of an executive order but did include both strictures against preemption in future rules as well as guidance requiring agencies to revisit previous regulations issued in the prior ten years. One observer singled out in particular the President's stricture against preemption in preambles of regulations, which were used in prior years to assert preemption without evidentiary support reviewable by courts (Center for Progressive Reform n.d.).

The substantive impact of the new guidance remains to be seen, but already the new thinking about preemption has had an impact in the Environmental Protection Agency's (EPA) rulings on carbon dioxide and in the final legislation on financial markets reform. In both cases, the Obama Administration followed the maxim of giving progressive states room to legislate and litigate on behalf of consumer protection and other progressive values. In the case of climate change, the California law regulating carbon dioxide emissions from automobiles became the basis for the new federal standard. The financial markets reform provided room

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for states to exercise concurrent jurisdiction over financial institutions and consumer protection, as will be discussed below.

Partial preemption has several advantages for progressive interests and leaders. First, it is a one-tail devolution, allowing only those states sharing progressive policy agendas to enjoy greater flexibility. Indeed, states adopting progressive policies have been found to lead the movement to nationalize their own policies to put a floor on potentially destructive intergovernmental competition from laggard states who enjoy last mover advantages in such areas as environmental protection and gun control (Posner 1998). Second, partial preemption programs typically engage states in sharing administrative burdens of implementing complex federal initiatives. Since federal policy ambitions often far exceed its administrative, legal, fiscal, and political authority, engaging states as third-party partners extends the capacity of federal agencies to implement national initiatives (Light 1999).

Safeguarding State Prerogatives in Financial Reform

The administration's approach to financial markets regulation constitutes the most important example of how the Administration used regulatory flexibility for states to pursue progressive policy agendas. The states played a major role in the oversight of financial products historically. Since 1864, the nation has had a dual banking system where both state-chartered as well as federally chartered banks are subject to a combination of federal and state laws. States also retained nearly exclusive jurisdiction over the regulation of insurance, with some major exceptions in such areas as health care and flood insurance. State rules were backed up by enforcement by both state agencies and by state attorneys general who asserted jurisdiction over financial fraud and consumer protection.

Historically, the principle governing interaction of federal and state law is that federal law overrides states when the two conflict or when state law impairs national banks' ability to conduct business. Federal legislation, such as the Riegle-Neal Act of 1994 reaffirmed the applicability of state law to national banks. The case-by-case preemption approach was overturned by the field preemption issued by the Office of the Comptroller of the Currency during the Bush Administration. Here dozens of state laws designed to protect consumers and maintain competition were preempted when applied to national banks, and state attorneys general were enjoined from enforcing state laws against federally chartered national banks and subsidiaries. Thus, for instance, a state that had prohibited prepayment penalties for loans could no longer insist on that provision for loans issued by federally chartered banks.

The Bush policy of field preemption in financial regulation was reversed in the Wall Street reform legislation signed by President Obama in June 2010. Given the potential centralizing effects of crises on public policy formation, it is notable that

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the final bill—the Dodd–Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203)—safeguarded existing state prerogatives for consumer protection and bank regulation even while it authorized a more powerful federal regulatory apparatus, including a new consumer protection bureau for financial markets. Earlier versions of the legislation in Congress would have continued and expanded federal preemption of states, particularly in the area of consumer protection. However, strong intervention by the Obama Administration and selected state attorneys general and banking officials helped protect the states (Milner 2010).

The final bill not only helped states safeguard their existing authority in the final conference bill, but also rolled back the field preemptions of the Bush era to return to the regime of concurrent jurisdiction of banking and consumer protection regulation that had existed for many years. Essentially, the legislation incorporated state friendly court rulings that allowed for preemption only on a case-by-case basis where state actions could be shown to hamper the operation of national banks.

The new consumer protection bureau posed the greatest threat to state autonomy, as national banks and other financial interests sought to use this new instrumentality to preempt states. The final legislation, however, carried over the concurrent authority regime from banking regulation to consumer protection. Thus, while the new bureau is empowered to directly examine large federally chartered institutions for consumer protection violations, it can examine state chartered banks only on a joint basis with state bank supervisors.

Consistent with the partial preemption approach, states are encouraged to go beyond federal consumer protection standards in their own laws and rules, as federal consumer laws are considered a floor not a ceiling. Interestingly, the law provides for a majority of states to petition the new federal consumer protection bureau to issue new rules to protect consumers as well. The enactment of this bill shows that states have retained significant support in the current administration when enhanced state authority serves the interests of federal officials in promoting at least the perception of more aggressive consumer protection and regulatory effectiveness.

Creating a Climate for Change

Originally the Obama administration sought to address the issue of climate change through legislative action. When this effort failed, it reverted to addressing the issue through executive action and the rulemaking process. Both approaches deeply implicated intergovernmental relations and relied heavily on states for implementation.

Preceding the Administration's efforts to craft climate change legislation in 2009 was a legacy of state-initiated cap and trade programs. Twenty-three states and five Canadian provinces were already participating in three nascent, self-organized

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cap-and-trade systems—the Regional Greenhouse Gas Initiative (RGGI) in the Northeast, the Western Climate Initiative and the Midwestern Regional Greenhouse Gas Reduction Accord (Rabe 2004). In addition, California had adopted its own separate cap-and-trade program in 2006. Except for RGGI, these plans were not yet in operation as federal legislation was being debated, but they had already grappled with many of the key policy issues and helped shape the political context of reform.

State officials involved with these plans saw both risks and benefits associated with national legislation. On the one hand, a national cap and trade program could reduce the free rider issues and competitive risks associated with a patch work of state approaches. On the other hand, an intrusive and centralizing federal approach could override the efforts already made by leading states. Consequently, state and environmental advocates alike pushed for a partial preemption approach, giving individual states and regional compacts authority to exceed federal carbon emission standards.

The legislation crafted by Congress on cap and trade proved to be more centralizing and coercive, however. The House passed the American Clean Energy and Security Act (HR 2454) on June 26, 2009 by a narrow margin. Later that year, Senators John Kerry (D-MA) and Barbara Boxer (D-CA) introduced a Senate version—the Clean Energy Jobs and American Power Act (S. 1733). Both bills prescribed expansive federal roles across a wide range of activities. States were required to confirm their state and local building codes to new national energy efficiency building codes. States and local planning organizations were also required to develop plans to reduce greenhouse gas emissions from the transportation sector. Under the House bill, a new national renewable electricity standard was proposed requiring 20 percent of electric supply to be derived from efficiency and renewable energy measures by 2020.

Both proposals utilized a national cap-and-trade program with federal regulation and caps applying to individual sources. All major decisions on issues such as whether allowances would be provided for free or auctioned were to be made by EPA at the national level, not by the individual states. States were not provided with the authority to implement their own cap-and-trade programs or to go beyond the federal policy with more stringent programs. Instead, both House and Senate bills preempted regional programs for five years, to address the business community's concerns about having to meet different state and federal standards and trading regimes. The Congressional Budget Office found that both the House and Senate bills would impose costs on states that surpassed the thresholds established by the Unfunded Mandates Reform Act of 1995 (Congressional Budget Office 2009, 35).

National cap and trade legislation failed to win passage in the Senate, as the public mood soured on expansive federal policy initiatives and Democrats from conservative and energy producing states abandoned the fold. In the absence of

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new legislation, the EPA began to work on new rules to address carbon emissions under the Clean Air Act. In December 2010, the EPA announced plans to issue regulatory limits on greenhouse gas emissions from new stationary sources in 2011, as well as state guidelines for regulating existing sources under the CAA. Consistent with the underlying clean air act authority, the states will have the primary role for issuing permits for greenhouse gases from individual facilities, with EPA oversight.

Turning to rule making under the Clean Air Act, the Obama administration proposed a "Clean Power Plan Rule" in June 2013 designed to cut carbon pollution from electric power generation by 30 percent nationwide below 2005 levels.[6] Most noteworthy from an intergovernmental perspective, however, is that the EPA proposes state-specific goals[7] for carbon emissions from the power sector. In part, these state-by-state goals were based on each state's current energy generation mix, which led to significantly different savings targets for different states. West Virginia, with a power industry heavily reliant on coal, was expected under the initially proposed rule to cut its power plant emissions by 21 percent while Washington, with just one coal fired plant but extensive hydro, would be required to achieve an 85 percent reduction (Georgetown University Climate Center 2014). Yet, the proposed rule also appeared to accommodate political factors as well. More modest targets were set for energy producing states such as Kentucky and West Virginia where opposition could be expected to be most vociferous, wheras progressive states that were most politically supportive of climate change policy were given more ambitious targets (Wallach 2015). These state by state differences in reduction targets were modified in the final rule issued by EPA in July 2015, increasing the targets for producing states and rewarding those that had already made efforts to reduce carbon emissions. As one analyst noted, "EPA may well have decided that [producer state] opposition was a certainty in any case, so that the extra requirements won't generate any extra enmity" (Wallach). There is no question that the variable targets failed to ameliorate political opposition to the rule in red states. Political opposition was fierce, and many states have sued the EPA in an attempt to block the rules (Banerjee 2014).[8]

Apart from the issue of variability in state carbon emission targets, the Clean Power Plan is equally notable for giving states enormous and in some ways unprecedented flexibility to design their own program and approach to meet their reduction targets. As one high state environmental official told us, "In thirty years, I have never seen EPA give states this much flexibility." For example, states can choose a strategy that focuses on altering the mix of fuels used in power generation—shutting down coal plants and replacing them with natural gas, wind, and solar. Or they might emphasize energy efficiency technology and demand-side management. States can choose to join the California or Northeastern cap-and-trade programs. Or states could address demand by enacting a state-level tax on carbon pollution.

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The Plan allows states to work alone to develop individual plans or to work together with other states to develop multi-state plans. Also included is a flexible timeline for states to follow for submitting plans to the EPA-with plans due in June 2016, with the option to use a two-step process for submitting final plans if more time is needed.

Why is so much flexibility being offered to states? The defeat of legislation in the Congress in 2009 illustrated how polarized climate change politics had become across the states. Since then, the parties have staked out increasingly divergent positions on the issue. But the lines of cleavage go beyond party to encompass regional politics. Mindful of these intensely felt divisions, the Obama Administration has been surprisingly careful to accommodate state diversity even in its executive actions.

Conclusion

To date, the administration's pattern of intergovernmental decisions reflects our modern era of highly polarized politics. Progressive states have won several opportunities to exceed federal regulatory standards where they wish to do so, whereas conservative states can avail themselves of numerous opportunities for flexibility and opt outs, from maintaining state services without tax increases thanks to FMAP or deferring to Department of Health and Human Services implementation of health insurance exchanges in states that want no part of implementing reform.

Elsewhere, we have written that greater polarization among states is giving rise to a new and far more differentiated approach to policy development and implementation in our federal system. In the U.S. context, a multispeed approach reflects the growing challenges of accommodating a more polarized ideological policy process across all levels of the U.S. federal system (Conlan et al. 2014).

This marks an important evolution in a federal system that has heretofore been viewed as promoting national goals through cooperative intergovernmental bargaining. The cooperative bargaining model highlighted the roles played by U.S. administrators in reconciling different governmental perspectives to make new federal programs work (Peterson, Rabe, and Wong 1986). Even federal mandates often garnered broad based support by state and local officials, who agreed with the broad goals animating these programs (Posner 1998). General agreement existed over national goals in such areas as clean air, disability access and civil rights, even while considerable conflict occurred over the means by which those goals were implemented. During this era, even when Washington was slowed by divided government, states could be counted on to take up the slack, rising to fill their historic role as laboratories of policy innovation. Whether it was climate change or

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welfare reform, states proved willing and able to respond to national policy concerns with greater alacrity than a hamstrung Washington.

In contrast, the emerging ideological model features more fundamental disagreement about the underlying goals of federal intergovernmental programs. As epitomized by the legal challenges to health reform filed by over half of the states' attorneys general, this model shifts the actors responsible for defining conflicts over the federal role from like-minded bureaucratic experts and interest groups to party leaders and elected officials at the national and state levels. Unlike the previous era of cooperative federalism and national expansion, gridlock in Washington is now matched by equally trenchant conflicts among the states. Rather than respond to pent up policy demands for public action on broadly agreed goals and concerns, states instead have cleaved to radically different policies and agendas mirroring the conflicts in Washington. Rather than acting as a relief valve for national policy paralysis, states have now tended collectively to ratify and intensify those conflicts (Thurber and Yoshinaka 2015).

Drawing upon the European Union experience, one outcome in the U.S. may be "variable speed federalism." Variable speed federalism implies that there will ultimately be convergence on major policy goals, such as improved health care coverage or environmental outcomes, but that implementation will occur at different rates and in different ways in different states. This is reminiscent of the pattern seen in the original development of the Medicaid program in the 1960s. It took five years for virtually all (forty-eight) states to sign up for participation, and over fifteen years for the last state, Arizona, to participate in 1982 (Rose 2013). Today, progress in enlisting state participation in the expansion of Medicaid appears to be slower, reflecting today's more challenging political context. Yet, a majority of states (twenty-nine) have expanded Medicaid thus far, and some Republican governors are pushing their reluctant legislatures to do the same.

On the other hand, Medicaid expansion is increasingly premised on the development of new forms of federal-state partnerships negotiated with individual states. Rather than simply expanding the existing Medicaid program to low wage individuals above the poverty line, many conservative governors are successfully redefining that program, through hybrid public/private systems, which use public dollars to fund enrollment of Medicaid populations in private insurance programs. Even greater state policy diversity is being seen in highly conflictual policy fields like environmental protection and education, where liberal and conservative states are moving in opposite policy directions

This raises the possibility that "variable geometry" may be the more fitting concept to describe emerging patterns in American federalism. As the concept is used in Europe, variable geometry depicts a system where differences among the states become institutionalized. In states' own spheres of policy responsibility, that is nothing new. Despite secular trends in policy centralization in the United States,

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and despite robust mechanisms of policy diffusion among the states themselves, there are many long standing differences in state based policies that reflect the geographical variety of a large and diverse country. But national policies of the type examined in this article are premised on achieving greater uniformity nationwide, and states' capacity to implement such programs differently has historically been limited. The growing use of waivers in welfare, education, and health care, the tolerance of diverse state policies regulating abortion and controlling climate change, and the increased willingness of federal policy makers to utilize opt out and opt in provisions in new federal programs suggest a growing acceptance for interstate differences in federal program participation and implementation, driven by need to accommodate rising political polarization and geographic differentiation.

Either form of differentiated federalism can be an expedient way to work around the deeply entrenched ideological conflicts among parties at all levels of government in the U.S. system. While a second best solution for all sides, it nonetheless has permitted national leaders to move forward on national policies, at the price of limiting their scope and uniformity. In a sense, variable speed federalism in the U.S. offers more satisfying solutions to partisans on both sides of the spectrum. Policy advocates and champions gain the ability to implement more efficacious policy options freed of the need to compromise with resistant states. On the other hand, resistant states are either freed of the yolk of carrying out national responsibilities or gain significant flexibility in tailoring national programs to their own goals and political environments.

The shifts we are seeing in our federal system reflect changes in the politics of intergovernmental policymaking and implementation. In our recent book, *Pathways of Power: The Dynamics of National Policymaking*, we suggested that policymaking had become more diverse in its origins and methods of mobilization thanks to shifts in parties, interest groups, media and the growing roles of experts. A four-fold typology of distinct pathways was developed to capture the more diverse ways that new issues reach the agenda and take policy form: pluralist, partisan, expert, and symbolic (Conlan, Posner, and Beam 2014). Each of these strategies draws on different political resources, appeals to particular actors and elicits its own unique strategies, language and styles of coalition. The following chart depicts the four pathways organized by method and scope of mobilization.

The traditional models of intergovernmental bargaining are reflected in the expert pathway, where professionals across levels of government work together in implementing challenging programs under the cover of broad consensus about program goals and objectives. Derthick noted that states are typically ready to be the subordinate actor because they are financial supplicants in need of federal money. They do not assert their independent interests, partly because federal policies are so broad based in popularity (Derthick 2001).

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Table 1 Pathways of power

Scope of mobilization/ Basis of mobilization	Narrow	Broad
Interests	Pluralist	Partisan
Ideas	Expert	Symbolic

The forces that provided the glue for professionalized intergovernmental networks are in a state of flux. The broad consensus and deep popularity of federal domestic programs that Derthick noted have been replaced by deep schisms between partisans who increasingly inhabit separate policy and media worlds. While the picket fence federalism model of earlier eras aptly depicted these mutually reinforcing networks, they are no longer adequate to encompass the deep conflicts seen today in intergovernmental politics and policy.

Unlike traditional bargaining between state and federal officials on modest differences in the pace and content of state implementation of federal programs, today's polarization thrusts party leaders into the intergovernmental limelight. Far from like-minded actors seeking to cooperate on common enterprises, the elected officials across federal, state and local governments have vastly different agendas and priorities, as described in this article. Indeed, while all governors still must pay attention to their fiscal bottom lines, a new breed of hyper-partisan governors appear to take their policy cues more from their base primary coalitions and ideological soul mates than they do from their budget directors or bond markets.

The partisan pathway has thus become a principal arena through which major intergovernmental policies are developed and implemented. The partisan pathway was typically associated with broad scale federalism reforms undertaken by national leaders with strong views about the federal system. Whether it was President Richard Nixon or Ronald Reagan's new federalism proposals or the welfare reforms of the 104th Congress, this pathway was often the staging ground for intergovernmental reforms that mobilized support for policy change from the top down.

Today, the partisan pathway in intergovernmental policy is not manifested in grand national reforms—the system is too polarized to permit this to happen. Rather the partisan pathway has come to life in policy implementation, where elected officials have vaulted to the lead in determining intergovernmental positioning and bargaining strategies. While the bargaining that characterized the expert and pluralist pathways proceeded under the penumbra of a broad consensus about the value of participating in federal programs, the strategies pursued by intensely partisan officials often features an opt out stance, accommodating

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resistance by some states to joining national policy programs. Using the Hirschman exit-voice taxonomy, the expert pathway features states using their voice to bargain with federal officials over the inevitable decision to join national programs on negotiated terms. Hirschman predicted that loyalty to the underlying polity and policy would restrain the use of exit options by actors in public and private sectors. Under the partisan pathway, however, polarized state leaders often have no such deeply held loyalties to national frameworks or leaders and, as Hirschman might have predicted, have come recently to choose exit over voice to exercise their prerogatives in our federal system (Hirschman 1970).

The exit strategy has high potential payoff for states. As Helen Ingram noted, federal officials value participation by states far more than they do accountability for specific provisions. When faced with a choice, federal officials will generally not enforce compliance provisions if it threatens to push states out of the program (Ingram 1977). Indeed the Obama Administration's need for state participation in such programs as Medicaid expansion and the Recovery Act provided powerful incentives for the granting of significant financial incentives and regulatory flexibility to encourage states to join in the implementation of these intergovernmental initiatives.

Yet, it is unclear whether this state exit strategy remains sustainable in a national political and economic system. Over the long term, states themselves may find the inducements of federal funding and other policy benefits to be too tempting to continue their hold out. The slow movement of conservative led states toward adoption of the Medicaid expansion illustrates the strong economic forces that continue to inhibit fiscally hard pressed states from turning away federal funds. In effect, the exit strategy may constitute the most powerful bargaining strategy for the states when they ultimately relent and participate in these programs.

However, the relative leverage provided by the exit option for states is highly contingent on the degree of federal dependence. If the states are the only option for the federal government to deliver the program, as with Medicaid, then states have maximum potential leverage when threatening or using the exit strategy. However, if the federal government has recourse to alternative forms of delivery, then states' use of the exit option could be less rewarding and even self-defeating. Under the ACA, the federal government can and has taken over the health exchanges in recalcitrant states. Advocates of strong national health programs welcome this and hope that it has a path dependent effect of encouraging other states to rely on the federal mechanism. Indeed, economies of scale can be achieved by a common federally run or regulated exchange.

A key question going forward is whether such differentiated federalism will become a stable and sustainable new equilibrium for domestic policy. The answer to this question in no small part resides in the evolution of American politics going forward. It appears that partisan polarization is here to stay for the foreseeable

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future: fundamental social and demographic forces are at work to sort out the electorate into increasingly conflictual and divisive parties (Shor 2015). Already we have seen how polarization in the states has prompted a progressive Democratic President with an assertive national policy agenda to adopt decentralizing strategies that have ceded more flexibility and authority to states than anything conjured up by Nixon or Reagan. Would a Republican President with strong national policy positions find himself in a similar position and have to satisfy restive Democratic governors through delegation and concessions to avert significant exits by states whose participation is vital for any viable national initiative? While it is difficult to predict, part of the answer lies in whether polarization is equally distributed across the parties, or whether polarization is asymmetrically concentrated among Republicans, as suggested by Thomas Mann and Norman Ornstein (Mann and Ornstein 2013). If the asymmetric scenario is true, then Democratic governors and legislatures may prove more likely to pursue voice rather than exit options when faced with new conservative policy reforms.

To be clear, the renewed vigor of the partisan pathway has not supplanted other pathways in our federal system (Conlan, Posner, and Beam 2014, ch. 9). In fact, we know that intergovernmental policy remains vitally shaped by experts, interest groups, and symbolic politics. The fate of the REAL ID Act is a case in point. Nearly every state objected to the federal government's attempt to mandate a new hardened drivers' license in 2005. Their resistance was rewarded, as the Department of Homeland Security delayed the required new license from 2008 until 2020. Hewing to an expert consensus developed by state drivers' license administrators, most states are now in the process of developing hardened licenses, with only seven states not compliant according to federal officials. Working through the expert and pluralist pathways, states are using voice to reshape the nature and timing of the mandate, while nonetheless accepting the basic policy framework underlying the REAL ID of 2005.

As scholars of federalism, it may be time to once again highlight the role of parties in our federal system. In the past, eminent scholars of American politics and federalism—Morton Grodzins, David Truman, and William Riker—all stressed the fundamental inter-relationships that existed between the structure of a decentralized party system and the structure and functioning of American federalism and policy making (Grodzins 1968; Truman 1967; Riker 1964). As the decentralized party system weakened and intergovernmental relations and policy making became increasingly complex and professionalized, our scholarly focus turned elsewhere. But the contemporary impact of our increasingly ideological and polarized parties on intergovernmental policy making and implementation suggests a new research agenda for federalism scholars, examining more closely the powerful links between party systems and governance at both state and federal levels and in their patterns of intergovernmental interaction.

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Notes

1 The original estimate of $787 billion for ARRA was subsequently revised upward to $836 billion as of February 2015, reflecting the increased funding for refundable tax credits and unemployment compensation added as part of P.L. 111–312 (Congressional Budget Office 2015).
2 OMB, Historical Tables, Budget FY2015, table 12-1, p. 259.
3 Ibid.
4 U.S. Government Accountability Office 2010, p. 6
5 Historically, however, federal administrators have been very reluctant to penalize existing beneficiaries of federal programs as a means of penalizing states that fail to comply with federal rules (Derthick 1970).
6 The rule was proposed by EPA on June 18, 2014 (Federal Register 2014).
7 The rate-based standard means that it caps the ratio of carbon pollution per megawatt hour of electricity generated in each state.
8 By 2016, the number of states joining the lawsuit had reached twenty-seven.

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