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A State Is a “They,” Not an “It”: Intrastate Conflicts in Multistate Challenges to the Affordable Care Act

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A State Is a “They,” Not an “It”:
Intrastate Conflicts in Multistate Challenges
to the Affordable Care Act

*Anthony Johnstone**

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INTRODUCTION

Who speaks for a state? The law conceives of states as unitary legal actors. Even the simple appearance of “the State” in court,

* Helen & David Mason Professor of Law, University of Montana Blewett School of Law. I introduced a portion of this article in Anthony Johnstone, *Foreword: The Future of Federalism, from the Bottom Up*, 76 MONT. L. REV. 1 (2015). Thanks to the participants in the State Enforcement in a Multistate World symposium for a valuable discussion, the editors of BYU Law Review for their patience and suggestions, Elizabeth Webster and McKenna Ford for editorial and research assistance, and my family for their support.

however, conceals a complex intersection of state officials acting in a range of legal roles. Take for example the various authorities represented in the topside of the caption in a typical criminal case. The lawyer appearing for “the State” may work for a prosecutor elected at the local level and supervised by the state attorney general, enforcing a law enacted by a legislature elected in districts across the state, which is interpreted by trial and appellate courts that may be elected locally or statewide, or appointed by an elected governor. Should that lawyer’s case land in the federal courts, however, the lawyer may be asked to speak for all three branches and their system of overlapping constituencies as “the State.” The same is true of state lawyers on either side of civil litigation, including constitutional litigation defending state law or challenging federal law, where they must advance a constructed “state interest” defined by legal and political imperatives.

Like Congress,¹ the executive branch,² and the judiciary,³ a state is a “they,” not an “it.”⁴ Each state contains its own separation of powers among the legislative, executive, and judicial branches. Yet the states are even more plural than the federal government. States further divide their executive branches,⁵ and sometimes even their courts of last resort.⁶ Beyond structure, distinctions among the

1. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

2. Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It”*, 96 MINN. L. REV. 194 (2011).

3. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

4. Professor Roderick M. Hills offered a classic statement of this phenomenon: [I]n discussions about American federalism, it is common to speak of a “state government” as if it were a black box, an individual speaking with a single voice. State governments are, of course, no such thing. Rather, a “state” actually incorporates a bundle of different subdivisions, branches, and agencies controlled by politicians who often compete with each other for electoral success and governmental power. In particular, these institutions compete with each other for the power to control federal funds and implement federal programs. Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1201 (1999).

5. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006) (contrasting the state model of the divided executive with the federal model of the unitary executive).

6. See, e.g., TEX. CONST. art. V, § 5(a) (“The Court of Criminal Appeals shall have final appellate jurisdiction coextensive with the limits of the state . . .”); Ben L. Mesches, *Bifurcated Appellate Review: The Texas Story of Two High Courts*, 53 JUDGES J. 30 (2014).

powers and duties of each branch,⁷ and between the officers within each branch,⁸ add layers of comparative complexity to state governments. Most of these officers are independently elected, even within the executive branch, which introduces a fundamentally different model of political accountability than exists anywhere within the "jurisdictional chaos"⁹ of federal agencies ultimately accountable (directly or indirectly) to a single elected official.¹⁰ Subsidiarity within the states—an "Our Localism"¹¹ that functions distinctly from "Our Federalism"¹²—also takes a variety of forms in the organization of local governments under states' authority. This diversity in state political structures, and its divergence from the federal model, is

7. For example, many state constitutions authorize, and some require, the state supreme court to issue advisory opinions. *See, e.g.*, R.I. CONST. art. X, § 3 ("The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly."). *See generally* Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1836 (2001) ("State courts . . . are not bound by Article III, and judicial practice in some states differs—and differs radically—from the federal model."). State attorneys general also give legal opinions, and in a few states, those opinions effectively operate as binding law. *See* EMILY MYERS, *STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES* 85 (4th ed. 2018).

8. For example, states typically allocate consumer protection duties across a range of executive branch offices including the attorney general, conventional executive branch agencies headed by a gubernatorial appointee, elected public service commissions, and elected commissioners of agriculture, banking, insurance, or securities, among others. *See generally* *State Consumer Protection Offices*, USA.GOV, <https://www.usa.gov/state-consumer> (last visited Nov. 9, 2019). For example, Florida separately elects an attorney general, a chief financial officer, and a commissioner of agriculture and consumer services, each with consumer protection duties. *See* FLA. STAT. ANN. § 501.203(2) (West 2017) (Attorney General's Department of Legal Affairs); FLA. STAT. ANN. § 624.307(10) (West 2017) (Chief Financial Officer's Department of Consumer Services); FLA. STAT. ANN. 570.07(36)-(37) (West 2018) (Commissioner's Department of Agriculture and Consumer Services).

9. David A. Hyman & William E. Kovacic, *State Enforcement in a Polycentric World*, 2019 BYU. L. REV. 1447, 1460.

10. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2317 (2001) ("[T]he President, in relation to these other actors, has attained an ever greater capacity to oversee, to supervise, and even to direct administrative action."); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so.").

11. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 2 (1990) (Briffault defines "Our Localism" as "the legal powers of contemporary American local governments, the practical social and political ramifications of local legal power in a system characterized by wide divergences in local fiscal capabilities and needs and the ideological commitment to localism that sustains and legitimates local autonomy.").

12. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

underappreciated.¹³ All of these branches, all of these officers, and all of these levels of state government may claim to speak for the states in legal proceedings.

While a growing body of scholarship, including this Symposium, addresses the functions of state litigation in our federal system, its main concern is *when* and *where* states may speak in court, rather than *who* speaks for the State.¹⁴ The conventional model of the state attorney general bringing cases as a party, or joining cases as an *amicus curiae*, is assumed.¹⁵ Yet the rise of state public law litigation is accompanied by a diffusion of legal actors who claim to speak for the State in that litigation. Like the subjects of multistate litigation itself, partisan dynamics in who claims to speak for the State track trends of partisan mobilization across states and between the states and the federal government. As the captions in multistate litigation increasingly align along partisan lines, the titles of state officials claiming to speak for the state increasingly extend to governors, legislators, and others.

This article examines the pluralism of state constitutional politics through the lens of the states' responses to the Affordable Care Act (ACA, or "the Act") over the past decade. Although the Act was conceived as a model of cooperative federalism, its broad policy scope and deep impacts on states and their citizens invited state partisan mobilization for and against the law even before Congress enacted it.¹⁶ The Act depends on executive and legislative branches of state governments to implement two of its key

13. See generally Anthony Johnstone, *The Federalist Safeguards of Politics*, 39 HARV. J.L. & PUB. POL'Y 415 (2016).

14. For exceptions, see Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1561, 1564 (2015); Hills, Jr., *supra* note 4; David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 795-98 (2017). A comprehensive overview of state-level policy developments under the Affordable Care Act, including intrastate debates enabled by the Act's federalism provisions, is Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018); see also Abbe R. Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L.J. 1471 (2020).

15. See, e.g., Linda S. Mullenix, *Complex Litigation in a Dual Court System*, 2019 BYU L. REV. 1551 (2020) (discussing state attorney general authority relative to federal courts in mass actions context). But see Hyman & Kovacic, *supra* note 9, at 1449 ("[R]ecent scholarship has recognized the possibility of plural interests within an individual state—such as when the AG is from one political party, and the governor is from another political party.").

16. See Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State Based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 113-18 (2010) (summarizing how state challenges to the Act predated its enactment and "continued, escalated, and morphed" over the Act's first year).

elements, health insurance exchanges and Medicaid expansion respectively. The need for state implementation provided multiple points for federal-state policy coordination, and, in many states, federal-state political contestation.¹⁷ These policy and political disputes immediately spilled into court. There state officials, led by attorneys general, reframed the Act's policies as presenting a series of constitutional questions that would reshape the Act itself.

On the day President Obama signed the Act into law, state attorneys general joined other parties to challenge it on constitutional grounds. These state executives, mobilizing almost exclusively along national Republican Party lines, repeatedly asked the federal judiciary to invalidate or rewrite the Act.¹⁸ Meanwhile, Democratic attorneys general lined up to defend the Act, joining a debate over the meaning of federalism itself. When the state challenges succeeded in *Florida v. Dept. of Health & Human Serv.* (consolidated with *NFIB v. Sebelius* and *U.S. Dept. of Health & Human Serv. V. Florida* as "*the Health Care Cases*"),¹⁹ the attorneys general changed the rules of federal-state engagement under the Act by providing their executive and legislative counterparts grounds for resistance that Congress did not originally provide (in the case of Medicaid expansion) or foresee (in the case of state exchanges). Encouraged by their early success and motivated by the failure of their co-partisans in Congress to repeal the Act, the attorneys general returned to court again and again over the decade, as parties and amici curiae, culminating in a battle to dismantle the Act in *Texas v. United States*, now pending in the Supreme Court.

The bright partisan lines of red-state attacks on the Act, and blue-state defenses of it, obscure a more complicated political

17. See Gluck & Huberfeld, *supra* note 14, at 1701.

18. The one Democrat, Louisiana Attorney General Buddy Caldwell, switched from Democrat to Republican shortly after joining the lawsuit. *Attorney General Buddy Caldwell Switches to Republican*, TIMES-PICAYUNE (New Orleans) (Feb. 3, 2011), https://www.nola.com/news/politics/article_69bf659c-7815-5d9f-912b-f430c0ecb373.html.

19. *NFIB v. Sebelius*, 567 U.S. 519 (2012). The case involved three consolidated petitions: *NFIB v. Sebelius* (No. 11-393), a challenge brought by individuals to the individual mandate; and *U.S. Dept. of Health & Human Serv. v. Florida* (No. 11-398) and *Florida v. Dept. of Health & Human Serv.* (No. 11-400), cross-petitions in a challenge brought by states to the Medicaid expansion (and related issues of severability and the Tax Anti-Injunction Act). This Article will refer to the consolidated cases as "*the Health Care Cases*" in the text.

reality on the ground in the states. The Act passed along party lines in the Senate, and thirty-four Democrats joined all Republicans voting against it in the House.²⁰ State officials' responses to the Act would break from Congressional party politics for a couple of reasons. First, state officials did not always track national partisan alignments on the Act. Second, state officials engaged with the Act over a decade in which the parties in power changed in many states. Every state, through its attorney general and sometimes its governor and legislators, has weighed in on litigation over the Act at some point in the past decade, most of them repeatedly.

More than half of the states rendered a mixed verdict on the Act, supporting some of its elements and opposing others. At least half of the Congressional delegations in 30 states, measured as the average of House and Senate vote shares, supported the Act on final passage. Of these, 17 states would take at least one position opposed to the Act, either challenging it in court or refusing to adopt Medicaid expansion or a state exchange. Of the 20 states with Congressional delegations opposed to the Act at its final passage, nine would take at least one position in support of the Act, either defending the Act in court, expanding Medicaid, or establishing a state exchange. In the courts alone, several attorneys general switched positions – or voters switched attorneys general – at some point during the Act's legal saga. In several states, officials other than the attorney general joined the courtroom scrum, sometimes lining up directly opposite the state's chief legal officer in attempts to give voice to other state interests. These intrastate conflicts challenge simple models of partisan federalism and raise difficult questions of federalism and state power in an emerging regime of state public law litigation.²¹

This article proceeds in three parts. First, it introduces the office of state attorney general and the role of attorneys general in national policymaking through litigation. State attorneys general increasingly engage in ideologically charged multistate litigation with the federal government and reinforce national party lines

20. "Patient Protection and Affordable Care Act: Roll Vote No. 396 Leg.," 155 Cong. Rec. S13891 (Dec. 24, 2009); "Patient Protection and Affordable Care Act: Roll No. 165," 156 Cong. Rec. H2153 (Mar 21, 2010).

21. See generally Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 95–96 (2018).

when doing so. Second, the article sketches out this new regime, taking as its model several landmark challenges that mobilized a wide majority of state attorneys general in opposition to, or support of, the Affordable Care Act over the past decade. This new regime includes other state actors too: state legislatures that enacted Medicaid expansion under the Act, state governors who established health insurance exchanges under the Act, and some actors from both groups appearing in litigation, as parties or amici, aligned with or opposed to their state's position taken by its attorney general. Third, the article suggests some doctrinal implications of this new regime for separation of powers under state constitutions and federalism doctrine under the United States Constitution, as well as procedural implications for the handling of these cases by the Supreme Court and other federal courts.

I. FEDERALISM, THE STATES, AND THE ATTORNEYS GENERAL

From *McCulloch v. Maryland*²² to *Massachusetts v. EPA*²³ the standard model of state litigation against the federal government centers on the state attorney general. Most states provided for an attorney general, an office inherited from England through the colonies, in their first constitutions.²⁴ Typically state constitutions describe the attorney general as "the legal officer" of the state.²⁵ Although there is significant variation among the states, most states recognize broad common law or statutory authority for the attorney general to represent the state's interests in litigation.²⁶ Through cooperation with, and resistance to, the federal government in litigation, attorneys general shape federalism as both political and legal actors.²⁷ The standard model plays out mainly along an orbital plane, gravitating from state capitols to Washington, D.C., and radiating back, between an indivisible state

22. *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 372 (1819) (Luther Martin, Attorney General, appearing for Maryland).

23. *Massachusetts v. EPA*, 549 U.S. 497, 501 (2007) (Thomas F. Reilly, Attorney General, appearing for Massachusetts).

24. EMILY MYERS, *STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES* 7 (4th ed. 2018).

25. *Id.* at 92, 520–21.

26. *Id.* at 93.

27. Anthony Johnstone, *Hearing the States*, 45 PEPP. L. REV. 575, 598–609 (2018).

and (less often) a monolithic federal government. This model has the virtue of simplicity, but it is incomplete.

As early as *McCulloch*,²⁸ Chief Justice John Marshall provided a lasting reminder of the multiple sources of popular sovereignty in a federal system. When the people act at the federal level, “they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves. . . .”²⁹ Chief Justice Marshall spoke of the constitutional ratification process, but he could just as well have been describing how the people act in their states, through the mediation of state laws,³⁰ to choose Congressional delegations,³¹ and presidential electors.³² Similarly, the people express their sovereignty at the state level by electing and empowering multiple state officials with competing duties to legislate, execute, and adjudicate state policies.³³ In federalism doctrine, the usual attention is on the radial or vertical separation of the people’s “two political capacities, one state and one federal, each protected from incursion by the other.”³⁴ Federalism doctrine also should attend to the horizontal separation of the people’s political capacities within the states.

The Court’s lack of attention to the states’ distinct political structures weakens its conventional rationales for certain federalism-promoting rules. According to the Court’s federalism doctrine, for example, the genius of dual sovereignty also presents a danger of

28. *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316 (1819).

29. *Id.* at 403.

30. See U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

31. See *id.* art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”); *id.* amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .”).

32. See *id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

33. See generally *Johnstone*, *supra* note 13, at 443–67.

34. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”).

misplaced accountability. In order for citizens to exercise their two political capacities properly, they must know which government is acting on their behalf. When both government jurisdictions overlap, as they often do in the contemporary constitutional order, bright lines such as the anti-commandeering rule must be drawn to preserve political accountability between voters and the government actors responsible for a particular policy.

Maintaining accountability within these separate spheres is a central theme of *New York v. United States*: "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."³⁵ The translation of this accountability principle from an anti-commandeering rule to a more general anti-coercion rule of cooperative federalism³⁶ was the crucial move in *the Health Care Cases* that led to the invalidation of the Medicaid expansion requirement. According to a seven-member majority on the Court, "[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system," otherwise, "when the State has no choice, the Federal Government can achieve its objectives without accountability. . . ."³⁷ The solution to the accountability problem is to give states a choice in adopting the federal policy: "States may now choose to reject [Medicaid] expansion; that is the whole point."³⁸

35. *New York v. United States*, 505 U.S. 144, 169 (1992). This accountability concern can be overstated in the anti-commandeering context, as demonstrated by the political situation in *Printz v. United States*, 521 U.S. 898, 957 & n.18 (1997) (Stevens, J., dissenting). Sheriff Jay Printz, himself an elected official, did not need the Supreme Court to tell the gun buyers of his Montana county who was behind the Brady Act's background checks. In 1994, the year after the Brady Act's passage, Ravalli County's electorate voted by more than a 2-to-1 margin for Senator Conrad Burns, who opposed the Brady Act. See MONT. SEC. OF ST., 1994 *Statewide General Canvass* 3 (updated Nov. 5, 1996), <https://sosmt.gov/Portals/142/Elections/archives/1990s/1994/1994gen.pdf>. In 1996, President Bill Clinton, who signed the Brady Act, went on to win only thirty-one percent of the vote in Ravalli County. See MONT. SEC. OF ST., 1996 *Statewide General Canvass* 3 (updated Dec. 10, 1999), <https://sosmt.gov/Portals/142/Elections/archives/1990s/1996/1996gen.pdf>.

36. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) ("[I]n some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937))).

37. *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012).

38. *Id.* at 587.

The Court considered how states could respond to the choice it now offered under the Act: “Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion.”³⁹ Alternatively, the Court suggested, “[o]ther states . . . may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.”⁴⁰ What is striking about this discussion, and the Court’s federalism rhetoric more generally, is the monolithic “state” that is the subject of its analysis. A “state” sued to vindicate its sovereignty; a “state” won a choice to opt out of the Medicaid expansion; a “state” either did or did not opt out; and, thanks to the Court, a “state” was accountable to the people for its choice. This is too simple even as to the Medicaid expansion itself. After all, state attorneys general challenged Medicaid expansion, but state legislators would decide whether to implement it. Despite common federalism shorthand, a “state” comprises many different political actors, each independently elected and accountable to the state’s citizens in ways the courts have failed to consider.

At times, some Justices are more sensitive to the various political offices and interests that each lay claim to the title of “state.” In *New York*, where an elected state attorney general sued notwithstanding the fact that “[a] Deputy Commissioner of the State’s Energy Office testified in favor of the Act” and “Senator Moynihan of New York spoke in support of the Act on the floor of the Senate,” the Court held that a “departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”⁴¹ In *United States v. Comstock*,⁴² twenty-nine States appeared as amici to support the federal civil commitment law at issue, which, not coincidentally, assumed the financial burden of civil commitment from the States.⁴³ Dissenting, Justice Thomas reiterated that federal power “does not expand merely to suit the States’ policy

39. *Id.*

40. *Id.*

41. *New York v. United States*, 505 U.S. 144, 181–82 (1992).

42. *United States v. Comstock*, 560 U.S. 126 (2010).

43. *Id.* at 179 (Thomas, J., dissenting).

preferences, or to allow state officials to avoid difficult choices regarding the allocation of state funds."⁴⁴

In both of these cases, however, the state officials are taken as a unified whole in their consent to the exercise of federal power, whether it is commandeering in *New York* or the necessary and proper extension of commerce power in *Comstock*. But as the attorney general's presence in *New York* demonstrated, different state officials have different roles and a "state's" authority to accept or reject federal law is structured by state law. The justices' analyses would have benefitted from an acknowledgement that it was not simply "state officials" who consented due to their policy preferences, but a set of separately elected executive and legislative officials whose views of "the States' policy preferences" might work at cross-purposes.⁴⁵ Instead of acting inconsistently or strategically, the state officials may be playing out the same checks and balances the Court celebrates and reinforces at the federal level. The Court disrespects dual sovereignty when it neglects how States structure their governments and does not hear the voices of the State that its own citizens choose to speak through on particular issues.

II. WHO SPEAKS FOR STATES ON THE AFFORDABLE CARE ACT?

The States' varied responses to the Affordable Care Act of 2010 demonstrate a complex dynamic of litigation, legislation, and regulation that cannot be captured on the caption of a Supreme Court brief. In their engagement with federal policies, state officials function across the range of modes recognized in American federalism. Dean Heather Gerken helpfully classifies them: "the de jure autonomy associated with the sovereignty account; the de facto autonomy associated with process federalism; and the power of the servant, which is the best way to conceptualize state power in cooperative federal regimes."⁴⁶

44. *Id.*

45. *Id.* *But see New York*, 505 U.S. at 200 (White, J., dissenting in part) (noting "to say, as the Court does, that the incursion on state sovereignty 'cannot be ratified by the "consent" of state officials,' is flatly wrong," and arguing that the State should be estopped from challenging a federal law from which it derived substantial advantages).

46. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1552 (2012).

All three modes are at work in the legal and political debate over the Affordable Care Act.⁴⁷ On the campaign trail, the process federalism account dominates as state legislators and governors position themselves in campaigns and governance for or against the federal policy at the statehouse. At the courthouse, dual sovereignty claims dominate as the state attorneys general ask the Supreme Court to police the federal government's trespass beyond its delegated powers into the state sphere of reserved powers. In the wake of the split decision in *the Health Care Cases*, and with the Court's blessing, states revert to a cooperative federalism mode of negotiation and implementation of federal policy on the states' terms. In sum, voters mobilized state officials (alongside federal officials) to oppose the Act through process federalism, some of those state officials rewrote the Act's terms in court through sovereignty federalism, which gave other state officials new leverage to implement the Act through servant federalism.

The fulcrum in this account of federalism is the state constitutional challenge to the Act, led by attorneys general, in *the Health Care Cases*. This marked the culmination of growing federalism conflicts along two axes: vertical between the states and the federal administration and horizontal among the states themselves.⁴⁸ Professors Margaret Lemos and Ernest Young distinguish between the two: vertical conflicts concern the scope of federal power and "each state's right to go its own way," while in horizontal conflicts, some states try to impose their policy preferences on other states in "fights for the right to control national policy."⁴⁹ As Professors Lemos and Young explain, most state litigation over the Affordable Care Act appears to be a vertical conflict over federalism, but it has become a horizontal conflict due to the national scale and interconnectedness of health care reform—a state's decision "to go its own way" without universal insurance coverage as a matter of federalism may undermine the policy's efficacy in other states.⁵⁰ These two types of conflicts increasingly

47. See Leonard, *supra* note 16, at 160, tbl. 3 (mapping state responses to ACA onto state sovereignty and servant accounts of federalism).

48. See Paul Nolette, *State Litigation During the Obama Administration: Diverging Agendas in an Era of Polarized Politics*, 44 *PUBLIUS* 451, 457 (2014).

49. Lemos & Young, *supra* note 21.

50. *Id.* at 95, 99.

take place along national party lines, mobilizing partisan opposition or support relative to the party in power at the federal level, in what Professor Jessica Bulman-Pozen calls "partisan federalism."⁵¹ At the same time, what I have termed "the nationalization of state politics," increasingly uniform federal regulation and deregulation imposed on state election laws, eases the entry of national partisan actors.⁵² The intensified politics of the Act drove national party lines right through states themselves, overwhelming local distinctions in political structures and interests. State officials on each side of the partisan divide then claimed to represent the state's interests from different offices.

Within states, the diverse configurations of policy choices on the issue make it difficult to discern a "state's" choice in anything more than a formal sense, even when considering a single choice in isolation. Iterated over multiple policy and political cycles, the monoliths of state positions for or against a given federal policy fracture into shifting coalitions that often run across state offices and sometimes place officials of the same state on opposite sides of the same case. Emphasizing the role of governors and state legislatures, Professors Abbe Gluck and Nicole Huberfeld find "[d]ivergences in state law and divergences among the internal state actors—in other words attributes of the state *sovereign* apparatuses—are critical to how federal-law implementation occurs on the ground."⁵³ State litigators, primarily attorneys general, also are a central part of each state's sovereign apparatus, both challenging and defending the implementation of federal law.

The states' positions in the decade-long litigation of the Affordable Care Act, and their reactions to each decision of the courts, demonstrate this dynamic in five acts. First, attorneys general and other state officials challenged and defended the Act's individual mandate and Medicaid expansion in *the Health Care Cases* (2010). Second, governors and state legislatures decided whether or not to expand Medicaid with the option the Court

51. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1096 (2014); see also Lemos & Young, *supra* note 21, at 101 ("In an interconnected economy such as ours, one state's autonomy will sometimes be another state's shackles, and we should not be surprised that many such policy disagreements play out along partisan lines.")

52. See also Johnstone, *supra* note 13, at 434–42 (critiquing the "nationalization of state politics" through federal election law).

53. Gluck & Huberfeld, *supra* note 14, at 1776.

provided in *the Health Care Cases*, and whether or not to implement the Act through state-established health insurance exchanges beginning in 2014. Third, attorneys general and other state officials challenged and defended the availability of tax subsidies for insurance bought on state exchanges established by the federal government in *King v. Burwell* (2014). Fourth, attorneys general and other state officials challenged and defended contraceptive coverage rules promulgated under the Act in *Burwell v. Hobby Lobby* (2014) and *Zubik v. Burwell* (2016). Fifth, after Congress zeroed-out the tax penalty for the individual mandate, attorneys general and other state officials are challenging and defending the validity of the entire Act in *Texas v. United States*, now at the Supreme Court.

A. *The Health Care Cases*

Despite the multitude of state actors who mobilized in *the Health Care Cases* and subsequent litigation, the federal courts responded with indifference to the States' diverse infrastructures supporting the litigation and the policy responses to the outcome of the case.⁵⁴ As the Court noted, "[o]n the day the President signed the [Affordable Care] Act into law, Florida and 12 other States filed a complaint,"⁵⁵ and each of those States was represented by their constitutional officers responsible for litigation – thirteen attorneys general in all.⁵⁶ Indeed, the lead plaintiff pleaded the attorney general's conventional role:

The State of Florida is a sovereign state and protector of the individual freedom, public health, and welfare of its citizens and residents. Bill McCollum, Attorney General of Florida, has been

54. Elizabeth B. Wydra noted the point at the time. See Elizabeth B. Wydra, *Who Really Represents the States in the Health Care Cases?*, HUFFINGTON POST (May 27, 2012, 9:01 AM), https://www.huffpost.com/entry/who-really-represents-the_b_1381334?guccounter=1 ("Thirteen states and more than 500 legislators from each of the 50 states have filed briefs with the Supreme Court strongly disagreeing with the challenger states' legal position and their flawed, historically-inaccurate view of federalism." (citing *Supreme Court Amici Brief – HHS v. Florida*, CONSTITUTIONAL ACCOUNTABILITY CTR., <http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/supreme-court-amici-brief> [<https://web.archive.org/web/20150326001017/http://theconstitution.org/cases/briefs/us-department-health-human-services-v-florida-florida-v-hhs/supreme-court-amici-brief>])).

55. See *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 567 U.S. 519, 540 (2012).

56. Complaint, *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010) (No. 3:10-cv-00091).

directly elected by the people of Florida to serve as their chief legal officer and exercises broad statutory and common law authority to protect the rights of the State of Florida and its people; Fla. Const. art. IV, § 4(b). The State, by and through the Attorney General, has standing to assert the unconstitutionality of the Act. He is authorized to appear in and attend all suits in which the state is interested. § 16.02(4) & (5), Fla. Stat.⁵⁷

Yet when the Court continued to explain how these parties “were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business,”⁵⁸ it was mistaken. Iowa, Mississippi, and Nevada were represented by their governors despite the attorneys’ general independent legal status and traditional authority under state law to represent the state in court.⁵⁹ These states’ attorneys general declined to join the litigation, and Iowa’s attorney general would appear in an amicus brief on the opposing side. Wyoming’s Governor also appeared in the case on behalf of his state instead of its attorney general, even though the attorney general is appointed by the Governor and serves at his pleasure.⁶⁰ The Court took no note of the distinction between the attorneys general who represented their States and governors who represented only their offices.⁶¹ Neither did the four dissenting Justices, who referred to the “the 26 States that brought this suit.”⁶² In the most significant federalism decision of the new century, the Court mistook who actually spoke for the States.⁶³

As a technical matter of standing, the distinction made no difference. The only mention of who actually purported to speak for the states in *the Health Care Cases* arose in Florida’s challenge to the individual mandate, when the district court held the “[t]he States of Idaho and Utah, through plaintiff Attorneys General

57. See *id.* at 12; see also Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268–69 (5th Cir. 1976) (recounting the broad common law powers of the state attorney general).

58. *NFIB*, 567 U.S. at 540.

59. See IOWA CONST. art. V, § 12; MISS. CONST. art. VI, § 173; NEV. CONST. art. V, § 19.

60. See WYO. STAT. ANN. §§ 9-1-202, -601 (West 2019).

61. See *NFIB*, 567 U.S. at 524–28 (listing each state representative who appeared in the case).

62. *NFIB*, 567 U.S. at 686 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

63. When not otherwise indicated, a reference to “states” as parties or amici curiae presumes the attorney general is representing the State as its constitutional legal officer. “State plaintiffs,” with state as the modifier, refers to the broader category of officials who claim to speak for the State.

Lawrence G. Wasden and Mark L. Shurtleff, have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors.”⁶⁴ Therefore, the district court reasoned, it was unnecessary to consider the standing of other state plaintiffs, including those represented by their governors.⁶⁵ The court’s reliance on this conservative view of attorney general standing—dependent upon the consent of the legislature and the governor despite the attorney general’s generally independent constitutional authority as the legal officer of the state—highlighted the other officials’ lack of such authority, either as a general constitutional matter or under specific legislation. On the other side of the case, Iowa’s Attorney General actually represented the State of Iowa in an amicus brief *supporting* Medicaid expansion, even though the state’s governor already represented the state according to the Court. Meanwhile, Washington’s Governor appeared on the same amicus brief instead of that state’s Attorney General.⁶⁶ Both Iowa’s Attorney General and Washington’s Governor were Democrats. Unlike the Court, the state attorneys general recognized the state separation of powers issue and listed Washington’s Governor as appearing in her official capacity as governor, but not in a representative capacity as the state itself.⁶⁷ Justice Ginsburg’s partial concurrence, at least, acknowledged this nuance in citing the brief.⁶⁸

64. *Florida ex rel. Bondi v. U.S. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1272 (N.D. Fla. 2011).

65. *See id.* *But see Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 272 (4th Cir. 2011) (holding that not even a state attorney general had standing to challenge the individual mandate).

66. *See* Brief of Oregon et al. as Amici Curiae Supporting Respondents, *Florida v. Dep’t. Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 588460 [hereinafter Brief of Oregon] (supporting Medicaid expansion). California filed a separate brief supporting severability. *See* Brief of California et al. as Amici Curiae Supporting Respondents, *Florida v. Dep’t. Health & Human Servs.*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400), 2012 WL 293712.

67. *See* Brief of Oregon, *supra* note 66, at 1.

68. *See NFIB*, 567 U.S. at 598-99 (Ginsburg, J., concurring in part and dissenting in part) (citing “Brief for Governor of Washington Christine Gregoire as *Amicus Curiae*” and “Brief for Commonwealth of Massachusetts as *Amicus Curiae*”).

B. Legislators and Medicaid, Governors and Exchanges

Once the Court in *the Health Care Cases* gave the states a choice of whether or not to expand Medicaid, the litigating states split along several different policy paths. As Professors Gluck and Huberfeld explain, "[a] clear learn-and-response pattern materialized" among and within states, "with governors and legislators of the same (typically Republican) party at odds on whether and how to expand."⁶⁹ States where the executive sued for the right to reject the Medicaid expansion and the legislature exercised that right to reject it might be called "winners," at least by the logic of *the Health Care Cases*. They fought for an opt-out from the Act, won it, and used it to decline Medicaid expansion. States where the executive sued but the legislature adopted Medicaid expansion anyway might be called "choosers." Notwithstanding their attacks on the Act in court, they beat Medicaid expansion then joined it. On the other side, states where the executive defended Medicaid expansion, or did not join *the Health Care Cases* on either side, and then opted into the program might be called "losers." Again, as discussed below, they are losers only according to the logic of the cases. A few states sat on the sidelines, neither challenging nor adopting Medicaid expansion.

Using these terms, only ten of the original state plaintiffs are "winners": their executive sued for the right to avoid the Medicaid expansion, and their legislature exercised that right to stay out of the expanded program.⁷⁰ Nineteen states are "losers": their

69. Gluck and Huberfeld, *supra* note 14, at 1733. Professors Gluck and Huberfeld break down the full history of state Medicaid expansion decisions into four waves: early, generous implementers; responses to *the Health Care Cases*; waivers and concessions; and renegotiated deals and political change. *See id.* at 1734-46. A table depicting these divisions shortly after the decision is printed in Johnstone, *supra* note *, at 18.

70. *See Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAMILY FOUND. (Sep. 20, 2019), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicare-expansion-decisions-interactive-map/> (identifying Alabama, Florida, Georgia, Kansas, *Mississippi*, South Carolina, South Dakota, Texas, Wisconsin, *Wyoming* (italics denote governor-plaintiffs)). Virginia, which brought a separate challenge to the Act, expanded its Medicaid program. *See id.*; *see also* Virginia *ex rel.* Cuccinelli v. Sebelius, 656 F.3d 253 (4th Cir. 2011). Oklahoma also sued separately, though the district court stayed the case pending resolution of *the Health Care Cases*, and after that decision the attorney general amended the complaint to bring the claims decided in *King v. Burwell*, 135 S. Ct. 2480 (2015). *See* Oklahoma *ex rel.* Pruitt v. Burwell, 51 F. Supp. 3d 1080 (E.D. Okla. 2014).

executive did not sue and their legislature opted in;⁷¹ twelve attorneys general and a governor from these states filed an amicus brief arguing the Medicaid expansion was constitutional.⁷² These states were losers in name only: they could not have expected a result in which their expansions of Medicaid was paid mostly by federal tax dollars from all states, including from states that opted out. The other sixteen state plaintiffs turn out to be “choosers”: their executive sued, and their legislature opted in anyway; these states also enjoyed a sweet deal, spending their co-plaintiffs’ tax dollars on the Medicaid expansion their executives once united to oppose.⁷³ These state plaintiffs (including governors) who confronted “a gun to the head” according to the Court turned out not to need the Act’s coercion after all. To the contrary, the Court’s decision gave these states new leverage over the federal government. Many of these anti-ACA states that did adopt Medicaid also impose premiums or work requirements.⁷⁴ Finally, there are just three states that sat out of both the challenge and (so far) the Medicaid expansion. Their inactivity was not due to disinterest, however, as the politics of the Affordable Care Act still played a significant role in campaigns for state offices.⁷⁵

71. See KAISER FAMILY FOUND., *supra* note 70 (distinguishing Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, West Virginia).

72. See Brief of Oregon, *supra* note 66, at 1 (Oregon, Vermont, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maryland, Massachusetts, New Mexico, New York, and the Governor of Washington). These parties, except Massachusetts and with the addition of the District of Columbia, also filed an amicus in support of severability. See Brief of California et al. as Amici Curiae Supporting Respondents, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (No. 11-393), 2012 WL 293712.

73. See KAISER FAMILY FOUND., *supra* note 70 (marking out Alaska, Arizona, Colorado, Idaho (pending after initiative), Indiana, *Iowa*, Louisiana, Maine, Michigan, Nebraska, *Nevada*, North Dakota, Ohio, Pennsylvania, Utah (pending after initiative), Washington) (italics denote governor-plaintiffs).

74. Lilliard E. Richardson Jr., *Medicaid Expansion During the Trump Presidency: The Role of Executive Waivers, State Ballot Measures, and Attorney General Lawsuits in Shaping Intergovernmental Relations*, 49 *PUBLIUS: J. FEDERALISM* 437, 445–47 (2019).

75. See, e.g., Andy Sher, *GOP Wants AG Hopefuls Quizzed on ACA Support*, CHATTANOOGA TIMES FREE PRESS (Sept. 7, 2014), [http://www.timesfreepress.com/news/local/story/2014/sep/07/gop-wants-ag-hopefuls-quizzed-on-aca-support/266513/\[https://perma.cc/PKG9-F65T\]](http://www.timesfreepress.com/news/local/story/2014/sep/07/gop-wants-ag-hopefuls-quizzed-on-aca-support/266513/[https://perma.cc/PKG9-F65T]) (“Conservative criticism of current [Tennessee] Attorney General Bob Cooper, a Democrat and Chattanooga native who did not join the anti-Obamacare lawsuit filed by mostly Republican state attorneys general.”). Missouri filed a

Even this picture is incomplete because many of these states divided on the Act long before the judgment in *the Health Care Cases*. Not surprisingly, a majority of the Congressional delegations in all but one of the eventual "winner" states voted against the Act or split.⁷⁶ A majority of Congressional delegations in all but one of the eventual "loser" states voted for the Act or split.⁷⁷ All but the last three of the "chooser" states, meanwhile, supported or split on the Act in their delegations.⁷⁸ In *the Health Care Cases*, the then-current Democratic Senate majority leadership and then-former Democratic House majority leadership filed a brief supporting Medicaid expansion, including members of Congress from states who appeared on the other side.⁷⁹ Further scrambling the picture, 539 state legislators from all fifty states filed a brief supporting Medicaid expansion,⁸⁰ while separate groups of state legislators from Indiana⁸¹ and Texas⁸² filed briefs opposing the Medicaid expansion. In an example of *McCulloch's* principle of people acting in their states but not through them, the former group explained its interest "to represent their constituents and many other residents and State leaders in the challengers' respective States who disagree with these legal challenges and support health care reform."⁸³

Around the same time that state legislatures began expanding Medicaid coverage, state governors also faced a choice of whether

brief arguing the severability of both the individual mandate and the Medicaid expansion from the rest of the Act, though it also noted (in a footnote), that "[t]he expanded Medicaid provisions in the ACA are also unconstitutional because they impose billions of dollars in new costs for states, and leave Missouri no option but to accept the burdens." See Brief of Missouri Attorney General as Amicus Curiae Supporting Respondents, *Florida v. Dep't Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 441262 *i, *4 n.1.

76. See 155 CONG. REC. 13,891 (Dec. 24, 2009); 156 CONG. REC. 2,153 (Mar. 21, 2010).

77. See 155 CONG. REC. 13,891 (Dec. 24, 2009); 156 CONG. REC. 2,153 (Mar. 21, 2010).

78. See 155 CONG. REC. 13,891 (Dec. 24, 2009); 156 CONG. REC. 2,153 (Mar. 21, 2010); see also Johnstone, *supra* note *, at 18.

79. See Brief of Senate Majority Leader Harry Reid et al. as Amici Curiae Supporting Respondents, *Florida v. Dep't Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 523365 (Michigan, Nevada, South Carolina, Washington).

80. See Brief of State Legislators from the Fifty States, the District of Columbia, and Puerto Rico as Amici Curiae Supporting Respondents, *Florida v. Dep't Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 588461.

81. See Brief of Indiana State Legislators et al. as Amici Curiae Supporting Petitioners, *Florida v. Dep't Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 160244.

82. See Brief of Texas Public Policy Foundation et al. as Amici Curiae Supporting Petitioners, *Florida v. Dep't Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 273134.

83. *Id.* at *1.

to establish an exchange to market health insurance that complies with the Act or allow the federal government to establish an exchange for the state.⁸⁴ Governors who established state exchanges empowered the states to control the marketing of health insurance to their residents. As Professors Gluck and Huberfeld explain, however, compromises between federal and state control arose out of

the tension between the political pressure on state officials to publicly “resist” the ACA and the practical view many of those same officials held that it was not in the long-term interests of the states—their sovereign interests—to cede full control of their insurance markets to the federal government.⁸⁵

States that chose to rely on various forms of federal support for their enrollment platform could still opt into state-run exchanges. In states that did not establish an exchange, the federal government ran the exchange.

State decisions of whether or not to establish an insurance exchange under the Act tracked partisan positions on the Act itself more than even the Medicaid expansion decisions. Nearly all states that established state exchanges had supported the Act in Congress, and nearly all states that left the exchanges to federal control had opposed the Act in Congress. Notable exceptions include Idaho (which established a state exchange to retain local control) and Hawaii (which turned to a federal exchange after technological troubles).⁸⁶ The stronger alignment of political positions against both the Act and the state exchanges seems contradictory. Unlike a state’s opposition to the Act itself, state’s refusal to establish an exchange supports a greater assertion of federal policy, and a loss of state policy control, through the establishment of a federal exchange. This may be what Professors Gluck and Huberfeld call “federalism for federalism’s own sake”⁸⁷: given the political cost of supporting any implementation of the Act in some states, and the policy flexibility in achieving some measure of state input into hybrid exchanges, state officials could afford to reject state

84. Fahey, *supra* note 14, at 1561 (explaining state consent procedure to establish exchanges).

85. See Gluck & Huberfeld, *supra* note 14, at 1767.

86. See KAISER FAMILY FOUND., *supra* note 70.

87. See Gluck & Huberfeld, *supra* note 14, at 1730.

exchanges even when they could not afford to reject Medicaid expansion.

C. *King v. Burwell*

Soon after the split decision in *the Health Care Cases*, upholding the individual mandate to purchase health insurance but invalidating the state mandate to expand Medicaid, the states lined up again in the next major challenge to the Affordable Care Act. Although the question presented involved a matter of statutory interpretation—whether the Act authorized tax-credit subsidies for an “[e]xchange established by the State” in federally operated exchanges—practically, the stakes for the states were similar to those in *the Health Care Cases*. As the Supreme Court explained in *King v. Burwell*, the subsidies at issue prevented a “death spiral” of declining enrollment and increasing premiums, without which the Act would not operate as planned.⁸⁸

For the half-dozen challenger states in *King*, the case was a chance to win the victory that eluded them in *the Health Care Cases*: the failure of the Act as a practical, if not a constitutional, matter. Twenty-two states and the District of Columbia, all duly represented by attorneys general, filed a brief in support of the subsidies for federally operated exchanges.⁸⁹ The amici included ten states that had not established state exchanges, five of which had opposed the Act in *the Health Care Cases*⁹⁰ and, with the exception of Mississippi, had expanded Medicaid or would do so soon. Current and former Democratic members of Congress who supported the Act also filed a brief, joined by current and former state legislators.⁹¹ On the other side, six states opposed the subsidy, including West Virginia, which had not opposed the Act in *the Health Care Cases* and had just expanded Medicaid.⁹² In a standalone brief, Indiana

88. *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

89. See Brief of the Commonwealths of Va. et al., *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

90. Maine, Mississippi, North Dakota, Pennsylvania, and Virginia (through the attorney general or governor).

91. See Brief of Members of Congress and State Legislatures as Amici Curiae in Support of Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

92. See Brief of the States of Oklahoma et al. as Amici Curiae Supporting Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114) (opposing states were Alabama, Georgia, Nebraska, Oklahoma, South Carolina, West Virginia).

and several of its public school corporations opposed the subsidies because it triggered an “employer mandate” of minimum essential health coverage.⁹³ Several state legislators from Ohio (which had expanded Medicaid by this time) and Tennessee (which had not) also argued against the subsidies based on federalism and the inapplicability of deference canons.⁹⁴ State legislators from Virginia, arguing opposite their attorney general, filed a brief opposing the subsidies,⁹⁵ as did Republican members of Congress.⁹⁶

D. Hobby Lobby and Zubik v. Burwell

As the Obama Administration drew to a close with the Affordable Care Act still intact, several states joined a more focused challenge to rules under the Act that required employers or health plans to cover contraceptive care. Unlike *the Health Care Cases, King*, or *Texas*,⁹⁷ these cases did not present existential threats to the Act and state policymakers’ implementation of or resistance to it. Instead, they presented a more typical opportunity for states to engage in ideological signaling along partisan lines based on broad assertions of general state interests in religious liberty,⁹⁸ corporate governance,⁹⁹ and gender equity.¹⁰⁰ Although state attorneys general decisions enjoy substantial political latitude to author or sign onto amicus briefs due to their low salience, this also may free them to be more partisan in ideologically charged cases with low stakes for their states but high potential for favorable messaging with their political base.¹⁰¹ As such, they do not present federalism or state

93. See Brief of Amici Curiae of Indiana and 39 Indiana Public School Corporations in Support of Petitioners at 1-3, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

94. See Brief of Galen Institute and State Legislatures at 21-24, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114).

95. See Brief Amicus Curiae of Virginia State Delegates et al. in Support of Petitioners at 13-15, *King*, 135 S. Ct. 2480 (No. 14-114); Brief of the Commonwealths of Virginia et al. as Amici Curiae in Support of Affirmance at 15-16, *King*, 135 S. Ct. 2480 (No. 14-114).

96. See Brief of Amici Curiae Senators John Cornyn et al. in Support of Petitioners at 4-6, *King*, 135 S. Ct. 2480 (No. 14-114).

97. See *infra* Section II.E.

98. See Brief of the State of Oklahoma as Amicus Curiae in Support of Respondents at 1-3, *Sebelius v. Hobby Lobby*, 573 U.S. 682 (2014) (No. 13-354).

99. See Brief of Amici Curiae States of Michigan et al. for Conestoga, *Hobby Lobby*, *Mardel* at 3-4, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354, 13-356).

100. See Brief of California et al. as Amici Curiae Supporting Federal Petitioners and Respondents Kathleen Sebelius, et al. at 2-4, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354, 13-356).

101. See *Johnstone*, *supra* note 27, at 607.

powers issues of the same magnitude as the other challenges, but they do provide a baseline measure of ideological mobilization by attorneys general in the absence of the broader practical and policy concerns raised by the global challenges to the Act.

In early 2014, *Burwell v. Hobby Lobby* presented the question of whether the Religious Freedom Restoration Act protects a closely-held corporation's faith-based refusal to cover contraception under rules promulgated pursuant to the Act.¹⁰² The Court held that the law did protect the corporation's refusal, in part, because there were less restrictive means of providing contraceptive care through an insurer's funding instead of the employer's funding.¹⁰³ *Zubik v. Burwell*, briefed two years later in 2016, followed up with a challenge to the rule requiring religious organizations to cover contraceptive care for their employees.¹⁰⁴ With thirty-seven states arguing one side or the other, participation in both cases was nearly as broad as participation in *the Health Care Cases*, and broader than in *King*. Unlike in *the Health Care Cases* though, all states appeared through their attorneys general, again fitting the conventional model of state amicus work.

The lineups were predictable from the states' earlier positions on the Act, with eighteen of the twenty-one states challenging the Act in *Hobby Lobby*, and fifteen of the nineteen states challenging the Act in *Zubik* drawn from the original twenty-six *Florida* state plaintiffs. Thirteen of the sixteen states supporting the Act in *Hobby Lobby*, and thirteen of the eighteen states supporting the Act in *Zubik*, earlier joined as amicus curiae supporting the Act in *Florida*. But the mix of states changed. Five states that joined *Hobby Lobby* sat out *Zubik*,¹⁰⁵ and five new states joined.¹⁰⁶ Arkansas and Nevada, two new state opponents of the Act who joined in *Zubik*, did so after electing Republican attorneys general to succeed Democrats in

102. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688-90 (2014).

103. *Id.* at 730.

104. *Zubik v. Burwell*, 136 S. Ct. 1557, 1559 (2016). Instead of deciding the case, the Court vacated the judgments below to encourage parties to find an implementation of the rule that did not require action by the organization to trigger the insurer's coverage of contraception. *Id.* at 1560.

105. Alaska, Louisiana, North Dakota, and South Dakota opposing, with Maine supporting.

106. Arkansas and Nevada opposing, with Minnesota, New Hampshire, and Virginia supporting.

2014.¹⁰⁷ The remaining eight states that joined or left these cases saw no partisan switches in attorneys general, so those states' decisions may have arisen from ordinary office concerns such as staffing or retail politics at the state level. The ebb and flow of attorney general involvement in the contraceptive cases serves as a reminder that, even in ideologically charged cases aligned along national partisan lines, these local factors still matter.¹⁰⁸

E. Texas v. United States

After the Democrats took back the House of Representatives in the 2018 mid-term elections, the Republicans' opportunity to repeal of the Affordable Care Act ended. In the states, however, a new challenge to the Act gained momentum. In February 2018, Texas led eighteen states (through their attorneys general and two governors) in a final and novel challenge to the entire Act.¹⁰⁹ The

107. In Arkansas, Leslie Rutledge (R) succeeded Dustin McDaniel (D) in 2015; in Nevada Adam Laxalt (R) succeeded Catherine Cortez Masto (D) in 2015. Paul Nolette, *Attorneys General by State, 1980-2018*, PAUL NOLETTE (last visited Nov. 9, 2019), <https://paulnolette.com/attorneys-general-data/list-of-attorneys-general-by-state-1980-2014/>.

108. Johnstone, *supra* note 27, at 605-07 (discussing the interplay of ideological and institutional factors in a state's decision to join an amicus brief).

109. Complaint for Declaratory and Injunctive Relief, *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (No. 4:18-cv-00167-O), 2018 WL 1061440, at paras. 2-3 (filed Feb. 26, 2018). An amended complaint restyled the Mississippi Governor's title from "Mississippi, by and through Governor Phil Bryant" to "Governor Phil Bryant of the State of Mississippi." Amended Complaint for Declaratory and Injunctive Relief, *Texas*, 340 F. Supp. 3d 579 (No. 4:18-cv-00167-O), 2018 WL 8262615 (filed Apr. 23, 2018).

The two governors' claims to represent the state pitted their executive powers against the common law powers of their states' attorneys general. Mississippi's governor brought suit under a statute authorizing "foreign suits" outside the state "for the recovery of any moneys due or owing to the state, or upon any claim or demand on which the state is entitled to sue." MISS. CODE ANN. § 7-1-33 (Westlaw through 2019 Reg. Sess.). *But see* MISS. CODE ANN. § 7-5-1 (Westlaw through 2019 Reg. Sess.) ("The Attorney General . . . shall be the chief legal officer and advisor for the state . . . He shall have the powers of the Attorney General at common law and, except as otherwise provided by law, is given the sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest."); *Hood ex rel. Mississippi v. AstraZeneca Pharms., LP*, 744 F. Supp. 2d 590, 595 (N.D. Miss. 2010) (quoting *Gandy v. Reserve Life Ins. Co.*, 279 So. 2d 648, 649 (Miss. 1973)) ("Under Mississippi common law, the Attorney General is a constitutional officer possessed of . . . the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the State, preservation of order and the protection of public rights."). Maine's governor simply cited the office's vesting clause. ME. CONST. art. V, Pt. 1, § 1 ("The supreme executive power of this State shall be vested in a Governor."). *But see* *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 (Me. 1973) ("As the chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary,

plaintiffs' argued: (1) a majority of the Supreme Court in *the Health Care Cases* opined the Act's individual mandate exceeded Congress's powers under the Commerce Clause and could be upheld only as an exercise of the taxing power; (2) in 2017, Congress eliminated the tax penalty, which the Court considered essential to the Act's function in *King v. Burwell*; and (3) "[o]nce the heart of the ACA—the individual mandate—is declared unconstitutional, the remainder of the ACA must also fall."¹¹⁰ Maryland filed a separate action seeking a declaration that the Act is enforceable, with a supporting brief amicus curiae from fourteen states and the District of Columbia, including two states that did not intervene in *Texas*: New Mexico and Pennsylvania.¹¹¹

In December 2018, a district court in Fort Worth agreed with the state plaintiffs and declared the individual mandate unconstitutional and inseverable from the remainder of the Act.¹¹² Although both Maine and Mississippi appeared through their governors, the district court referred to Mississippi but not Maine as a party, and collectively referred to the group as "the State Plaintiffs."¹¹³ Meanwhile, more states joined the case as intervenors. In May 2018, the district court granted permissive intervention to sixteen states and the District of Columbia, all of which appeared through their attorneys general.¹¹⁴ On both sides of the issue, the lineups were familiar. The twenty original state plaintiffs that appeared through Republican attorneys general and governors included sixteen of the twenty-six plaintiffs in *the Health Care Cases*, plus three states whose attorneys general switched from Democrats to Republicans in the

exercise all such power and authority as public interests may, from time to time require, and may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.").

110. Complaint for Declaratory and Injunctive Relief, *supra* note 109, at para. 7.

111. See *Maryland v. United States*, 360 F. Supp. 3d 288 (D. Md. 2019).

112. *Texas*, 340 F. Supp. 3d at 619.

113. *Id.* at 591. Mississippi pleaded a rarely cited statute authorizing the governor to "order and direct suits to be brought for and in the name of the state in any other state or foreign jurisdiction for the recovery of any moneys due or owing to the state, or upon any claim or demand on which the state is entitled to sue." MISS. CODE. ANN. § 7-1-33. Maine, in contrast, merely cited the governor's role as chief executive. See ME. CONST. art. V, Pt. 1, § 1. The district court also referred to "twenty-six states" in *NFIB*. *Texas*, 340 F. Supp. 3d at 587.

114. Order, *Texas*, 340 F. Supp. 3d 579 (No. 4:18-cv-00167-O) (filed May 16, 2018).

intervening years.¹¹⁵ Maine's Governor and Wisconsin through its attorney general dropped out as plaintiffs after the 2018 elections switched those officers from Republicans to Democrats.¹¹⁶ Four other state plaintiffs in *the Health Care Cases* joined the 16 state intervenors and D.C. to defend the Act on appeal in the Fifth Circuit.¹¹⁷ The United States, which conceded part of the Act was inseverable in the district court,¹¹⁸ declined to defend any of the Act on appeal.¹¹⁹ In December 2019, the Fifth Circuit agreed with the state plaintiffs that the individual mandate was now unconstitutional, but remanded to the district court for reconsideration of severability in its remedy; the Supreme Court granted California's petition and Texas's cross-petition for *certiorari* in March 2020.¹²⁰

The stakes are high for the severability argument: in addition to unravelling a range of health care policy reforms, a final judgment of non-severability would invalidate the Medicaid expansion adopted by the legislatures or people (by initiative) of thirty-six states and the District of Columbia. Of the twenty-one state

115. In Arkansas, Leslie Rutledge (R) succeeded Dustin McDaniel (D) in 2015 by election; in Tennessee, Herbert Slattery III (R) succeeded Robert Cooper (D) in 2015 by appointment; in West Virginia, Patrick Morrissey (R) succeeded Darrell McGraw (D) in 2013 by election. Nolette, *supra* note 107. In Missouri, Josh Hawley (R) succeeded Chris Koster (D) in 2017 by election; Eric Schmitt (R) succeeded Hawley in 2019 by appointment after Hawley's election to United States Senator. *Id.*; Press Release, Governor Mike Parson Announces Eric Schmitt as the Next Attorney General of Missouri (Nov. 13, 2018), <https://governor.mo.gov/press-releases/archive/governor-mike-parson-announces-eric-schmitt-next-attorney-general-missouri>.

116. In Wisconsin, Josh Kaul (D) succeeded Brad Schimel (R) in 2019 by election. See Nolette, *supra* note 107; Josh Kaul, NAT'L ASS'N ATT'YS GEN. (last visited Nov. 9, 2019), <https://www.naag.org/naag/attorneys-general/whos-my-ag/wisconsin/josh-kaul.php>. Maine's former attorney general, Janet Mills (D), succeeded Paul LePage (R) as governor in 2019; in late 2018 Attorney General Mills's office opined that "[t]o the extent that Paul R. LePage seeks to represent the interests of the State of Maine in this lawsuit, such participation is not authorized by law." Steven Porter, *Maine Reiterates That It Isn't A Plaintiff in ACA Lawsuit*, HEALTHLEADERS (Nov. 20, 2018), <https://www.healthleadersmedia.com/strategy/maine-reiterates-it-isnt-plaintiff-aca-lawsuit>.

117. Colorado, Michigan, and Nevada, whose attorneys general switched to Democrats, and Iowa, whose governor opposed the Act and whose attorney general defended it.

118. *Texas*, 340 F. Supp. 3d at 591.

119. Letter from U.S. Dep't of Justice to Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit (Mar. 25, 2019), <https://affordablecareactlitigation.files.wordpress.com/2019/03/doj-anti-aca-letter-3-25.pdf>.

120. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), *cert. granted* 140 S.Ct. 1262 (Mar. 2, 2020) (Nos. 19-840 & 19-1019).

intervenors defending the Act, all represented by attorneys general, all but North Carolina have expanded Medicaid. Surprisingly, eight of the eighteen state plaintiffs challenging the Act also expanded Medicaid, including Nebraska and Utah, whose voters recently approved expansion through ballot measures yet to be fully implemented. These state attorneys general risk their own legislature's or people's adoption of Medicaid expansion in their attack against the entire Act. Two Medicaid-expansion states with Republican attorneys general filed their own brief arguing the individual mandate was unconstitutional, but that it was severable and the non-severability doctrine itself was constitutionally problematic.¹²¹

As *Texas v. United States* works its way through the Supreme Court, it is shaping up to be the broadest state conflict over the Affordable Care Act yet. Forty-three states plus the District of Columbia and the governor (and former attorney general) of Kentucky, have joined the case as plaintiffs, intervenor-defendants, or amici curiae, seven more than the number of states with officials on briefs in *the Health Care Cases*. The lineup in *Texas* suggests, after nearly a decade of implementation, the weight of state attorney general opinion on the Affordable Care Act has shifted. In the first round of litigation, twenty-four states (including Virginia's separate unsuccessful action) and three governors challenged the Act, while only fourteen states (including Missouri's severability-focused brief) defended it. Currently twenty-six states (including Montana and Ohio's severability-focused brief) are defending the act in *Texas*, and eighteen states remain plaintiffs. With each challenge to the Act, the number of state opponents has dropped, and the number of state supporters has risen, in each case from *Florida & Virginia* (27-14), to *Hobby Lobby* (21-16), to *Zubik* (19-18), to *Texas & Maryland* (16-27), with *King* (6-23) as an outlier potentially due to its question presented being statutory, not constitutional, in nature. The shift in the states roughly reflects the shift in national public opinion, with a plurality or majority disapproving of the Act

121. Brief of Amicus Curiae States of Ohio & Mont. in Support of Neither Party, *Texas v. United States*, No. 19-10011 (5th Cir. filed July 9, 2010) (brief filed Apr. 1, 2019).

through 2016, and an unsteady majority approving of the Act since early 2017.¹²²

III. HOW TO SPEAK FOR THE STATES MORE CLEARLY

State challenges to the Affordable Care Act provide a natural experiment for testing some of the factors at play in state public law litigation. Under the Act, and in the wake of *the Health Care Cases* and *King*, different branches of state government face different political choices that help to shape each state's policy landscape. Congressional delegations may or may not vote for the Act. Legislatures may or may not expand Medicaid under the Act. Governors may or may not establish state exchanges under the Act. Attorneys general may or may not challenge some or all of the Act in multistate and related litigation. And voters may or may not return these officials to office in the next election.

Who, then, speaks for the states, and for whom do they speak? It's complicated. The people of each state elect officials with distinct but overlapping mandates to make policy for the state in Congress, the state capitol, and the courts. Over time, the politics of each office and the state as a whole shift in response to both state and national developments. In the implementation of or resistance to federal policy, partisan federalism mobilizes state officials along national political lines.¹²³ It plays an increasingly important—and for federalists, troubling—role in the alignment of state attorneys general with national parties rather than state interests.¹²⁴ Yet as Professors Gluck and Huberfeld note, “[t]he ACA story, to be sure,

122. See KFF Health Tracking Poll: *The Public's Views on the ACA*, KAISER FAMILY FOUND. (Sept. 12, 2019), <https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable-Unfavorable&aRange=all> (53% approve and 41% disapprove in September 2019, with recent majority support beginning in February 2017); Lydia Saad, *'Obamacare' Still Earns a Split Decision From Americans*, GALLUP (Apr. 29, 2019), <https://news.gallup.com/poll/249146/obamacare-earns-split-decision-americans.aspx> (50% approve and 48% disapproved in April 2019, with recent majority support beginning in April 2017).

123. See Bulman-Pozen, *supra* note 51, at 1080 (“Put in only slightly caricatured terms, Republican-led states challenge the federal government when it is controlled by Democrats, while Democratic-led states challenge the federal government when it is controlled by Republicans. States oppose federal policy because they are governed by individuals who affiliate with a different political party than do those in charge at the national level, not because they are states as such.”).

124. See Johnstone, *supra* note 27, at 609–614 (discussing the increasing partisanship of state attorneys general over the past two decades).

illustrates a key role for partisanship, but in many ways the partisanship has been superficial."¹²⁵ Their study of state legislative and executive implementation of the Act demonstrates "an intrastate dynamic that undermines the lockstep partisan account of state-federal interaction as the only, or even dominant, game in town."¹²⁶ This dynamic extends from the statehouse to the courthouse in the various legal challenges to and defenses of the Act by state attorneys general.

Few states maintained a united front throughout a decade of Affordable Care Act litigation and policymaking. A reliably Democratic cast of states bought into Medicaid expansion, established state exchanges, and fought for the Act every step of the way in court, including California, Connecticut, Illinois, Massachusetts, Maryland, New Mexico, New York, Oregon, and New York and the District of Columbia. Hawaii would be the eleventh state of this group, but for technical difficulties that caused it to abandon its state exchange. Delaware uniformly supported the Act in court, though only after its lone representative voted against the Act in Congress.

On the other side, only Alabama, Georgia, and South Carolina held out from Medicaid expansion and state exchanges and fought against the Act in every case discussed above from *the Health Care Cases* to *King to Texas*, with Nebraska excluded from the hold-outs only because its citizens approved Medicaid expansion by ballot. Not even the lead plaintiffs in the primary constitutional cases, Florida and Texas, showed up in *King*. Another dozen states across the partisan spectrum—from Wyoming to Rhode Island—sat out one or more rounds of the legal and policy contests.

The remaining half of the states took mixed positions over the decade, meaning the state's attorney general bucked other state officials or the Congressional delegation, or the state's internal politics shifted on the issue even as national partisanship hardened. Just as partisanship cannot fully account for state decisions on implementing the Act, it does not fully determine state positions on challenging or defending the Act. There are lessons for federalism where partisanship does not dominate state public law litigation.

125. Gluck & Huberfeld, *supra* note 14, at 1751.

126. *Id.*

Some of those lessons can inform the states about the possibility of the attorney general's independence from other state officials as well as national parties, and its value in discerning and advancing state-based views of the public interest. Other lessons can inform the courts about the complexity of accountability rationales for federalism, and ways to improve accountability in both doctrine and procedure.

A. Lessons for the States

In the midst of a great political debate, such as the decade-long Affordable Care Act controversy, state attorneys general still enjoy significant autonomy in their litigation decisions. For students of the attorneys general, this comes as no surprise given the office's structural independence in state law and its political independence in state practice. In a detailed study of state amicus briefs, Professors Maggie Lemos and Kevin Quinn find "partisanship does not provide a *full* explanation" of attorney general litigation, and that in many less ideological cases attorneys general "are acting *contrary* to partisan motivations."¹²⁷ In light of increasing national partisan pressures on state officials in general, and state attorneys general in particular, however, these findings are encouraging for federalism. The attorney general's autonomy runs along two dimensions, one across the state's branches of government and the other between the state and national political parties.

1. Intrastate Independence

A state's attorney general is empowered to act independently of policy decisions made by the state's legislature and governor. For example, several attorneys general continued to attack the practical operation (in *King*) and legal validity (in *Texas*) of the Act despite their state's initial support for the Act, the expansion of Medicaid, the establishment of a state exchange, and even the governor's or some legislators' appearance on the other side of the same case. Although it occurred less frequently, other attorneys general defended the Act despite their state delegation's original opposition to the Act, their legislature's hostility to Medicaid expansion or state

¹²⁷ Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General as Amici*, 90 N.Y.U. L. REV. 1229, 1263 (2015).

exchanges, their predecessor's leadership in litigation against the Act, or the appearance of fellow state officials on the other side of the same case. To be sure, some of this apparent independence within a state is traceable to the dependence of some attorneys general upon national political forces. This kind of intrastate conflict may compromise an attorney general's fidelity to state interests in court, or it may reflect the independence of state officials on the other side. The other officials also may be captive to opposing national political forces, and any particular analysis of intrastate independence requires a localized account of state political culture and interests.¹²⁸

Political forces occasionally will overwhelm intrastate independence. One emerging check on this state-level autonomy is several states' legislative "power plays" to hobble attorney general powers as a prior administration leaves office. Professor Paul Nolette recounts how the Washington legislature threatened to reduce the attorney general's budget for joining *the Health Care Cases*, while the Georgia legislature threatened to impeach the attorney general for refusing to join.¹²⁹ In Wisconsin, the lame-duck legislature passed a law restricting the attorney general's control of litigation, including litigation against the federal government, after the attorney general joined *Texas* then lost re-election. Professor Miriam Seifter describes the emergence of "power play" litigation under state constitutions, including controversies generated by state implementation of the Act, and demonstrates how a states' own law and politics can check partisan entrenchment through enforcement of state constitutional separation of powers.¹³⁰ For example, in a separate lawsuit by the

128. See Johnstone, *supra* note 27, at 606 ("As lawyers with a duty to the state's overall policy agenda, attorneys general must discern that agenda in the complicated ideological commitments of its electorate as filtered through the state's constitution and laws, as well as broader economic and social interests."); Lemos & Young, *supra* note 21, at 113-17 (critically considering the state attorney general's competence, relative to private litigants, to represent the public interest); see also Johnstone, *supra* note 13, at 460-67 (reviewing the persistence of state political cultures with attention to election laws).

129. See Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1227 (2019). Wisconsin withdrew from *Texas v. United States* during a temporary stay of the Wisconsin law's restrictions in the spring of 2019. Mark Sommerhauser, *Federal court OKs Josh Kaul's request to withdraw Wisconsin from two Obamacare lawsuits*, WISC. ST. J. (Apr. 3, 2019), https://madison.com/wsj/news/local/govt-and-politics/federal-court-oks-josh-kaul-s-request-to-withdraw-wisconsin/article_8f05dceb-0b86-510e-a346-a6e99fea8bae.html.

130. See Seifter, *supra* note 129, at 1220, 1233 (describing litigation over the Maine governor's duty to implement a citizen-initiated Medicaid expansion).

City of Seattle to force Washington's attorney general to withdraw from *the Health Care Cases*, the state supreme court upheld the attorney general's independence under state law.¹³¹ Both sides complained the other was motivated by politics,¹³² but the case shows how state law can manage intrastate conflicts in a way that leaves the state's public in charge. As Professor Seifter argues, "[p]ower play litigation is dialogue-forcing in a state realm that needs dialogue," namely the value of state separation of powers to state policy and legal deliberations.¹³³

2. Interstate and National Independence

State attorneys general also can exercise independence from their national parties, as evidenced by the surprising number of times attorneys general do not sign onto partisan multistate briefs. The conventional wisdom held, at least before the recent partisan polarization of states and their attorneys general, that the credibility of a brief increased with the number of states signing.¹³⁴ Sign-ons are a low-cost signaling mechanism of an attorney general's fidelity to the party's position in a case, in terms of both office resources and political capital. Yet one-third or more of states stayed on the sidelines in the highest-profile Affordable Care Act cases. Given the practical ease of joining an amicus brief and the political value of affiliating with a national partisan alliance, the absence of so many states suggests that local interests are entering into attorney general calculations.

Those attorneys general that did join briefs nearly always toed the party line. Indeed, taking a state Congressional delegation's original support for the Act as the baseline, attorney general decisions to join briefs on either side of the challenges were more polarized than the legislative decisions to expand Medicaid and the

131. See *City of Seattle v. McKenna*, 259 P.3d 1087, 1093 (Wash. 2011) ("The people of the state of Washington have, by statute, vested the attorney general with broad authority, and Attorney General McKenna's decision to sue to enjoin the enforcement of the PPACA falls within that broad authority.").

132. See Rachel La Corte, *State Attorney General Rob McKenna's power question in lawsuits*, SEATTLE TIMES (Nov. 17, 2010) (the State Democratic Party Chairman said the attorney general "made a decision to appease tea-party supporters by taking a position on a very political issue," while a Republican political consultant said "[t]he 2012 campaign has begun").

133. See Seifter, *supra* note 129, at 1220–21.

134. Johnstone, *supra* note 27, at 620–21.

executive decisions to establish a state exchange.¹³⁵ In other words, the state delegations' original votes on the Act were more highly correlated with the states' subsequent litigation positions than with the states' decisions about actually implementing the Act in the state. Two of the most polarized brief lineups were in the most highly charged but low-stakes cases: *Hobby Lobby* and *Zubik. King*, again the outlier, featured a small core of ideologically consistent states on the challengers' side. In some cases, the partisan pull was so strong that it compromised the attorneys' general institutional loyalty to their office, such as when they solicited sign-ons from governors in states where the brief lacked attorney general support, and thereby undermined the authority of the attorney general to speak for that state in court.¹³⁶

B. Lessons for the Courts

A decade of state litigation holds both doctrinal and procedural lessons for the courts, too. First, the diversity of intrastate positions and interstate coalitions in the Affordable Care Act litigation complicates the conventional accountability-based justifications for elements of federalism doctrine. In elaborating federalism principles, the courts claim to clarify lines of political accountability from voters to their federal or state elected officials. Those lines blur when state officials—empowered by federalism doctrine itself—identify themselves through their opposition to or support for federal policy. The courts should be realistic about what kinds of accountability federalism can serve.

1. Clarifying accountability in doctrine

Recall the scorecard of state litigants from *the Health Care Cases* and their positions through the remaining cases. Across this wide variety of contradictory legal policy and strategy choices within each state, what kind of accountability could possibly emerge? Is there more accountability in the "chooser" states whose attorneys general led the charge against the Affordable Care Act, after their

135. For these purposes, polarization is measured as the difference between the average weighted congressional delegation vote on either side of a case (e.g., *Texas v. United States*) or implementation of a policy (e.g., Medicaid expansion). See *infra* Appendix.

136. Johnstone, *supra* note 27, at 613.

Congressional delegations voted for the Act and before their statehouses gladly signed up under the Act once the constitutional dust settled? Or is there more accountability in the “loser” states whose Congressional delegations, attorneys general, and statehouses all supported the Act even before *the Health Care Cases* brought them a windfall of subsidies from the opt-out states’ tax dollars? Can the states that stood on principled opposition to the Act, from the Capitol to the courthouse to the statehouse, only to see their tax dollars go to their political and legal opponent states, really be considered “winners” at all? And what of accountability in the apparently indifferent states that neither challenged the Act nor implemented Medicaid expansion? States were buffeted by aggressive campaigns seeking to hold attorneys general, legislators, and governors accountable in *state* elections for what began at the *Federal* level with Congressional votes for or against the Act.¹³⁷

The Court’s decision in *the Health Care Cases* may be a superficial victory for an anti-coercion rule of federalism, but any claim of victory for accountability (the principle that supports the anti-coercion rule) is incoherent.¹³⁸ Instead, as implementation proceeded in statehouses and the legal challenges piled up in courthouses, all while later Congresses and a new President worked to undermine it, the Affordable Care Act presented one opportunity after another for state and federal officials to pass the buck back and forth from branch to branch, sovereign to sovereign.¹³⁹ “Since the

137. See, e.g., Erik C. Anderson, *Bucy, Fox Trade Jobs, Ads in High-stakes AG Race*, MADISONIAN (Oct. 11, 2012), <http://www.madisoniannews.com/bucy-fox-trade-jobs-ads-in-high-stakes-ag-race/> [https://perma.cc/Z2SF-MNTD] (“[A]ssistant Montana attorney general candidate [Pam Bucy] blasted [candidate Tim] Fox’s focus on the federal health care law, saying it has overshadowed discussion of the office’s principal duties Fox . . . defends his focus on Obamacare . . . [and] would have joined that effort [state attorneys general in the challenge to the Act].”).

138. See Nicholas Stephanopoulos, *Accountability Claims in Constitutional Law*, 112 NW. U. L. REV. 989, 1047 (2018) (“There is no evidence that voters’ attributions of responsibility or retrospective decisions—such as they are—actually *would* be attenuated [if the federal government required the states to enforce federal policy]. There is only a status quo that is not entirely devoid of accountability, and a suspicion that things might change for the worse if federal interference intensified. This suspicion is not wholly fanciful, but it is still a flimsy foundation for a claim of constitutional stature.”).

139. See Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 828 (1998) (“The difficulty with such political accountability arguments is that they overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability.”).

2016 presidential election," Professors Gluck and Huberfeld find "the citizenry is deeply confused about the implications of repealing the ACA, what it accomplished, whether it even exists, and who is accountable for what."¹⁴⁰ Like the implementation of the Act itself, it is unclear whether the litigation over it "helped to strengthen or to diminish state local democracy."¹⁴¹

Who speaks for the state matters for political accountability. In general, as Professor Elizabeth Weeks Leonard argues, state officials are in a better position to voice their constituents' preferences using the language of federalism.¹⁴² Professor David Schleicher explains, in his examination of the states' implementation of the Affordable Care Act, that because of difference in the salience of state elections, some state voices are more likely to express the voters' views on state issues while others may simply express national partisanship.¹⁴³ The federal government can choose who speaks for a state in what Bridget Fahey calls "consent procedures" in cooperative federalism.¹⁴⁴ Her argument can extend to the federal judiciary and its procedures for recognizing who may speak for states in court.

Professor Schleicher further argues that governors are better positioned than legislators or low-profile statewide officials to reflect state interests rather than national partisan alignments, because governors' impact on state policy is better understood by voters.¹⁴⁵ Thus, the regulations giving governors, not legislators or other officials, the power to establish state health insurance exchanges "are a straightforward effort to give authority to the parts of states most responsive to local opinion and least tied to Washington's political fights."¹⁴⁶ On the other hand, the Court's delegation to state legislatures of the Medicaid expansion option is more likely to lead to a "partisan federalism" alignment of state policy with

140. Gluck & Huberfeld, *supra* note 14, at 1786. Early in the implementation and litigation of the Act, Elizabeth Weeks Leonard was more optimistic about public understanding: "Ongoing, post-enactment state resistance to each provision of ACA that rolls out should continue to inform the public about the new law in more digestible bites." Leonard, *supra* note 16, at 164.

141. Gluck & Huberfeld, *supra* note 14, at 1785.

142. Leonard, *supra* note 16, at 165.

143. Schleicher, *supra* note 14.

144. Fahey, *supra* note 14.

145. Schleicher, *supra* note 14, at 795.

146. *Id.* at 796.

national political positions.¹⁴⁷ We might expect state attorneys general to fit closer to governors than state legislators in this model, and therefore speak as relatively faithful representatives of their state interests in litigation, at least more so than state legislators.¹⁴⁸

2. *Clarifying accountability in procedure*

There are practical lessons of judicial procedure in this story as well. Professor Schleicher's recommendations for the policymaking branches of state and federal government include enhancing the power of higher-profile state executive officials and helping voters to distinguish between state and federal issues.¹⁴⁹ State attorneys general may be second to governors in salience to voters, but they do enjoy both constitutional and political primacy in the legal domain, where governors serve as understudies only when an attorney general will not represent the state on a case caption. Federal courts, and particularly the Supreme Court, have the power to reinforce the attorney general's role in public law litigation and thereby increase accountability for who speaks for the states in court. Yet the federal courts fail to do so. It may seem a small thing to call governors appearing as individual officers a "state," as the Court did in *the Health Care Cases*. But there are important norms of attorney general representation at the Court. These are reflected, for example, in Rule 37.4, which permits a state to appear as amicus curiae without leave "when submitted by its Attorney General."¹⁵⁰ When governors or other state officials participate in attorney general briefs, they violate the rule and distort the identity of the "states" as a party. When used by governors and other state officials to bypass an attorney general with a different position on the case—including no position at all—it distorts the apparent composition of states signing on. The state plaintiffs in *the Health Care Cases* achieved this distortion by bringing governors aboard its

147. *Id.*

148. *Id.* at 765 n.10 ("[S]tate supreme court judges and attorneys general are more prominent, while state insurance commissioners and local treasurers are less prominent and more likely to be second order. Existing research does not allow us to know in each instance whether these elections look more like gubernatorial races or legislative ones, although they likely either fall between those poles or are like legislative races, depending on their prominence.").

149. *Id.* at 772.

150. SUP. CT. R. 37.4.

brief to increase the appearance of "state" representation in its caption, misleading the dissent with an apparent twenty-six state majority. The Court's policing of this rule, in a way that ensures that attorneys general alone are able to speak for the states as such, would be a small victory for accountability in the Court's opinions. It may also matter in the states, by clarifying for voters who does and does not have the power to set the state's litigation agenda in these high-profile cases.

CONCLUSION

Among other values, federalism is supposed to serve the accountability of the federal and state governments, separately, to their citizens. Among other duties, state attorneys general are supposed to enforce that accountability, on behalf of their states' citizens, in federal court. *The Health Care Cases* and their aftermath tested both of these suppositions in the teeth of the decade's defining political and legal controversy around the Affordable Care Act. Neither federalism nor the office of state attorney general performed as the conventional models would suggest. Instead, from the day the Act was signed into law, state attorneys general mobilized along partisan lines in a continuation of the national political debate over the Act, framed in legal terms. A chorus of assorted state officials joined them, along similar partisan lines, to assert their own claims to speak for the state in court regardless of state law or federal procedure. The resulting waves of litigation blurred lines of accountability among officials within states and between the state and federal governments.

A clearer conception of the states' role in federalism can help bring these blurred lines back into focus. A primary condition for states to enjoy their autonomy as sovereigns is that they should decide who speaks for them. In the courts, including at the Supreme Court in federalism cases, that voice is almost always the state attorney general. Although, like most state officials, attorneys general are buffeted by accelerating partisan pressures, their positions grant them significant autonomy to give voice to state interests in public law litigation, including federalism interests in the state's own autonomy. The courts, including the Supreme Court in federalism cases, can and should amplify the voice of attorneys' general on behalf of the states, and distinguish it from the dissonant

voices of state officials who lack the authority or independence to speak for the states in court. Federalism starts with respecting the states' own structures of political accountability. Only then can the courts begin to work out the doctrine accountability demands.

APPENDIX: STATES ON THE AFFORDABLE CARE ACT¹⁵¹

| STATE | ACA Vote (blended) | Florida (2012) | Medicaid (year) | Exchange (form) | King (2015) | Hobby (2014) | Zubik (2016) | Texas (2018) |
|-------|--------------------|----------------|-----------------|-----------------|-------------|--------------|--------------|--------------|
| CT | √ | √/O (AG) | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| DC | √ | √ (AG)* | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| HI | 100% | √/O (AG) | 2014 | Fed. | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| RI | 100% | | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| VT | √ | √/O (AG) | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| ND | 100% | X (AG) | 2014 | Fed. | √ (AG) | X (AG) | | X (AG) |
| MA | √ | √ (AG)* | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| NY | √ | √/O (AG) | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| OR | √ | √/O (AG) | 2014 | State-Fed. | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| MD | √ | √/O (AG) | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| CO | √ | X (AG) | 2014 | State | | X (AG) | X (AG) | √ (AG) |
| NM | √ | √/O (AG) | 2014 | State-Fed. | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| WA | √ | X (AG) / √ (G) | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| WV | √ | | 2014 | State-Ptr | X (AG) | X (AG) | X (AG) | X (AG) |
| CA | √ | √/O (AG) | 2014 | State | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| WI | √ | X (AG) | X | Fed. | | X (AG) | X (AG) | √ (AG) |
| IL | √ | √/O (AG) | 2014 | State-Ptr | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| MN | √ | | 2014 | State | | | √ (AG) | √ (AG) |
| NJ | √ | | 2014 | Fed. | | | | √ (AG) |
| MI | √ | X (AG) | 2014 | State-Ptr | | X (AG) | X (AG) | √ (AG) |
| NH | √ | | 2014 | State-Ptr | √ (AG) | | √ (AG) | √ (AG) |
| PA | √ | X (AG) | 2015 | Fed. | √ (AG) | | | √ (AG) |
| VA | √ | X (AG) VA* | 2018 | Fed. | √ (AG) | | √ (AG) | √ (AG) |
| AR | √ | | 2014 | State-Fed. | | | X (AG) | X (AG) |
| NV | √ | X (G) | 2014 | State-Fed. | | | X (AG) | √ (AG) |
| IA | √ | √ (AG) / X (G) | 2014 | State-Ptr. | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| IN | √ | X (AG/L) | 2015 | Fed. | X (AG)* | | | X (AG) |
| DE | √ | √/O (AG) | 2014 | State-Ptr. | √ (AG) | √ (AG) | √ (AG) | √ (AG) |
| ME | √ | X (AG) | 2019 | Fed. | √ (AG) | √ (AG) | | √ (AG) |
| MT | √ | | 2016 | Fed. | | X (AG) | X (AG) | O (AG) |

151. Includes Washington, D.C. for completeness. X = took a position opposed to the Act (in state column = consistently opposed the Act); √ = took a position supporting the Act (in state column = consistently supported the Act); O = took another position. (AG) = Attorney General, (G) = Governor, (L) = Legislature. * = took position in different case raising same issue. **Bold signifies opposition to the Act.**

ACA Vote: "Patient Protection and Affordable Care Act: Roll Vote No. 396 Leg.," 155 Cong. Rec. S13891 (Dec. 24, 2009); "Patient Protection and Affordable Care Act: Roll No. 165," 156 Cong. Rec. H2153 (Mar 21, 2010). The percentage is the average share of votes for the Act in the House and Senate delegations of the state. For example, a state with one Senator (50%) and no Representative (0%) voting for the act would show a vote of 25%.

Florida v. DHHS: See Brief of State Petitioners on Medicaid, *Florida v. Dep't. Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400); Brief of Oregon et al. as Amici Curiae Supporting Respondents, *Florida v. Dep't. Health & Human Servs.*, 567 U.S. 519 (2012) (No. 11-400), 2012 WL 588460 [hereinafter Brief of Oregon] (supporting Medicaid expansion); Brief for State Petitioners (Severability), *Florida v. Dep't. Health & Human Servs.*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400); Brief of California et al. as Amici Curiae Supporting Respondents (Severability), *Florida v. Dep't. Health & Human Servs.*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400), 2012 WL 293712; Brief of Missouri as Amici Curiae Supporting Respondents (Severability), *Florida v. Dep't. Health & Human Servs.*, 567 U.S. 519 (2012) (Nos. 11-393 & 11-400)

Medicaid Expansion: See KAISER FAMILY FOUND., *supra* note 70.

| STATE | ACA Vote (blended) | Florida (2012) | Medicaid (year) | Exchange (form) | King (2015) | Hobby (2014) | Zubik (2016) | Texas (2018) |
|-------|--------------------|----------------|-----------------|-----------------|-------------|--------------|--------------|--------------|
| OH | 50% | X (AG) | 2014 | Fed. | | X (AG) | X (AG) | O (AG) |
| NC | 44% | | X | Fed. | √ (AG) | | | √ (AG) |
| FL | 44% | X (AG) | X | Fed. | | X (AG) | X (AG) | X (AG) |
| MO | 42% | O (AG) | X | Fed. | | | | X (AG) |
| KY | 33% | | 2014 | State-Fed | √ (AG) | | | √ (G) |
| AZ | 31% | X (AG) | 2014 | Fed. | | X (AG) | X (AG) | X (AG) |
| AK | 25% | X (AG) | 2015 | Fed. | | X (AG) | | |
| LA | 25% | X (AG) | 2016 | Fed. | | X (AG) | | X (AG) |
| NE | 25% | X (AG) | 2020 | Fed. | X (AG) | X (AG) | X (AG) | X (AG) |
| SD | 25% | X (AG) | X | Fed. | | X (AG) | | X (AG) |
| TX | 17% | X (AG/L) | X | Fed. | | X (AG) | X (AG) | X (AG) |
| SC X | 17% | X (AG) | X | Fed. | X (AG) | X (AG) | X (AG) | X (AG) |
| TN | 17% | | X | Fed. | | | | X (AG) |
| GA X | 15% | X (AG) | X | Fed. | X (AG) | X (AG) | X (AG) | X (AG) |
| KS | 13% | X (AG) | X | Fed. | | X (AG) | X (AG) | X (AG) |
| MS | 13% | X (G) | X | Fed. | √ (AG) | | | X (AG) |
| AL X | 0% | X (AG) | X | Fed. | X (AG) | X (AG) | X (AG) | X (AG) |
| ID | 0% | X (AG) | 2020 | State | | X (AG) | X (AG) | |
| OK | 0% | | X | Fed. | X (AG) | X (AG)* | X (AG) | |
| UT | 0% | X (AG) | 2020 | Fed. | | X (AG) | X (AG) | X (AG) |
| WY | 0% | X (AG) | X | Fed. | | | | |

State Exchange: See *State Health Insurance Marketplace Types, 2020*, KAISER FAMILY FOUND., <https://www.kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/>.

King v. Burwell: See Brief of the Commonwealths of Va. et al., *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Members of Congress and State Legislatures as Amici Curiae in Support of Respondents, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of the States of Oklahoma et al. as Amici Curiae Supporting Petitioners, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Amici Curiae of Indiana and 39 Indiana Public School Corporations in Support of Petitioners at 1-3, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Galen Institute and State Legislatures, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief Amicus Curiae of Virginia State Delegates et al. in Support of Petitioners, *King*, 135 S. Ct. 2480 (No. 14-114); Brief of the Commonwealths of Virginia et al. as Amici Curiae in Support of Affirmance, *King*, 135 S. Ct. 2480 (No. 14-114); Brief of Amici Curiae Senators John Cornyn et al. in Support of Petitioners, *King*, 135 S. Ct. 2480 (No. 14-114).

Sebelius v. Hobby Lobby: Brief of the State of Oklahoma as Amicus Curiae in Support of Respondents, *Sebelius v. Hobby Lobby*, 573 U.S. 682 (2014) (No. 13-354); Brief of Amici Curiae States of Michigan et al. for Conestoga, *Hobby Lobby*, Mardel, *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354, 13-356); Brief of California et al. as Amici Curiae Supporting Federal Petitioners and Respondents Kathleen Sebelius, et al., *Hobby Lobby*, 573 U.S. 682 (Nos. 13-354, 13-356).

Zubik v. Burwell: Brief for the States of Texas, et al. as Amici Curiae Supporting Petitioners, *Zubik v. Burwell*, 136 S.Ct. 1557 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191); Brief for the States of California, et al. as Amici Curiae in Support of Respondents, *Zubik v. Burwell*, 136 S.Ct. 1557 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, 15-191).

California v. Texas: Brief of the States of California et al., *California v. Texas* (No. 19-840) (filed May 6, 2020); Brief of the States of Maryland et al. as Amici Curiae in Support of Petitioners, *California v. Texas* (No. 19-840) (filed May 13, 2020); Brief of Amici Curiae States of Ohio and Montana in Support of Neither Party, *California v. Texas* (Nos. 19-840 & 19-1019) (filed May 13, 2020); Consolidated Opening Brief on the Merits of State of Texas, et al. (Nos. 19-840 & 19-1019) (filed June 25, 2020).