States as “Incubators of Freedom”?
Republican Governors and State Legislatures Opposing President Obama*

1. Introduction

One of the most important political developments of the Obama presidency was the fact that state governments gained traction during his two presidential terms: some by accepting and even pioneering his policies, others by opposing them. This “fragmented”\(^1\) or “variable speed federalism” was insofar counterintuitive and in need of an explanation as Obama started his presidency with a “new nationalism”\(^2\) which set out to strengthen the hand of the federal government vis-à-vis the states. All of his signature initiatives – health care reform, education reform, immigration reform, and the climate change bill – would have led to a centralization in intergovernmental relations if they had been enacted as initially outlined. But since all of them, with the exception of health care reform (which was substantially altered during its passage through Congress) did not become federal law, Obama needed to find other tools to achieve his policy aims. These tools like (competitive) federal grants, financial incentives, selective law enforcement, executive rulemaking, shared decision-making, waiver clauses and opting-out rules had to be softer than more generally binding legislation. Consequently, they opened the door for state governments to resist the policies concerned.

It was first and foremost Republican governors, their state administrations and Republican state legislatures that seized the opportunity to lead the political resistance against the Obama initiatives. After Obama’s ambitious policy agenda had led to the emergence of an intense protest movement, most notably in the form of the Tea Party, and to the “shellacking” of the president and his Democrats in the midterm elections of 2010, the chances of an effective opposition led by Republican states increased: Congress was gridlocked for the rest of the Obama presidency, and more and more Republican trifectas\(^3\)

* I am very much indebted to Dr. Jared Sonnicksen (TU Darmstadt) for eliminating the worst lingual adulterations and thereby greatly improving the wording of this text.


\(^3\) A “partisan trifecta” is defined as the control of the executive branch and both legislative chambers by the same political party. See Geoff Pallay, Who Runs the States? An In-Depth Look at Historical State Partisan Control
were elected into office in the states. With more than twenty states under unified Republican control after 2011 (Table 1), Republican governors (Table 2) and state legislators had much leeway to write their political preferences into state law or to otherwise oppose the policy initiatives of the Obama administration. It is the intent of this contribution to first briefly trace the political development of “Red America” under President Obama (Chapter 2) and then discuss the function of states as “incubators of freedom” against an encroaching federal government (Chapter 3). This will lead to an examination of three of the policy fields – namely immigration, health and education – in which the encroachments of the federal government were most intrusively felt by the states and where political resistance was strongest. It will be examined which policy tools were at the disposal of the federal and the state governments and which were most effectively used by them (Chapter 4). Finally, Chapter 5 provides a conclusion on the question of whether states successfully fulfilled their function as bulwarks of freedom against federal encroachments during the Obama presidency or whether in the end the federal government managed to effectively expose them to a creeping, but irresistible process of national standardization.

2. “Red America” under President Obama

George W. Bush left office with only nine Republican trifectas remaining in the fifty states: Florida, Georgia, South Carolina and Texas in the South, Missouri, North and South Dakota in the Mid-West, Idaho and Utah in the West. Missouri elected a Democratic governor in 2008 (Jay Nixon) and was substituted by Arizona as the ninth Republican trifecta in January 2009 – not as the result of a state-wide election but following the resignation of Democratic Governor Janet Napolitano to become Obama’s Secretary of Homeland Security. Fifteen months later Arizona’s new Republican Governor Jan Brewer became a national hero for conservatives when she signed Senate Bill 1070 into law, the so-called “Support Our Law Enforcement and Safe Neighborhoods Act.” The nationwide breakthrough for Republican control of the states then came in November 2010: As a result of the midterm elections, a dozen more states got a unified Republican government at the beginning of 2011 – among them Indiana, Kansas, Michigan, Ohio, Pennsylvania and Wisconsin. Especially governors Sam Brownback (Kansas), Rick Snyder (Michigan) and Scott Walker (Wisconsin) made national headlines in the ensuing years with their experiments in conservative governance. One year later Mississippi, Louisiana and Virginia became the 21st, 22nd and 23rd Republican
trifecta in the states during President Obama’s first term. Moreover, Mississippi switched party control of its House of Representatives from Democrats to Republicans for the first time since Reconstruction (Tables 1 and 2).  

Table 1: Republican Trifectas, 1992 – 2017

<table>
<thead>
<tr>
<th>States with a unified Republican government before 2009</th>
<th>Unified Republican government since 2009</th>
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<tbody>
<tr>
<td>1) Utah 1992-</td>
<td>16) Alabama 2011-</td>
</tr>
<tr>
<td>2) South Dakota 1992, 1995-</td>
<td>17) Oklahoma 2011-</td>
</tr>
<tr>
<td>3) Idaho 1995-</td>
<td>18) Tennessee 2011-</td>
</tr>
<tr>
<td>5) South Carolina 2003-</td>
<td>20) Mississippi 2012-</td>
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<tr>
<td>6) Texas 2003-</td>
<td>21) Louisiana 2012-15</td>
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<tr>
<td>8) Georgia 2005-</td>
<td>23) Arkansas 2015-</td>
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<tr>
<td>9) Arizona 1993-2000, 2009-</td>
<td>24) Kentucky 2017-</td>
</tr>
<tr>
<td>15) Indiana 2005-06, 2011-</td>
<td>30) Missouri 2005-08, 2017-</td>
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Table 2: Republican Governors Leading a Trifecta Since the Election of President Barack Obama, 2009 – 2017

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Arkansas (2015-): Asa Hutchinson</td>
<td>Oklahoma (2011-): Mary Fallin</td>
</tr>
<tr>
<td>Georgia (2009-): George Perdue, Nathan Deal</td>
<td>South Carolina (2009-): Mark Sanford, Nikki Haley, Henry McMaster</td>
</tr>
<tr>
<td>Idaho (2009-): Butch Otter</td>
<td>South Dakota (2009-): Mike Rounds, Dennis Daugaard</td>
</tr>
<tr>
<td>Indiana (2011-): Mitch Daniels, Mike Pence, Eric Holcomb</td>
<td>Tennessee (2011-): Bill Haslam</td>
</tr>
<tr>
<td>Kansas (2011-): Sam Brownback</td>
<td>Texas (2009-): Rick Perry, Greg Abbott</td>
</tr>
<tr>
<td>Michigan (2011-): Rick Snyder</td>
<td>Wisconsin (2011-): Scott Walker</td>
</tr>
<tr>
<td>Mississippi (2012-): Phil Bryant</td>
<td>Wyoming (2011-): Matthew Mead</td>
</tr>
</tbody>
</table>

Sources: Pallay 2013 (note 3), pp. 14-15, NCSL, NGA.

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The second term of President Obama was characterized by a consolidation of the Republican grip on the states. Following the 2012 gubernatorial and state legislative elections, Alaska and North Carolina came under Republican control as well, though only for a short period of time. In 2012, Arkansas – as did Mississippi one year before – saw both houses of its state legislature come under control of a Republican majority for the first time since Reconstruction. With the election of Republican Governor Asa Hutchinson two years later, the Natural State became the last state of the Old Confederacy to have all branches of government (i.e. State executives and both houses of the State legislature) dominated by Republicans, completing the transformation of the South into Republican territory. At the end of Obama’s presidency, Iowa, Missouri, Kentucky, and New Hampshire supplemented the Republican camp. However, since Republicans in the meantime lost control of the Maine legislature (2012) and had to relinquish the governorships in Virginia (2013), Alaska, Pennsylvania (both 2014), Louisiana (2015), and North Carolina (2016), the number of Republican trifectas stayed constant during Obama’s second term. At the beginning of 2017, there were 24 of them (Figure 1), as had been the case in 2013. But the real story of the seismographic shift to Republicans all over the United States reveals itself, when we compare the numbers at the beginning and end of the Obama presidency: Between 2009 and 2017, Republican trifectas increased from 9 to 24, Republican control of state legislatures from 14 to 32, and Republican control of state governorships from 22 to 33 (Tables 1 and 2).

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9 In fact, there were 25 states with unified Republican control, since Nebraska’s unicameral legislature is not any longer nonpartisan as it supposed to be. The transformation of the Nebraska Senate is analyzed by Seth Masket and Boris Shor, Polarization Without Parties: Term Limits and Legislative Partisanship in Nebraska’s Unicameral Legislature, in: State Politics & Policy Quarterly, vol. 15 (2015), no. 1, pp. 67-90.

10 See NCSL, State Partisan Composition, ncsl.org, March 1, 2017.
3. States as “Laboratories of Democracy” v. States as “Incubators of Freedom”

“It is one of the happy accidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.”

Supreme Court Justice Louis Brandeis formulated his dictum of “laboratories of democracy” in one of his famous dissenting opinions. Brandeis' take on the virtues of the American federal system has provoked a rich literature in political science, especially in the field of public policy analysis, discussing the diffusion of innovations among the American states. As G. Alan Tarr has argued, the Brandeis metaphor has often been quoted by proponents of federalism, but seldom analysed. Consequently thought to its end, the process of interstate borrowing and emulation, as Brandeis saw it, did not lead to a diversity of policies in the states but towards a growing policy uniformity, to some kind of “unitary federalism” if we want to borrow the German phrase. Brandeis' fascination with and his belief in the development of scientifically based public policies reflected a progressive idea. Although Brandeis certainly

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often ruled in support of the states, his judicial philosophy altogether was in favor of finding nation-wide solutions – and be it with the help of the states – to social and economic problems.\(^{14}\)

Traditionally, this was not what conservatives thought the role of the states should be. Conservatives accepted the phrase of states as laboratories of democracy only if this meant that every state can govern its own way. But they used to resist the idea that social or economic experiments should lead to innovations which then diffuse from one state to the other. Conservatives liked the notion that states should be left alone and insulated from outside intrusion. This perspective on the states had not changed much since the times of the constitutional convention at Philadelphia. The conservative argument resembled the Anti-Federalist mindset or at best the Madisonian way of looking at the constitution. In Federalist No. 45 Madison argued that

> “the powers delegated by the proposed constitution to the federal government are few and defined. Those which are to retain in the state governments are numerous and indefinite... The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state.”\(^{15}\)

Madison thought, like Hamilton, that the states rather than the national government would have the upper hand in domestic affairs. Conservatives would have been very happy if this prediction of the two founding fathers came true. But since it did not, American conservatives are incensed. To quote Texas Governor Rick Perry:

> “America is great. But we are fed up with being overtaxed and overregulated. We are tired of being told how much salt to put on our food, what kinds of cars we can drive, what kinds of guns we can own, what kinds of prayers we are allowed to say and where we can say them, what we are allowed to do to elect political candidates, what kind of energy we can use, what doctor we can see.”

Conservatives are fighting against Big Government in Washington and their state capital, they want to “empower states” to fight for their beliefs and their liberties, to fight for “the soul of America.”\(^{16}\) In their view, states are only “true” laboratories of democracy if they serve as “incubators of freedom” against an encroaching federal government or a regulatory mindset.\(^{17}\)

4. Opposition Politics, Policies, and Policy Tools

Not every policy field is at all times likewise suitable for states to engage in political opposition against the federal government. Certain requirements need to be fulfilled to make a policy field accessible for opposition politics by states: First of all, there has to be a federal initiative which can be understood or depicted as an intrusion on state responsibilities. Second, such a case could be built much easier if there is not a supreme federal power enumerated in the


\(^{17}\) Stverak 2013 (note 4).
U.S. Constitution which can be used to justify the federal policy initiative. Then the presumption of the Xth Amendment is that the regulatory power is reserved for the states. However, the history of federal-state relations has shown that the federal government most often finds a way to construct a national responsibility by using the Welfare Clause (Article I, Section 8, Clause 1), the Commerce Clause (Article I, Section 8, Clause 3) or the Necessary and Proper Clause (Article I, Section 8, Clause 18) of the Constitution. In this case, state governments have no choice but to sue the federal government in a federal court. Third, even if there is an explicit law-making authorization of Congress or a civil rights guarantee in the Constitution, opportunities for states to oppose a federal statute or court ruling regularly emerge. It could be the case that

- concurrent responsibilities are assigned to the federal and state governments (e.g. the authority to tax, to borrow money or to conduct federal elections);
- a federal law is supplemented by a state law which is or is not explicitly pre-empted by a federal statute;
- a federal law or a court ruling is contradicted by an amendment to the state constitution or by a ballot initiative in the state;
- Congress abdicates from its responsibility because it is “gridlocked” and leaves the field open for executive rulemaking and regulation by the state;
- an executive rule by the President over-expands the meaning of an existing federal law and invites state opposition;
- states decide to reject federal grants-in-aid for certain federal programs;
- states do not comply with unfunded mandates of a federal statute;
- states negotiate with the federal administration to get a waiver or some sort of opting-out rule from a federal law.18

During the presidency of Barack Obama, the biggest federal-state conflicts have been in the fields of immigration, health care, education, environmental (energy), employment (right-to-work), and morality policy (abortion, gun control, death penalty, same-sex marriage, religious freedom). Conflicts in electoral politics about redistricting and voter rights abounded, as well. The following sub-sections of this chapter will concentrate on the three policy fields of immigration, health care, and education policy. This selection is based on the timing of these policy initiatives; i.e. they represent the early and major federal initiatives during the Obama presidency. For the purpose of analytical focus, the Clean Power Plan, the fourth and latest major Obama initiative that encroached on the responsibilities of the states, will be omitted here.19 All the other federal-state conflicts with respect to right-to-work policy, morality policy, 

19 However, for preliminary assessments of policy developments in this area, see e.g. David M. Konisky and Neal D. Woods, Environmental Policy, Federalism, and the Obama Presidency, in: Publius: The Journal of Federalism,
and electoral politics were more bottom-up – that is to say they originated in the states and not in Washington, D.C.

4.1 Immigration Policy

Immigration policy is an example of a policy field where the federal government possesses all necessary requirements to exert its supreme regulatory authority. Article I, Sect. 8, No. 4 of the Constitution states that Congress shall have the power to “establish a uniform rule of naturalization”. But since Congress failed to enact an immigration bill in the past decades\(^{20}\) – the last comprehensive reforms being the Immigration Reform and Control Act of 1986 (Public Law 99-603) and the Illegal Immigration Responsibility Act of 1996 (Public Law 104-208) –, states took matters into their own hands. In April 2010, Arizona Governor Jan Brewer drew the national spotlight on the Grand Canyon State by signing SB 1070 into law, then the most restrictive immigration law in the country. The act criminalized failure to carry proof of legal immigration status; it allowed the police to determine the immigration status of a person detained in a lawful stop, detention, or arrest; and it prohibited state officials from limiting enforcement of federal immigration laws.\(^{21}\) The law led to an outcry by pro-immigration groups who feared racial profiling. The federal Justice Department filed a lawsuit in order to block it. In June 2012, the Supreme Court ruled that several sections of the statute were preempted by federal law. However, it allowed a controversial part of the law to stand, requiring law enforcement officers to determine the immigration status of an individual during a lawful stop.\(^{22}\)

Most astounding, the imminent unconstitutionality of SB 1070 did not deter other states from introducing copycat legislation. The Arizona bill itself has been copied from an American Legislative Exchange Council’s (ALEC) model bill.\(^{23}\) Until the end of 2011, 23 additional state legislatures (18 of them controlled by Republicans) introduced a similar “Show-me-your-papers-law” as in Arizona. As of December 2011, five more states had signed these measures into law: Alabama, Georgia, Indiana, South Carolina, and Utah. Alabama’s anti-immigration law was called an “SB 1070 plus” because it was even harsher than the Arizona law. The federal Justice Department filed suit against the Alabama law as well, so that, in effect, legal challenges have prevented the laws from being enforced in full scope.\(^{24}\) All six


\(^{23}\) See Alan Greenblatt, ALEC Enjoys a New Wave of Influence and Criticism, governing.com, December 2011 (accessed on November 19, 2014).

states with an Arizona-like immigration enforcement law were Republican trifectas at the time of the statute’s enactment and still are (Figure 2).25

**Figure 2: States with an Arizona-like Immigration Enforcement Law**

[Map of the United States with states shaded in red indicating states with Arizona-like immigration laws.]

Source: NCSL Immigrant Policy Project, 2012

Republican opposition against President Obama’s immigration policy took not only the form of state laws complementing and at times contradicting federal law, but also the form of lawsuits against an overreaching federal executive branch. Since President Obama was not able to get a majority in Congress to pass the DREAM Act, a bill introduced in Congress by Senator Richard Durbin (D-IL) and Representative Howard Berman (D-CA) in March 2009, he resorted to executive orders to push his political preferences. In June 2012, in the middle of his re-election campaign, Obama ordered his “Deferred Action for Childhood Arrivals” (DACA) which allowed certain immigrants who entered the country illegally as children (the so-called Dreamers) to be spared from deportation. In November 2014, he extended the DACA policy and tried to expand the deportation stop to the parents of naturalized and otherwise legalized immigrants (“Deferred Action for Parents of Americans and Lawful Permanent Residents” or DAPA), a group of approximately 4.3 million people. This move prompted Texas and 25 more states to challenge the constitutionality of the President’s unilateral action. In December 2014, they filed a lawsuit in federal court arguing that the President violated the Take Care Clause of the Constitution (Article II, Section 2) by rewriting existing immigration law “under the guise of presidential ‘discretion.’”26 A federal district court enjoined DAPA, a decision that was upheld by the appellate court and a 4-4 tied Supreme Court in June 2016. Although the

court’s decision did not affect the temporary protection and work permit for 730,000 Dreamers, it did upend an integral part of Obama’s immigration policy. Of the 26 states suing Obama on DAPA, 21 were Republican trifectas at the time, three (Montana, Virginia, and West Virginia) had Republican-controlled legislatures and two (Maine and Nevada) a Republican governor. Among the states who would have been mostly affected by Obama’s deportation stop were Texas (home to 825,000 unauthorized immigrants potentially eligible for DAPA), Florida (300,000), and four more states (Arizona, Georgia, Nevada, and North Carolina) each being home to more than 100,000 of these immigrants (Figure 3).

Figure 3: States Suing President Obama on DAPA (December 2014/January 2015) and their Estimated Number of Unauthorized Immigrants Eligible for DAPA

![Map showing states suing Obama on DAPA and their estimated number of unauthorized immigrants eligible for DAPA.](source: Pew Research Center.)

4.2 Health Care Policy

Whereas strong national powers to regulate immigration have long been accepted and the discovery of this policy field by the states is foremost the result of a Congressional abdication from its responsibility, the federal role in devising health care policy is more controversial. Historically, health and welfare policies were regarded as a states’ domain, and it was not until Lyndon B. Johnson’s Great Society in the mid-1960s that the federal government enacted Medicare, a health insurance program for the elderly, and Medicaid, a means-tested health program for people with low income. Nevertheless, health care remained a policy field with concurrent federal and state powers. Medicaid, e.g., is a joint federal-state program which is governed by federal guidelines on eligibility, services, and financing, but is designed and administered by the respective state. The costs of the program are split between the two

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28 See Mark Hugo Lopez and Jens Manuel Krogstad, States Suing Obama Over Immigration Programs Are Home to 46% of Those Who May Qualify, February 11, 2015, pewresearch.org (accessed on June 23, 2017).
levels of government – with the federal share ranging from 50 to 73 percent (Mississippi) and the state’s share being on average about 36 percent of the total cost.\textsuperscript{29} About 57 million people were enrolled in Medicaid in the fall of 2013. With the state health insurance markets and the Medicaid expansion of the Affordable Care Act (ACA) going into effect in 2014, the number of people enrolled in Medicaid and CHIP, the Children Health Insurance Program, increased to 75 million people by March 2017.\textsuperscript{30} Even before the Medicaid expansion in 2014, the program consumed about a fifth of all state spending, and for many states it was the largest item in their budget.\textsuperscript{31}

It is therefore comprehensible that states opposed the enactment of ACA. The causes of this opposition were multifaceted: They had to do with identity, ideology, partisan politics, policy views, and with budgetary liabilities in the states. In order to dispel the fiscally motivated objections against ACA, the law stipulated that the federal government would bear 100 percent of the coverage cost for newly enrolled people under the Medicaid expansion through calendar year 2016 – afterwards the federal matching rate was designed to gradually scale down to 90 percent in 2020 and beyond.\textsuperscript{32} But these carrots did not convince the opposing states to cave in. On March 23, 2010, the day President Obama signed ACA into law, a coalition of 26 states under the leadership of Florida filed a federal lawsuit challenging the constitutionality of ‘Obamacare’. Virginia and Oklahoma filed their own lawsuits. Altogether, 28 states demonstrated their resistance against ACA in challenging the constitutionality of certain aspects of the law in federal court (states in Figure 4 plus Missouri).\textsuperscript{33}

\textsuperscript{29} In fiscal year 2011 the federal government spent $264 billion on Medicaid, the states approximately $150 billion. See Kaiser Family Foundation, The Role of Medicaid in State Economies and the ACA, November 2013, p. 2, kff.org (accessed on June 16, 2017).
\textsuperscript{30} See March 2017 Medicaid and CHIP Enrollment Data Highlights, medicaid.gov (accessed on June 16, 2017).
\textsuperscript{31} Mark Carl Rom, State Health and Welfare Programs, in: Gray, Hanson, and Kousser 2013 (note 18), p. 341.
Figure 4: States Position in the ACA Case before the Supreme Court (2012)

The complaints were mainly directed against the two central features of ACA: the individual mandate and the Medicaid expansion. In June 2012, the Supreme Court upheld the individual mandate in a 5-4 decision, arguing it was within Congress’ tax power, but struck down the Medicaid expansion as unconstitutionally coercive. The decision made the Medicaid expansion optional for the states.\textsuperscript{34}

After the main legal challenge against ACA was decided in favour of the federal government, states primarily resorted to three other avenues of opposition: (1) legislatures enacting laws contradicting ACA, (2) governors deciding against state-run health exchanges, and (3) governors opting out of the Medicaid expansion.

(1) State Laws: Between 2010 and 2016, 22 state legislatures enacted laws, constitutional provisions or interstate compacts that challenged or opted out of main elements of ACA. Ten states (Arizona, Arkansas, Georgia, Missouri, Montana, New Hampshire, North Carolina, South Carolina, Utah, Wyoming) demanded that further compliance with ACA had to be approved by their state legislature. With the exception of Arkansas, North Carolina, and Utah all of the above-mentioned states plus Alabama, Florida, Idaho, Indiana, Kansas, Louisiana, North Dakota, Ohio, Oklahoma, Tennessee, and Virginia enacted laws or constitutional amendments that forbid state governments to require the purchase of insurance by individuals (the individual mandate) or payments by employers. Although these laws were

pre-empted by the 2012 Supreme Court decision, they aimed at barring state governments from enforcing fines and penalties for individuals not complying with the individual mandate. Most of these laws were copycat legislation like the “show-me-your-papers” immigration bills drafted from an ALEC model bill.\textsuperscript{35} Separately, nine states (Alabama, Georgia, Indiana, Kansas, Missouri, Oklahoma, South Carolina, Texas, and Utah) passed laws intended to create Interstate Health Compacts that would operate outside ACA. They were pre-empted by federal regulations as well and would have needed Congressional approval in order to become law. Utah repealed their statute in 2014 (Figure 5).\textsuperscript{36}

\textbf{Figure 5: State Laws Opposing ACA (2010-2016)}

(2) In order to make health care affordable for low-income people, the ACA established health insurance markets in the states through which a variety of insurance packages, some of them subsidized by the federal government, could be chosen. In its original form, the ACA only allowed states to run their own exchange or to let the federal government run the marketplace. Since initially only one Republican-controlled state (Idaho) and two states with a Republican governor (Nevada, New Mexico) joined Democratic-controlled states in indicating their intention to run own exchanges, the Department of Health and Human Services (DHHS) entered a bargaining process with the states over the deadlines and modalities.\textsuperscript{37} In the end, deadlines were postponed and five exchange models were devised between which the states

could chose: a state-run exchange, a state-run exchange using a federally-supported website (healthcare.gov), a state-federal partnership, a federally-run individual marketplace in combination with a state-run exchange for small businesses, and a federally-facilitated marketplace. When the exchanges opened in October 2013, 17 states opted for state-run exchanges, five of them (Hawaii, Nevada, New Mexico, Kentucky, Oregon) using the federally-supported website, seven agreed to participate in state-federal partnerships, and 25 states defaulted to a federally-facilitated marketplace. Utah and Mississippi also opted for an individual marketplace run by the federal government, but retained (Utah) or installed (Mississippi) their own exchange for small businesses. All of the most uncooperative states were controlled by Republicans or had at least a Republican-dominated legislature or a Republican governor (Figure 6).

Figure 6: Health Insurance Exchange Structures as of February 2017

Source: NCSL.

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The Affordable Care Act initially required from the states to expand Medicaid eligibility to individuals with income below 138 percent of the federal poverty level (FPL). The reason for this provision was that those under 100 percent of FPL were eligible for Medicaid, whereas those above 138 percent of FPL could shop on the newly constructed state marketplaces for health insurance and were eligible for income-adjusted federal tax credits. This meant that many of the still uninsured and under-insured people were located in the income bracket of 100-138 percent of FPL. Since the Supreme Court had declared this provision of ACA in *NFIB v. Sibelius* (2012) unconstitutionally coercive of the states, state governors had the option to decide whether they wanted to expand Medicaid eligibility for this group of persons. If they did, the federal government would pay for all the additional costs through 2016 and for 90 percent thereafter. Thus, even for Republican governors the decision was not an easy one to take, because states usually tend not to leave money on the table – even if this money is attached to despised conditions. Nevertheless, there are always and have always been cases where governors refused to accept federal grants. Mostly, these decisions have been motivated by a mix of partisan (ideological) and budgetary (economic) reasons. In 2009 e.g., seven Republican governors rejected stimulus money designed to extend unemployment benefits for full-time and part-time workers. Another example during the early Obama years was the decision by Republican governors John Kasich (Ohio), Scott Walker (Wisconsin), and Rick Scott (Florida) to reject federal money for high-speed rail lines in their state. In both cases governors argued that the long-term costs of the commitments or policy changes necessary to receive federal grants weighed far more heavily than the short-term benefits of the imminent awards.

Although partisanship is an important – and, it seems: necessary – condition for governors to oppose federal policy initiatives, it is not sufficient to explain all state reactions, at least in cases where large sums of federal money are involved. Even with respect to partisanship, there can be a difference between legislators with their local representational ties and governors with a state-wide constituency. Arizona Governor Jan Brewer for example carved enough Republican votes out of the steadfast Republican opposition in the legislature to enact the Medicaid expansion. The same was true of other Republican governors leading a trifecta in their home-state such as John Kasich (Ohio), Rick Snyder (Michigan), Tom Corbett (Pennsylvania), Jack Dalrymple (North Dakota) or Sean Parnell (Alaska). But not all Republican governors successfully confronted the opposition of their fellow party members in the statehouses: Florida and Tennessee decided against the Medicaid expansion although

41 Bob Riley (Alabama), Bobby Jindal (Louisiana), Tim Pawlenty (Minnesota), Haley Barbour (Mississippi), Mark Sanford (South Carolina), Rick Perry (Texas), and Sarah Palin (Alaska).
governors Rick Scott and Bill Haslam were in favour of it. But they both were seeking re-election in 2014 and had to be more cautious than Brewer who was term-limited in 2014. The decision to expand Medicaid was somewhat easier to take for Republican governors who confronted a Democratic-controlled or a split legislature as did Brian Sandoval (Nevada), Susana Martinez (New Mexico), Terry Brandstad (Iowa) or Chris Christie (New Jersey). But even in those cases it could come with a political cost – especially for those who had national ambitions and pondered about running for president in 2016. The presidential aspirations of Christie and Kasich certainly did not benefit from their going against the political tide.

Besides partisanship and politics there are other potential factors that could influence state policymaking. Among those are for example prior state policies which can establish a specific path-dependency in a policy field or economic circumstances and administrative capacities of a state. It is also conceivable that policy or “process learning” due to intergovernmental bargaining influences the decision-making process. Research has shown that in addition to partisanship especially two factors were significant predictors of implementing the Medicaid expansion: established policy trajectory and process learning, whereas state affluence and administrative capacities had no discernible effects. States with a long history of strong welfare policies were more inclined to follow this established policy path and accordingly were more willing to enact the Medicaid expansion. And the governors’ proposal of a Medicaid waiver to the Centers for Medicare and Medicaid Services (CMS) in the DHHS had a positive influence on the decision to enact health care reform. The waiver proposal triggered a state-federal negotiation process that made it possible to enact alternative policies. Since 2014, seven states have approved Section 1115 waivers for the Medicaid expansion: three had Republican trifectas at the time of approval (Arizona, Indiana, and Michigan), in Arkansas and Montana Republicans controlled the legislature, in Iowa they controlled the House and the governorship, and in New Hampshire the Senate. Altogether, 32 states adopted the Medicaid expansion, which means that the phalanx of the Republican opposition in the states was not as cohesive as with respect to the health insurance marketplaces. Thus, even in times of extreme partisan polarization it is difficult for states that oppose a federal policy proposal to outright reject the offered money (Figure 7).

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4.3 Education Policy

Education policy – especially concerning K-12 education – is also a policy field that was traditionally left to the subsidiary levels of government: state departments of education and local school boards, but nowadays is characterized by a complex combination involving national, state, and local governments. Beginning with the National School Lunch Act of 1946 and following Supreme Court rulings like Brown v. Board of Education, 347 U.S. 483 (1954), as well as national laws like the 1965 Elementary and Secondary Education Act (ESEA), the federal government more actively intervened in local affairs – although it has long been Republican policy at least to leave education to the states. After a Democratic-controlled U.S. Congress established a federal Department of Education during the presidency of Jimmy Carter (1979), every Republican national platform since Ronald Reagan’s successful 1980 campaign sought to abolish the federal department. All the more surprising was the fact that Republican President George W. Bush expanded the role of the federal government with his “No Child Left Behind” (NCLB) law. NCLB set national standards, required mandatory testing in reading, math and science, ordered states to measure adequate yearly progress (AYP) of

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their schools, and tied federal grants to the performance of schools and teachers. Hence, state governments and teacher unions were among the law’s strongest opponents. Since it was met with scepticism by Republicans and Democrats alike, which even grew during the implementation of the law, Congress failed to reauthorize NCLB at the end of the Bush presidency.48

The opposition from both parties in Congress and from education practitioners in the states notwithstanding, President Obama and his Education Secretary Arne Duncan chose to build their education policy on NCLB. In principle, they supported the idea of improving student achievement by standardized testing, teacher and school accountability, and enhancing school choice (e.g. charter schools and home-schooling).49 Their criticism against NCLB was mainly directed at the unrealistically high target of college and career readiness (100% by 2014), which in their view encouraged states and local schools to lower their standards.50 Obama wanted to stop this race to the bottom with his signature education program “Race to the Top” (R2T). R2T was part of the $100 billion earmarked for education in early 2009 as part of the $840 billion economic stimulus package. R2T was a competitive grant program which awarded $4.35 billion to states with an innovative education policy. States were invited to propose their plans in four core areas: “(e)stablishing high, challenging learning standards”, “(d)eveloping and supporting effective teachers and leaders”, “(c)reating data systems”, and “(t)urning around the lowest-performing schools”.51

R2T created two application phases, the first in January 2010 and the second in June 2010. In the first phase, 40 states and the District of Columbia applied for grants, while ten states chose to refrain from the competition (Table 3). Only two states, Tennessee ($250 million) and Delaware ($119 million), were declared winner (Figure 8). In the second phase, 35 states and D.C. applied, while this time fifteen states resisted the federal carrots. Alaska, North Dakota, Texas, and Vermont were the only states who did not participate in any round of R2T (Table 3). The number of winners in the second phase increased to ten. The awards amounted to $75 million (D.C., Hawaii, Rhode Island), $250 million (Maryland, Massachusetts), $400 million (Georgia, North Carolina, Ohio) and $700 million (Florida, New York) – staggered according to population (Figure 8). In 2011, Congress allotted additional funds of $199 million for which only the losing finalists of the second round could apply. The

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seven winners of phase three (Kentucky, Louisiana, Colorado, Arizona, New Jersey, Pennsylvania, Illinois) got much smaller amounts of federal grants between $17 and $43 million than the 2010 winners (Figure 8).

Table 3: States Not Applying in Phase 1 and 2 of Race to the Top

| Phase 1 | Alaska, Maine, Maryland, Mississippi, Montana, Nevada, North Dakota, Texas, Vermont, Washington |
| Phase 2 | Alaska, Delaware, Idaho, Indiana, Kansas, Minnesota, North Dakota, Oregon, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, Wyoming |

Source: Manna and Ryan 2011 (note 50).

Figure 8: Race to the Top States and Award Amounts (in millions)


As important as the money was for cash-strapped states in times of an economic recession, the amount of federal money was not decisive for the policy consequences of R2T in the states – at least not from the federal perspective. Research has shown that the competitive grant program was a highly effective tool for the federal government to set the political agenda and to influence the direction of the national political discourse around education. As a result of R2T, states enacted much more educational reforms in the years

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following R2T than before. This increasing reform activity in the states was not only limited to the 19 winning states and the District of Columbia, but extended to the 28 losing applicants and the four states that did not participate in R2T as well. William G. Howell, who has done the most in-depth analysis of R2T to date, came to the following, remarkable conclusion:

“The surge of post-2009 policy activity constitutes a major accomplishment for the Obama administration. With a relatively small amount of money, little formal constitutional authority in education, and without the power to unilaterally impose his will on state governments, President Obama managed to jump-start policy processes that had languished for years in state governments around the country. When it comes to domestic policymaking, past presidents often accomplished a lot less with a lot more.”

R2T was also instrumental in bringing the National Governors Associations (NGA) and the Council of Chief State School Officers (CCSSO) to launch the Common Core State Standards Initiative (CCSSI) in 2009. The Common Core was an example of horizontal self-coordination of the states who tried to pre-empt the national standardization movement by taking matters into their own hands. The development of the standards was finalized in June 2010. By late 2011, 46 states and the District of Columbia had signed on. Only Alaska, Nebraska, Texas, and Virginia did not adopt the CCSSI (Figure 9).

Figure 9: Adoption of the Common Core Standards in the States

Source: NCSL.

55 NCSL, Common Core State Standards: Answers to Legislators’ Frequently Asked Questions, Washington, D.C., 2014, p. 3 (Figure 2).
As states implemented the new standards and aligned assessments in the following years more fully, the political resistance against the Common Core grew. At first, criticism came mostly from the right-wing media and Tea Party activists in the Republican Party. Then, the sweeping victories of Republicans in gubernatorial and state legislative elections all over the United States in 2010 increased the voices of opposition in the states. Between 2011 and 2014 more and more bills were introduced in state legislatures that tried to roll back the CCSSI. Some of these states were dominated by Republican legislatures and governors (Alabama, Oklahoma, South Carolina, and South Dakota), but others were politically more diverse (Minnesota, New Hampshire, Oregon, and Washington). Among teacher unions which traditionally have been aligned with Democrats and have ever been sceptical about testing, the resistance against the standards also expanded over time because the Obama administration never shied away from its intent to evaluate teacher performance by linking it to the outcome of student assessments. Interestingly, some states led by Republican trifectas like Idaho, Maine, and North Dakota managed to avoid conflicts over the standards. In general, the conflict level increased with advancement towards full implementation status at the end of 2014, which incidentally coincided with the midterm elections. By October 2014, five states had rescinded the Common Core – four of which were Republican trifectas (Indiana, Oklahoma, North Carolina, and South Carolina), while in Missouri a bipartisan coalition endorsed the measure to revise the standards. In Louisiana, Republican Governor Bobby Jindal failed to convince his Republican-controlled legislature to repeal the standards.

With the opposition against the federal education policy gaining ground in the states, the Obama administration tried to achieve its policy objectives by granting more flexibility to the states in administering NCLB. The most urgent need for states was to get exemptions for NCLB’s unrealistically high proficiency standards which an increasing number of schools failed to achieve. Beginning in September 2011, Education Secretary Arne Duncan invited states to apply for NCLB-waivers – provided that they were willing to support the reform agenda of the Obama administration as outlined in R2T. By the summer of 2012, 33 states and the District of Columbia had been granted waivers for some of NCLB’s most problematic mandates. Two years later in November 2014, ten more states had received federal approval on their waiver applications while Washington had lost its flexibility waiver because it refused to alter its teacher evaluation system (Figure 10). Seven states – California, Iowa, Montana, Nebraska, North Dakota, Wyoming, and Vermont – did not apply for a waiver, were rejected or withdrew their requests because they opposed teacher evaluations, national standards or some other element of Obama’s education policy. Although these were mostly Republican-

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controlled states, the rejection of California's and Iowa's waiver application and the revocation of Washington's waiver demonstrated that the opposition was not limited to Republicans. Other Democratic states like Maryland had also difficulties meeting the teacher evaluation requirements but finally got the federal approval for their reform plans after some legislative delays. Oklahoma lost its waiver for some months in 2014 because the Republican-controlled legislature and Republican Governor Mary Fallin rejected the Common Core standards.  

Figure 10: States Granted with a NCLB-Waiver

The bipartisan political backlash against R2T, the Common Core and Obama’s NCLB waivers finally resulted in the reauthorization of NCLB. Led by Senator Lamar Alexander (R-TN), a former Secretary of Education under George H. W. Bush, the Every Student Succeeds Act (ESSA) was passed by Congress with huge bipartisan majorities and signed into law by President Obama in December 2015. The ESSA retains the annual testing and reporting mandates of NCLB, but it rolls back the federal role in education policy. In the future, the yearly student and school achievement goals are defined more moderately, states have much more leeway in determining their own testing and accountability systems, and the federal government is not any longer allowed to attach conditions to their education waivers. This means for example that the federal government is prohibited from dictating national standards such as the Common Core to the states or to prescribe specific turnaround strategies the schools have to follow. In the end, Obama’s education legacy is at least ambivalent: on the

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one hand, his activist policy seemed to strengthen the standards-based accountability movement in the US, but on the other hand, his federal overreach provoked a backlash by the states who succeeded in constraining the power of the federal government in education for the foreseeable future. For a conservative critic and education reformer like Frederick M. Hess of the American Enterprise Institute, Obama’s legacy is, however, unequivocally negative:

"Barack Obama came to office at a time of broad bipartisan support for education reform. And he managed to simultaneously exploit and fracture this goodwill. His aggressive approach politicized nearly all that it touched, leaving in its wake unnecessarily divisive national debates... Although some of Obama’s education moves have been inopportune, his agenda has also included a number of notions with real promise. But his administration’s excessive faith in federal regulation, lack of time for the niceties of federalism, and contempt for critics helped undermine these ideas and support for reform more broadly."

5. Conclusion

The Obama presidency was characterized by high, maybe unprecedented levels of partisan polarization and Congressional gridlock at the federal level. With the exception of health care reform, all major policy initiatives of Obama stalled in Congress. A consequence of this Congressional logjam was that important policy decisions were made at other places and by other actors than the elected representatives in Congress: by the executive branch, by state governments, and also by the courts. Major policy changes in immigration, health, education, and also in environmental policy (which was not analysed above, but was characterized by many of the same phenomena as the other Obama initiatives in immigration, health and education policy) were set in motion by President Obama and shaped by his political struggles with the states during implementation. Sometimes these federal-state relationships were more of a cooperative nature, at other times more confrontational. Especially after the 2010 midterm elections, Republican governors, state attorney generals and state legislators advanced to leaders of the political opposition against, as they saw it, an overreaching executive – using an arsenal of different tools like refusing federal mandates, incentives and offered grants, filing lawsuits in federal court, proposing and enacting conflictive state legislation and state constitutional amendments. But even during times of heavy political confrontation between President Obama and state Republicans, cooperative relationships between the two levels of government continued. By way of applying for flexibility waivers

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from ACA or NCLB, states entered into negotiations with the federal government and enabled themselves to deviate from federally-prescribed policies.

In the end, does this mean that Republican states fulfilled their function as “incubators of freedom” successfully? Since this a politically charged term, the answer cannot be as clear-cut as we would want it to be, but has to differentiate between various levels of analysis. First, on a political (electoral) level there can be no denial that Republican states were rather successful in their steadfast opposition to President Obama’s major policy initiatives. They made their voices of opposition heard, and they won a rash of gubernatorial and state legislative elections with that political strategy. Second, their opposition was rather effective in terms of policy as well. A large number of Republican states refused to run their own health insurance exchanges, they did not participate in the Medicaid expansion, some of them overcame the temptation to apply for the competitive R2T grants or rejected the Common Core outright. Even in the predominantly federal field of immigration policy, Republican states were successful in stopping Obama’s DAPA policy, and some of them prevailed with their approaches toward stricter enforcement of immigration law – although not always to the extent they wished. Third, at times Republican policy success even stemmed from “a single courageous state” (Brandeis) serving as a model for other states which then emulated a policy that was seen as successful from a conservative perspective. Arizona was such an “incubator of freedom” for other Republican states with respect to its immigration policy, Arkansas with its premium assistance waiver for Medicaid, and Utah for Mississippi with its health insurance exchange for small businesses.

On the other hand, it is debatable, fourthly, whether all those flexibility waivers and federal-state negotiations were really increasing the decision-making leeway of the states and their level of freedom vis-à-vis an encroaching federal government. When states applied for waivers, entered negotiations with the federal government or accepted federal grants, they had to agree to certain conditions in return for the federal accommodation. Even states that resisted the federal carrots often could not help but follow the federal direction – this was especially obvious in the irresistible trend in education policy towards national standardization and testing, but also in the strong pressure on all of the 50 states to expand eligibility for Medicaid or to otherwise increase the insurance rate of their population. In spite of all the witnessed fragmentation, varieties and different speeds of US federalism during the Obama era, there also has been some sort of growing uniformity at least among the red and among the blue states, but also between them. The intensifying fragmentation of the National Governors Association (NGA) into a Republican and a Democratic arm and the growing

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importance of other openly partisan institutions of horizontal self-coordination such as ALEC are witness to the fact that the partisan polarization at the federal level has long permeated across the states as well. For states who want to preserve their peculiarity against the egalitarian impulses of the federal government, these are no good news.
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