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# The Inexorable Expansion of Medicaid Expansion

BRENDAN WILLIAMS\*

*Medicaid expansion to non-elderly adults under the Affordable Care Act (ACA) has come a long way since the U.S. Supreme Court made it optional in its landmark 2012 NFIB vs. Sebelius ruling, and 2018, in particular, was a banner year. In 2018 four states expanded Medicaid, three of them "red states" doing so by voter ballot. Expansion-favoring Democrats were also elected to replace expansion-opposing Republican governors. Strikingly, this success came just a year after Medicaid expansion, and the ACA as a whole, was only saved by a single U.S. Senate vote.*

*This article examines the early pushback by states against Medicaid expansion, and the eventual evolution into acceptance by many states, dating from the 2012 Court decision through 2017. It then assesses the Medicaid expansion success in 2018 and what that portends for the Medicaid program. Finally, it highlights key challenges that lie ahead.*

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Medicaid expansion under the Affordable Care Act (ACA) has come a long way since the U.S. Supreme Court made it optional, and 2018, in particular, was a banner year—with four states expanding Medicaid, three of them by voter ballot. Strikingly, this success came just a year after expansion was only saved by a now-iconic thumbs-down vote by the late Sen. John McCain (R., Ariz.), which defeated the final Republican effort to repeal the ACA.<sup>1</sup>

In his landmark 2012 decision upholding the ACA as a proper exercise of congressional taxing power,<sup>2</sup> Chief Justice John Roberts had found the

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1. See Stephanie Innes, *Sen. John McCain's thumbs-down recalled as a 'watershed moment' in U.S. health care*, ARIZ. REPUBLIC (Aug. 30, 2018), <https://www.azcentral.com/story/news/local/arizona-health/2018/08/30/john-mccains-thumbs-down-health-vote-recalled-watershed-moment/1116667002/> [<https://perma.cc/KSY5-UDXY>].

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

ACA's provisions coercing Medicaid expansion were "a gun to the head"—with states standing to lose all Medicaid funding if they chose not to participate.<sup>3</sup> As the Kaiser Family Foundation notes, "[u]nder the ACA, Medicaid eligibility is extended to nearly all low-income individuals with incomes at or below 138 percent of poverty (\$28,676 for a family of three in 2018)."<sup>4</sup> Roberts wrote that *requiring* expansion transformed the Medicaid program, making it "no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage."<sup>5</sup> He ruled: "What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding."<sup>6</sup> Under his opinion, "States may now choose to reject the expansion; that is the whole point. But that does not mean all or even any will."<sup>7</sup>

Roberts proved too modest. In a manner unappreciated at the time by Democrats celebrating a victory, or by Republicans mourning a defeat, Roberts eviscerated a key component of the ACA. In the wake of the ruling, Georgia's Republican Gov. Nathan Deal was typical in his reaction: "Today, the highest court in the country let the American people down. While we recognize this is a huge setback for fiscal sanity and personal liberty, we are not giving up."<sup>8</sup>

At the time, most experts felt Medicaid expansion was still a sure thing. After all, under the ACA, the federal government would "pay the full cost of covering those newly eligible for Medicaid for three years, from 2014 to 2016. The federal share will then gradually decline; it will be 90 percent, starting in 2020."<sup>9</sup> As the *New York Times* reported: "Sara Rosenbaum, a professor of health law and policy at George Washington University, predicted that 'only a small number of states' would pass up the opportunity to expand Medicaid, given the generous terms of the deal authorized by Congress."<sup>10</sup>

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3. *Id.* at 581.

4. Rachel Garfield, Anthony Damico & Kendal Orgera, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND., 1, March, 2019, <http://files.kff.org/attachment/Issue-The-Coverage-Gap-Uninsured-Poor-Adults-in-States-that-Do-Not-Expand-Medicaid> [<https://perma.cc/BRS8-8S4W>] (footnote omitted).

5. *Sebelius*, 567 U.S. at 583.

6. *Id.* at 585.

7. *Id.* at 587.

8. Press Release, Ga. Dep't of Law, Deal, Olens disappointed by ruling on Obamacare (June 28, 2012), <https://law.georgia.gov/press-releases/2012-06-28/deal-olens-disappointed-ruling-obamacare> [<https://perma.cc/BRH3-9S9J>].

9. Robert Pear, *Uncertainty Over States and Medicaid Expansion*, N.Y. TIMES (June 28, 2012), <https://www.nytimes.com/2012/06/29/us/uncertainty-over-whether-states-will-choose-to-expand-medicare.html> [<https://perma.cc/LV2P-4SG2>].

10. *Id.*

Yet while a battle was lost, the war was not over. After dusting themselves off, Republicans like Gov. Deal took Roberts' invitation to not expand Medicaid. A year following the Roberts' ruling, Margot Sanger-Katz would write in *The Atlantic*:

When the Supreme Court decided the big health-care case last June, its ruling was seen as a huge win for President Obama. His administration had fended off a challenge that would have dismantled the entire reform effort; it lost on only a small issue to which few people had paid much heed. But a year later, it's increasingly clear that the minor loss is punching a major hole in the law's primary ambition—expanding health insurance coverage to most of the 49 million Americans who lack it.<sup>11</sup>

“The Supreme Court dealt Obamacare a major blow after all,” she concluded.<sup>12</sup>

Yet, slowly but surely, and in ways never anticipated by the ACA's architects, Medicaid has expanded around the nation.

This article examines the early pushback by states against Medicaid expansion, and the eventual evolution into acceptance by many states, dating from the 2012 Court decision through 2017. It then assesses the Medicaid expansion ballot's success in four states in 2018 and what that portends for the Medicaid program. Finally, it highlights key challenges that lie ahead.

#### MEDICAID EXPANSION: 2012-2017

In rejecting Medicaid expansion for the nation's poorest, unhealthiest state, Mississippi's Republican Gov. Phil Bryant sanctimoniously offered an alternative to the poor, in a column in the *Washington Times*: “Living a healthy lifestyle that includes regular exercise and a proper diet can help shrink Mississippi's obesity rate and the chronic diseases such as diabetes that accompany it.”<sup>13</sup> Presumably, every *Washington Times*' subscriber in

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11. Margot Sanger-Katz, *All Those People Who Were Supposed to Get Insurance Probably Won't*, THE ATL. (June 11, 2013), <https://www.theatlantic.com/politics/archive/2013/06/all-those-people-who-were-supposed-to-get-insurance-probably-wont/276752/> [https://perma.cc/TP2S-2AW5].

12. *Id.*

13. Phil Bryant, *BRYANT: The truth about Obamacare in Mississippi*, WASH. TIMES (Oct. 1, 2012), <https://www.washingtontimes.com/news/2012/oct/1/the-truth-about-obamacare-in-mississippi-taxpayers/> [https://perma.cc/XAP6-2WJY]. In March 2013, Mississippi's Bryant belied his rhetoric about healthy lifestyles by signing a law, sponsored by a barbecue restaurant chain owner selling sandwiches called “L'il Piggies,” to prevent manda-

Mississippi took heed. As Sanger-Katz would write, “Medicaid was such a toxic issue in Mississippi that the Legislature adjourned without even reauthorizing the state’s *current* program.”<sup>14</sup> One in-depth article noted that “[t]o liberal observers, however, there were racial undercurrents at work. Images of ‘welfare queens’—black, Delta women in Cadillacs—still held potency for conservative whites in Mississippi.”<sup>15</sup> The author noted: “Even heady economic analyses couldn’t overcome ideological opposition: A state economist projected the Medicaid expansion would bring Mississippi \$1.2 billion in federal funding and 9,000 new jobs at a cost to the state of \$159 million by 2025.”<sup>16</sup>

Under Mississippi law, the state’s Medicaid participation must be reauthorized annually—a legislative vote that, given tax implications, requires a supermajority.<sup>17</sup> Because Republican legislators were afraid the Democratic minority would hijack a reauthorization vote with an amendment to expand Medicaid, they adjourned in April 2013 without a Medicaid budget.<sup>18</sup> That forced the possibility the state might leave Medicaid July 1.<sup>19</sup> Upon a special session being called in June 2013, Medicaid participation was reauthorized—without expansion.<sup>20</sup>

“You got to be almost dead before you can get Medicaid in Mississippi,” related one impoverished resident to the *New York Times*.<sup>21</sup> Almost

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tory restaurant disclosure of calorie contents, bans on toys with fast food meals, or regulation of food portion size. See Holly Yan, *No soda ban here: Mississippi passes ‘Anti-Bloomberg’ bill*, CNN (Mar. 21, 2013), <https://www.cnn.com/2013/03/21/us/mississippi-anti-bloomberg-bill/index.html> [<https://perma.cc/A3XQ-VESV>] (“In Mississippi, you will never be denied a colossal soda or huge restaurant portion because of a city ordinance.”); see also Kristen A. Lee, *Mississippi passes ‘anti-Bloomberg bill,’ banning local limits on portion sizes and requirements to post calorie counts*, N.Y. DAILY NEWS (Mar. 13, 2013), <https://www.nydailynews.com/life-style/health/passes-anti-bloomberg-bill-bans-limits-portions-posting-calorie-counts-article-1.1286804> [<https://perma.cc/U2CX-JP57>].

14. Sanger-Katz, *supra* note 11.

15. Sarah Varney, *How Obamacare Went South in Mississippi*, THE ATL. (Nov. 4, 2014), <https://www.theatlantic.com/health/archive/2014/11/how-obamacare-went-south-in-mississippi/382313/> [<https://perma.cc/6XHK-CCTE>].

16. *Id.*

17. Sandhya Somashekhar, *How Mississippi could end up killing Medicaid*, WASH. POST (June 13, 2013), [https://www.washingtonpost.com/news/wonk/wp/2013/06/13/how-mississippi-could-end-up-killing-medicaid/?utm\\_term=.2.15eb5e09920%5b](https://www.washingtonpost.com/news/wonk/wp/2013/06/13/how-mississippi-could-end-up-killing-medicaid/?utm_term=.2.15eb5e09920%5b) [<https://perma.cc/59EA-N6G2>].

18. *Id.*

19. *Id.*

20. *House passes Medicaid reauthorization during day one of special session*, MISS. BUS. J. (June 28, 2013), <http://msbusiness.com/2013/06/house-passes-medicaid-reauthorization-during-day-one-of-special-session/> [<https://perma.cc/9KSL-U9W7>].

21. Sabrina Tavernise & Robert Gebeloff, *Millions of Poor Are Left Uncovered by Health Law*, N.Y. TIMES (Oct. 2, 2013),

three-fifths of the state's poor, uninsured adults are African-American.<sup>22</sup> And their incomes are too low to qualify for health insurance subsidies through the federally-facilitated exchange.<sup>23</sup>

Like Bryant, Nebraska's Republican Gov. Jim Heineman prescribed exercise over expansion. "The governor suggested healthy habits and private charities could help low-income people who cannot qualify for Medicaid now and cannot afford health insurance," reported the *Omaha World-Herald*.<sup>24</sup>

As 2014 approached, only half of the states were willing to take the federal government's deal to pay 100 percent of the costs of Medicaid expansion through 2016—a funding proportion that by 2017 would decline, point by point, from 95 percent to 93 percent, and become 90 percent by 2020.<sup>25</sup>

Yet, as the Congressional Budget Office (CBO) had written, "although the 10 percent share of the costs of newly eligible people that states would ultimately bear would be a small share of total additional Medicaid spending, it would nevertheless represent a large extra cost for some states."<sup>26</sup> State governments, after all, cannot avoid cuts by simply borrowing money. Many state governments are not paying *current* Medicaid bills.

In her 2013 State of the State Address, Republican South Carolina Gov. Nikki Haley admitted that "here in South Carolina we have one of the

<https://www.nytimes.com/2013/10/03/health/millions-of-poor-are-left-uncovered-by-health-law.html> [https://perma.cc/WXT8-SQAE].

22. *Id.*

23. *Id.* One study "on nondisabled, childless adults in the Minneapolis–St. Paul region who enrolled in Medicaid between 2011 and 2013" found that only 47.2% were white non-Hispanic, while 32.6% were Black non-Hispanic. Nathan D. Shippee & Katherine D. Vickery, *The Complex Needs of Medicaid Expansion Enrollees with Very Low Incomes*, COMMONWEALTH FUND (May 31, 2018), <https://www.commonwealthfund.org/publications/issue-briefs/2018/may/complex-needs-medicaid-expansion-enrollees-very-low-incomes> [https://perma.cc/RXU8-AKGS]. Examining 2017 data, the Kaiser Family Foundation determined that of the 2.2 million Americans in the "coverage gap" in non-expansion states, 47% were white, and 47% African-American or Hispanic. *See* Garfield, *supra* note 4.

24. Martha Stoddard, *Heineman advocates healthy habits and charity over Medicaid expansion*, OMAHA WORLD-HERALD (Apr. 15, 2013), [https://www.omaha.com/news/heineman-advocates-healthy-habits-and-charity-over-medicaid-expansion/article\\_b000c84e-5e7b-5013-b83a-85e710bc5bd8.html](https://www.omaha.com/news/heineman-advocates-healthy-habits-and-charity-over-medicaid-expansion/article_b000c84e-5e7b-5013-b83a-85e710bc5bd8.html) [https://perma.cc/VT5N-P833].

25. *See* 42 U.S.C. § 1396d(y)(1) (2018).

26. Cong. Budget Office, *Estimates for the Insurance Coverage Provisions of the Affordable Care Act Updated for the Recent Supreme Court Decision*, CONG. BUDGET OFFICE (Jul. 2012), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/43472-07-24-2012-CoverageEstimates.pdf> [https://perma.cc/YYN4-U7LF].

lowest life expectancies and highest infant mortality rates in the U.S.”<sup>27</sup> Yet, she rejected Medicaid expansion: “The federal government likes to wave around a nine-dollar match like it is some silver bullet, some extraordinary benefit that we cannot pass up. But what good do the nine dollars do us when we can’t come up with the one?”<sup>28</sup> That was not necessarily a dishonest perspective.

Medicaid expansion had held the promise of being the only single-payer aspect in the ACA, giving some economic justice hope to at least the poor, yet the ACA bungled even that in making expansion coercive by not fully funding it.

Even when it assumed all states would participate in Medicaid expansion, the CBO, as late as March 2012, projected the federal cost to be \$795 billion from 2014-2021, relative to \$60 billion in cost for the states.<sup>29</sup> Thus, for the sake of saving \$60 billion over seven years, a federal government that, by 2014, had spent \$1.6 trillion waging war in Afghanistan and Iraq,<sup>30</sup> jeopardized access to health care for the poor.

One 2013 study of 14 states refusing to expand Medicaid projected they would lose out on \$8.4 billion from the federal government, spend an extra \$1 billion on uncompensated care in 2016, and have 3.6 million fewer insured residents.<sup>31</sup>

Objectively false claims were made in many states against expansion.

In Louisiana, Republican Gov. “Bobby” Jindal asserted, “President Obama's Medicaid expansion could cost taxpayers in Louisiana \$1.7 billion over the first 10 years of implementation, and the cost will continue to rise.”<sup>32</sup> Yet, a nonpartisan analysis by the state’s Legislative Fiscal Office showed potential state savings of over a half-billion dollars over that period.<sup>33</sup> A Tea Party group financed by the conservative billionaire Koch

27. *FULL TEXT: SC Gov. Nikki Haley State of the State address*, THE STATE (Jan. 16, 2013), <https://www.thestate.com/news/politics-government/article14419142.html> [<https://perma.cc/B4D4-6GKJ>].

28. *Id.*

29. See Cong. Budget Office, *Updated Estimates for the Insurance Coverage Provisions of the Affordable Care Act*, CONG. BUDGET OFFICE (Mar. 2012), <https://www.cbo.gov/system/files?file=2018-10/03-13-Coverage-Estimates.pdf> [<https://perma.cc/TAG2-9WKK>].

30. Amy Belasco, RL33110, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* 5 CONG. RESEARCH SERV., (Dec. 8, 2014).

31. Carter C. Price & Christine Eibner, *For States That Opt Out Of Medicaid Expansion: 3.6 Million Fewer Insured And \$8.4 Billion Less In Federal Payments*, 32 HEALTH AFFAIRS (June 2013).

32. Bobby Jindal, *Obamacare's Medicaid expansion is bad for Louisiana*, BATON ROUGE BUS. REP. (Apr. 22, 2013), <https://www.businessreport.com/article/obamacares-medicaid-expansion-is-bad-for-louisiana> [<https://perma.cc/6S6C-HM5Z>].

33. Editorial, *If Gov. Jindal won't accept Medicaid expansion, lawmakers should*, NOLA.COM, [https://www.nola.com/opinions/2013/04/if\\_gov\\_jindal\\_wont\\_accept\\_medi.html](https://www.nola.com/opinions/2013/04/if_gov_jindal_wont_accept_medi.html)

brothers sought to get every single Louisiana legislator to publicly declare opposition to expansion prior to the 2014 session.<sup>34</sup>

Jindal's conservative Democratic successor would embrace Medicaid expansion:

On his second day in office, Gov. John Bel Edwards signed, as promised, an executive order that begins the process of expanding Medicaid.

Tuesday's move will allow another 300,000 or so people—by July—to join the state-federal government program that already pays the health care costs for about 1.4 million Louisiana residents.<sup>35</sup>

Beyond being unwilling to run exchanges and expand Medicaid, some Republican governors worked actively to subvert the ACA.

One was Maine's Republican governor, Paul LePage. In November 2017, Maine voters overwhelmingly approved a LePage-fought measure to expand Medicaid, becoming the first state to do so by ballot, after LePage had vetoed five legislative bills to accomplish that aim.<sup>36</sup> However, well into 2018, his final year in office, LePage was vowing he would go to jail

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[<https://perma.cc/RC77-PY2V>] (noting that “Gov. Jindal's own Department of Health and Hospitals reported recently that the state would save as much as \$367.5 million over the first 10 years of the expansion under the Affordable Care Act.”). In the state of Washington, for example, a Republican Senate majority in 2013 banked on Medicaid expansion to balance its no-new-taxes budget. See Andrew Garber, *Senate's GOP is counting on Obamacare to balance budget*, SEATTLE TIMES (Apr. 13, 2013), <https://www.seattletimes.com/seattle-news/senatersquos-gop-is-counting-on-obamacare-to-balance-budget/> [<https://perma.cc/SAK6-832G>] (“Now the GOP-led state Senate is counting on Obamacare to help balance the budget, booking more than \$400 million in savings from the federal program over the next two years.”).

34. Niraj Chokshi, *The Koch brothers' group is getting involved in Louisiana's Obamacare fight*, WASH. POST (Feb. 8, 2014), [https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/08/the-koch-brothers-group-is-getting-involved-in-louisianas-obamacare-fight/?utm\\_term=.57d5edb40afc](https://www.washingtonpost.com/blogs/govbeat/wp/2014/02/08/the-koch-brothers-group-is-getting-involved-in-louisianas-obamacare-fight/?utm_term=.57d5edb40afc) [<https://perma.cc/3XRQ-XWWD>].

35. Mark Ballard, *Gov. John Bel Edwards issues executive order to expand Medicaid*, BATON ROUGE ADVOCATE (Jan. 14, 2016), [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_a035f7fd-fa48-5df6-9333-b3f1ceaa184d.html](https://www.theadvocate.com/baton_rouge/news/politics/article_a035f7fd-fa48-5df6-9333-b3f1ceaa184d.html) [<https://perma.cc/GNX9-VZAN>].

36. Amber Phillips, *Maine voters just resoundingly approved a Medicaid expansion. Their governor is trying to stop it from going into effect.*, WASH. POST (Nov. 8, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/11/07/maine-could-become-the-first-state-to-expand-medicare-by-ballot-initiative/?utm\\_term=.4e20a1d53df4](https://www.washingtonpost.com/news/the-fix/wp/2017/11/07/maine-could-become-the-first-state-to-expand-medicare-by-ballot-initiative/?utm_term=.4e20a1d53df4) [<https://perma.cc/7P3C-KCS7>].



rather than implement the voters' will.<sup>37</sup> Finally, in September 2018, he complied with a court order and filed a plan with the federal government—while asking the Trump Administration to reject it.<sup>38</sup>

Not all Republicans, even some vocal in their hostility toward the ACA, failed to see the benefits of Medicaid expansion.

In his 2013 State of the State address, Florida's Republican Governor Rick Scott stated, "I concluded that for the three years the federal government is committed to paying 100 percent of the cost of new people in Medicaid, I cannot, in good conscience, deny the uninsured access to care."<sup>39</sup> He admitted that "[a]fter a long fight, we lost in the Supreme Court over the President's health care law, and we lost a presidential election along with the promise of the law's full repeal."<sup>40</sup>

Yet, the Republican legislature adjourned without expanding Medicaid. There was a poignant aspect to this reported by the *Miami Herald*: "Florida House Republicans last month loudly and proudly rejected billions of dollars in federal money that would have provided health insurance to 1 million poor Floridians. Quietly, they kept their own health insurance premiums staggeringly low."<sup>41</sup>

Thus, Florida House members would "pay just \$8.34 a month for state-subsidized health care next year, or \$30 a month to cover their entire family."<sup>42</sup> That \$8.34 per month was a third of the \$25 per visit that Republicans had discussed charging Medicaid recipients as co-pays for medical visits.<sup>43</sup>

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37. Kevin Miller, *LePage says he'll go to jail before he lets Maine expand Medicaid without funding*, PRESS HERALD (July 13, 2018), <https://www.pressherald.com/2018/07/12/paul-lepage-says-hed-go-to-jail-before-he-expands-medicaid/> [<https://perma.cc/HS4A-CSUL>].

38. Joe Lawlor, *LePage files court-ordered plan to expand Medicaid in Maine – and asks feds to reject it*, PRESS HERALD (Sept. 5, 2018), <https://www.pressherald.com/2018/09/04/lepage-files-plan-to-expand-medicaid-but-asks-feds-to-reject-it/> [<https://perma.cc/PG96-X5TM>] ("I strongly encourage CMS (U.S. Centers for Medicare and Medicaid Services) to reject the State Plan Amendment that may soon be submitted by the Maine Department of Health and Human Services pursuant to court order," LePage wrote in a letter sent Friday to Seema Verma, CMS administrator, and U.S. Health and Human Services Secretary Alex Azar.').

39. Governor Rick Scott: We Must Protect the Uninsured and Florida Taxpayers with Limited Medicaid Expansion (Feb. 20, 2013), (transcript available at <https://www.flgov.com/wp-content/uploads/2013/02/2-20-13-REMARKSFORDELIVERY.pdf> [<https://perma.cc/5W9R-LQUF>]).

40. *Id.*

41. Tia Mitchell, *Florida lawmakers pay peanuts for health insurance*, MIAMI HERALD (Sept. 8, 2014), <https://www.miamiherald.com/news/politics-government/article1951512.html> [<https://perma.cc/X9LJ-2NWM>].

42. *Id.*

43. *Id.*

In 2015, Florida's Republican-controlled Senate voted to expand Medicaid, but Scott, despite support for the plan from "Associated Industries of Florida, the state's major business lobbying organization," flip-flopped again: "Gov. Rick Scott sides with the House against Medicaid expansion."<sup>44</sup>

In supporting Medicaid expansion, Republican Governor John Kasich of Ohio went so far as to invoke President Ronald Reagan: "I urge those who esteem Reagan to consider the principled, big-picture perspective at the core of his decisions. When we consider what Reagan would do, let's also remember what he did do—expand Medicaid."<sup>45</sup> Yet, his fellow Republicans in control of the Ohio Legislature would not go along. Thwarted by legislators, Kasich obtained Medicaid expansion approval in October 2013 through a state board stacked with his appointees.<sup>46</sup>

The most dramatic battle occurred in Arizona in 2013. Republican Governor Jan Brewer, a longtime Tea Party figure, touted before her Republican legislature "the enormous economic benefits" of Medicaid expansion that would "inject \$2 billion into our economy; save and create thousands of jobs; and provide health care to hundreds of thousands of low-income Arizonans."<sup>47</sup> She threatened to veto bills until she got her way.<sup>48</sup>

44. Bill Cotterell, *Senate passes 'don't call it Medicaid expansion' plan*, TALLAHASSEE DEMOCRAT (June 3, 2015), <https://www.tallahassee.com/story/news/politics/2015/06/03/senate-passes-call-medicaid-expansion-plan/28439965/> [<https://perma.cc/CM65-PUYJ>]. Scott's own history with health care, running the hospital chain Columbia/HCA, was quite colorful:

Scott was forced out of his hospital chain by his board in July 1997, after the federal government issued 35 warrants to search hospitals that were owned previously or at the time by Columbia/HCA and two companies doing business with the chain in seven states — Florida, Texas, Tennessee, North Carolina, Utah, Oklahoma and Georgia.

Alexandra Glorioso & Marc Caputo, *Scott tries to flip the script on historic Medicare fraud fine*, POLITICO (Sept. 30, 2018), <https://www.politico.com/states/florida/story/2018/09/30/scott-tries-to-flip-the-script-on-historic-medicare-fraud-fine-632303> [<https://perma.cc/2DAK-JXX2>]. The company then paid a \$1.7 billion fine for Medicare fraud. *See id.*

45. John Kasich, *Ohio governor: Reagan's compassionate Medicaid expansion*, USA TODAY (June 2, 2013), <https://www.usatoday.com/story/opinion/2013/06/02/ohio-governor-reagans-compassionate-medicaid-expansion/2382737/> [<https://perma.cc/EDY2-PSXB>].

46. Kyle Cheney, *Ohio OKs Medicaid expansion*, POLITICO (Oct. 21, 2013), <https://www.politico.com/story/2013/10/ohio-moving-toward-obamacare-medicaid-expansion-098609> [<https://perma.cc/2EX2-QCBP>].

47. Mark Brodie, *Arizona's Medicaid Expansion, 5 Years Later*, KJZZ (Oct. 29, 2018), <https://theshow.kjzz.org/content/718839/arizonas-medicaid-expansion-5-years-later> [<https://perma.cc/LP3U-NAFN>].

48. Fernando Santos, *Republicans in Arizona Are at Odds on Medicaid*, N.Y. TIMES (July 21, 2013), <https://www.nytimes.com/2013/07/22/us/arizona-republicans-are-at-odds-on-medicaid.html> [<https://perma.cc/YD7F-BHW9>].

Conservatives were irate, with one blog labeling “Republican legislators who voted for the expansion as ‘Brewercrats’ and the expansion itself as ‘Obrewercare,’ a play on the Republican moniker for President Obama’s health care overhaul.”<sup>49</sup>

When Brewer called a June 2013 special session to force the issue, the Republican Senate President and House Speaker issued a joint statement: “We are disappointed and stunned that the governor and her staff would resort to such an unnecessary, impulsive and unprecedented tactic.”<sup>50</sup> They accused Brewer of an “impetuous decision to intercede and collude with the democrat minority in order to force an expedited vote on her sole legislative priority of Obamacare.”<sup>51</sup> As the special session convened, sixteen anti-expansion House Republicans sat sulking in the House gallery in boycott;<sup>52</sup> yet Brewer managed to quickly overcome intransigence.<sup>53</sup>

Medicaid expansion was fraught with compromises even where Republican governors went along.

Michigan’s Republican Governor Rick Snyder pushed a Healthy Michigan Plan through his Republican Legislature.<sup>54</sup> It had the typical Republican personal responsibility language—requiring expansion beneficiaries to pay up to 5 percent of the costs of their care even if they were medically frail—though the federal government was, at that point, on the hook for 100 percent of those costs.<sup>55</sup> As one Republican representative said, “[t]his is a very unique opportunity for us to negotiate from a position of strength to get reforms in what have been long-held entitlement reforms, real reforms that will help people and help taxpayers.”<sup>56</sup>

In May 2014, with speculation that he would be a Republican presidential candidate, Indiana Governor Mike Pence released a Hoosier 2.0 he described as “based on personal responsibility and empowering people to

49. *Id.*

50. Ben Giles, *Lawmakers prepare to adjourn as Medicaid expansion moves toward approval*, ARIZ. CAP. TIMES (June 11, 2013), <https://azcapitoltimes.com/news/2013/06/11/az-gov-jan-brewer-calls-special-session-on-budget-medicaid/> [<https://perma.cc/D5TS-KFUU>].

51. *Brewer exhibits “blatant disrespect and reckless practices”*, ARIZ. DAILY INDEP. (June 12, 2013), <https://arizonadailyindependent.com/2013/06/12/brewer-exhibits-blatant-disrespect-and-reckless-practices/> [<https://perma.cc/CM9C-GCHB>].

52. *Id.*

53. Santos, *supra* note 48.

54. Marianne Udow-Phillipset al., *The Medicaid Expansion Experience In Michigan*, HEALTH AFFAIRS (Aug. 28, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20150828.050226/full/> [<https://perma.cc/4TUF-TDZQ>].

55. *Id.*

56. *Michigan House Approves Medicaid Expansion*, CBS DETROIT (June 15, 2013), <https://detroit.cbslocal.com/2013/06/15/michigan-house-approves-medicaid-expansion/> [<https://perma.cc/Y4SR-R8V6>].

take ownership of their health-care choices.”<sup>57</sup> It involved a Personal Wellness and Responsibility (POWER) account that, like a health savings account, would help pay for deductible expenses.<sup>58</sup> The deductible was \$2,500.<sup>59</sup> Those who chose not to contribute to their POWER accounts—or, more likely, couldn’t afford to—would be punished by being relegated to a plan that had reduced benefits.<sup>60</sup> They would also then be subject to punitive co-payments, such as seventy-five dollars for inpatient services.<sup>61</sup>

Progressives had become so unconditional in their cheerleading for the ACA that *Washington Post* columnist Dana Milbank celebrated Pence as “a happy warrior for conservatism” and wrote that “[a]s more conservatives realize that the law they hate allows them to implement policies they like, they may have trouble recalling what all the fuss was about.”<sup>62</sup> In 2017, Milbank’s “happy warrior” would go on to become perhaps the most conservative vice president ever.<sup>63</sup>

A desperate Obama Administration had, by 2013, hit upon an idea that seemed like a grotesque parody of a single-payer system. For states reluctant to expand Medicaid, the Administration would, instead, provide funding to purchase commercial insurance for those who would otherwise be Medicaid-eligible.<sup>64</sup> Some ideologically objecting to government paying health care providers for care were apparently comfortable with govern-

57. Mike Pence, *HIP 2.0 is improving Hoosiers' lives*, INDIANAPOLIS STAR (Jan. 30, 2016), <https://www.indystar.com/story/opinion/readers/2016/01/30/pence-hip-20-improving-hoosiers-lives/79566326/> [<https://perma.cc/7XSW-HG8N>].

58. Maureen Gropp & Barb Berggoetz, *Will Medicaid alternative politically help or hurt Gov. Mike Pence?*, INDIANAPOLIS STAR (May 15, 2014), <https://www.indystar.com/story/news/politics/2014/05/15/gov-pence-optimistic-feds-will-accept-medicaid-alternative/9115699/> [<https://perma.cc/ZY2D-XT83>].

59. *Id.*

60. *Id.*

61. *Id.*

62. Dana Milbank, *Indiana Gov. Mike Pence is taking Obamacare money and running with it*, WASH. POST (May 19, 2014), [https://www.washingtonpost.com/opinions/dana-milbank-indiana-gov-mike-pence-is-taking-obamacare-money-and-running-with-it/2014/05/19/7ae33bbe-dfa1-11e3-8dcc-d6b7fede081a\\_story.html?noredirect=on&utm\\_term=.455fc50ec8ab](https://www.washingtonpost.com/opinions/dana-milbank-indiana-gov-mike-pence-is-taking-obamacare-money-and-running-with-it/2014/05/19/7ae33bbe-dfa1-11e3-8dcc-d6b7fede081a_story.html?noredirect=on&utm_term=.455fc50ec8ab) [<https://perma.cc/5FEC-V9SQ>].

63. See George Will, *Trump is no longer the worst person in government*, WASH. POST (May 9, 2018), [https://www.washingtonpost.com/opinions/trump-is-no-longer-the-worst-person-in-government/2018/05/09/10e59eba-52f1-11e8-a551-5b648abe29ef\\_story.html?utm\\_term=.f8334b69db66](https://www.washingtonpost.com/opinions/trump-is-no-longer-the-worst-person-in-government/2018/05/09/10e59eba-52f1-11e8-a551-5b648abe29ef_story.html?utm_term=.f8334b69db66) [<https://perma.cc/N7Z8-HMVY>] (“The oleaginous Mike Pence, with his talent for toadyism and appetite for obsequiousness, could, Trump knew, become America’s most repulsive public figure.”).

64. Christine Vestal, *Obama Administration Poised to Approve Arkansas-style Medicaid Expansions*, STATELINE (May 6, 2013), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/05/06/obama-administration-poised-to-approve-arkansas-style-medicaid-expansions> [<https://perma.cc/R679-HX9P>].

ment paying an intermediary, a private insurer, which, in turn, would pay health care providers for care after extracting its own costs.

The plan was first implemented in Arkansas under the guise of “premium assistance.”<sup>65</sup> One insurance carrier’s CEO exulted: “We are very capable of doing an Arkansas-type model. That’s something that would be a sweet spot for us.”<sup>66</sup> It is reasonable to say this was not a “sweet spot” contemplated by Congress, despite its general disregard for the poor.

Iowa, experiencing a second round with its seemingly-permanent Republican Governor Terry Branstad, who also served as governor from 1983 to 1999 before winning again in 2010,<sup>67</sup> adopted a strange hybrid alternative to Medicaid expansion after majority Senate Democrats overcame the intransigence of Branstad and majority House Republicans.

The Iowa Health & Wellness Plan allowed those under the federal poverty line who were not already on Medicaid to go onto a state public insurance plan that would be an alternative to Medicaid.<sup>68</sup> For those whose income was between 100 percent and 138 percent of the federal poverty level, there would be a “premium assistance program” for commercial health insurance purchases through the exchange, similar to the Arkansas plan.<sup>69</sup> The program was granted a federal waiver.<sup>70</sup>

In 2014, Utah Republican Governor Bob Herbert failed to win legislative support in pushing for a federal Medicaid block grant – long a conservative ideal – through which private insurance would be purchased after tagging impoverished Medicaid recipients with hefty co-payments averaging \$420 annually.<sup>71</sup>

65. *Id.*

66. *Id.*

67. See Amber Phillips, *Terry Branstad just became the longest serving governor in American history*, WASH. POST (Dec. 14, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/12/14/meet-iowa-gov-terry-branstad-who-as-of-monday-is-americas-longest-serving-governor/?utm\\_term=.6d6b39e49f8a](https://www.washingtonpost.com/news/the-fix/wp/2015/12/14/meet-iowa-gov-terry-branstad-who-as-of-monday-is-americas-longest-serving-governor/?utm_term=.6d6b39e49f8a) [<https://perma.cc/S44N-HNZY>].

68. See Erin Murphy, *Jochum: Iowa Legislature reaches agreement on health care*, TELEGRAPH HERALD (May 22, 2013), [http://www.telegraphherald.com/news/breaking/article\\_f6f5e3e4-c311-11e2-9b15-001a4bcf6878.html](http://www.telegraphherald.com/news/breaking/article_f6f5e3e4-c311-11e2-9b15-001a4bcf6878.html) [<https://perma.cc/72LM-9AGN>].

69. *Id.*

70. See Ed Tibbetts, *Branstad, Obama administration reach Medicaid agreement*, COURIER (Dec. 13, 2013), [https://wfcourier.com/news/local/govt-and-politics/branstad-obama-administration-reach-medicaid-agreement/article\\_6bd19602-67a7-5def-9523-a684a88c2dae.html](https://wfcourier.com/news/local/govt-and-politics/branstad-obama-administration-reach-medicaid-agreement/article_6bd19602-67a7-5def-9523-a684a88c2dae.html) [<https://perma.cc/G5DR-WQJT>].

71. Lisa Riley Roche, *Gov. Gary Herbert offers 'Utah solution' to Medicaid expansion*, DESERET NEWS (Feb. 27, 2014), <https://www.deseretnews.com/article/865597533/Gov-Gary-Herbert-offers-Utah-solution-to-Medicaid-expansion.html> [<https://perma.cc/3EC5-6NWX>] (“House Speaker Becky Lockhart, R-Provo, dismissed his plan as ‘a straight-up expansion of Obamacare’ after she and Senate President Wayne Niederhouser had what she called an ‘informational’ meeting with the governor.”).

In New Hampshire, with a Democratic governor in Maggie Hassan, the 2014 legislative session brought an expansion of Medicaid – with money to be used to subsidize private insurance purchases.<sup>72</sup> An unintended consequence of that would, ultimately, be to raise rates in the exchange for individual market customers given the higher risk of those obtaining Medicaid coverage through the exchange.<sup>73</sup>

Yet, even this hybrid “free market” approach was not enough for many Republicans. In a sad farce in Montana, a bill to allow Medicaid dollars to be used to purchase commercial insurance for those who would otherwise qualify for Medicaid expansion died on the House floor in 2013 after a Democrat accidentally voted with the Republican speaker, in a 50-50 tie vote, to affirm the speaker’s re-referral of the bill to the burying ground of a Republican-controlled committee.<sup>74</sup> The Democratic governor had favored Medicaid expansion.<sup>75</sup> When the legislature reconvened in 2015, expansion passed into law with co-pay and premium components.<sup>76</sup>

In Virginia, Medicaid expansion was blocked when a Democratic state senator reportedly secured from Republicans appointments for himself and his daughter.<sup>77</sup> His resignation in June 2014 came during a high-stakes budget showdown over expansion between Democratic Governor Terry McAuliffe and Republicans and turned control of the Virginia Senate over to Republicans as the deadline approached for adopting a budget.<sup>78</sup>

Following the passage of a budget that did not expand Medicaid, McAuliffe announced he would work to expand it unilaterally—denouncing what he characterized as “the demagoguery, lies, fear and cowardice that

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72. *Medicaid expansion signed into law in NH*, UNION LEADER (Mar. 28, 2014), [https://www.unionleader.com/news/politics/state/medicaid-expansion-signed-into-law-in-nh/article\\_875952f3-2ee3-55a7-ac6d-3326a19310d9.html](https://www.unionleader.com/news/politics/state/medicaid-expansion-signed-into-law-in-nh/article_875952f3-2ee3-55a7-ac6d-3326a19310d9.html) [<https://perma.cc/M6XS-JV99>].

73. See Holly Ramer, *New Hampshire Medicaid expansion participants have higher medical costs than others*, PORTLAND PRESS HERALD (Aug. 28, 2017), <https://www.pressherald.com/2017/08/28/new-hampshire-medicaid-expansion-participants-have-higher-medical-costs-than-others/> [<https://perma.cc/AFY5-79BJ>].

74. Mike Dennison, *Vote that killed Medicaid bill was a mistake, lawmaker says*, MISSOULIAN (Apr. 20, 2013), [https://missoulian.com/news/local/vote-that-killed-medicaid-bill-was-a-mistake-lawmaker-says/article\\_28deaa2e-a92e-11e2-903e-001a4bcf887a.html](https://missoulian.com/news/local/vote-that-killed-medicaid-bill-was-a-mistake-lawmaker-says/article_28deaa2e-a92e-11e2-903e-001a4bcf887a.html) [<https://perma.cc/588C-2H4B>].

75. *Id.*

76. Associated Press, *Bullock signs Medicaid expansion into law*, BILLINGS GAZETTE (Apr. 29, 2015), [https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-signs-medicaid-expansion-into-law/article\\_5370b022-bc30-5020-8da1-9e4a7c703f27.html](https://billingsgazette.com/news/state-and-regional/govt-and-politics/bullock-signs-medicaid-expansion-into-law/article_5370b022-bc30-5020-8da1-9e4a7c703f27.html) [<https://perma.cc/M56W-6PJN>].

77. Laura Vozzella, *Virginia Democratic senator Puckett to resign, possibly dooming push to expand Medicaid*, WASH. POST (June 8, 2014), [https://www.washingtonpost.com/local/virginia-politics/2014/06/08/901edf8e-ef54-11e3-914c-1fbd0614e2d4\\_story.html?noredirect=on&utm\\_term=.32236b8d6c49](https://www.washingtonpost.com/local/virginia-politics/2014/06/08/901edf8e-ef54-11e3-914c-1fbd0614e2d4_story.html?noredirect=on&utm_term=.32236b8d6c49) [<https://perma.cc/UAX7-C5XW>].

78. *Id.*

have gripped this debate for too long.”<sup>79</sup> When the legislature convened in September 2014 in a special session to fill a budget gap, the Republican House voted 65-32 to authorize the speaker to hire an attorney to sue McAuliffe in the event he expanded Medicaid without legislative approval.<sup>80</sup>

Even prior to hybrid Medicaid expansion that featured commercial insurance, Medicaid, where it involved private carriers working with governments to secure coverage for beneficiaries, was not immune from the worst excesses of the profit motive.

In Washington, D.C., the dominant Medicaid carrier, D.C. Chartered Health Plan, having been forced into receivership and sold, notified providers in April 2013 that it would not be paying their claims.<sup>81</sup> One of the only private obstetrician-gynecologists in the District who took Medicaid was left roughly \$100,000 in arrears for his altruism in responding to the District’s call for more primary care physicians.<sup>82</sup> D.C. Chartered had served over 100,000 residents.<sup>83</sup> The \$43 million in unpaid bills it owed included \$8,355,320 for one hospital alone and even \$973,223 for the District’s fire department.<sup>84</sup>

In Kansas, Republican Governor Sam Brownback was implicated (though never charged) in an alleged scheme by confidantes and former campaign aides working as lobbyists to improperly steer Medicaid contracts—representing over \$3 billion annually—through the state’s privatized

79. Laura Vozzella et al., *Gov. Terry McAuliffe vetoes portions of Virginia budget, vows to expand Medicaid*, WASH. POST (June 20, 2014), [https://www.washingtonpost.com/local/virginia-politics/gov-terry-mcauliffe-vetoes-portions-of-virginia-budget-prolonging-medicaid-standoff/2014/06/20/960d98a8-f879-11e3-a3a5-42be35962a52\\_story.html?noredirect=on&utm\\_term=.b94f618043b7](https://www.washingtonpost.com/local/virginia-politics/gov-terry-mcauliffe-vetoes-portions-of-virginia-budget-prolonging-medicaid-standoff/2014/06/20/960d98a8-f879-11e3-a3a5-42be35962a52_story.html?noredirect=on&utm_term=.b94f618043b7) [https://perma.cc/T4GD-2E82].

80. Laura Vozzella & Rachel Weiner, *Va. legislators approve budget deal, reject Medicaid expansion*, WASH. POST (Sept. 18, 2014), [https://www.washingtonpost.com/local/virginia-politics/va-legislators-approve-budget-deal-reject-medicaid-expansion/2014/09/18/f8abde32-3dfe-11e4-b0ea-8141703bbf6f\\_story.html?utm\\_term=.1adb7f8405fe](https://www.washingtonpost.com/local/virginia-politics/va-legislators-approve-budget-deal-reject-medicaid-expansion/2014/09/18/f8abde32-3dfe-11e4-b0ea-8141703bbf6f_story.html?utm_term=.1adb7f8405fe) [https://perma.cc/MT9R-GVAZ].

81. Mike DeBonis, *D.C.’s Medicaid upheaval puts health-care providers in a tight spot*, WASH. POST (May 25, 2013), [https://www.washingtonpost.com/local/dc-politics/dcs-medicaid-upheaval-puts-health-care-providers-in-a-tight-spot/2013/05/25/e546e456-c3b9-11e2-8c3b-0b5e9247e8ca\\_story.html?utm\\_term=.d5eb453df0cc](https://www.washingtonpost.com/local/dc-politics/dcs-medicaid-upheaval-puts-health-care-providers-in-a-tight-spot/2013/05/25/e546e456-c3b9-11e2-8c3b-0b5e9247e8ca_story.html?utm_term=.d5eb453df0cc) [https://perma.cc/6H76-UU8U].

82. *Id.*

83. *Id.*

84. Colbert I. King, *D.C. taxpayers on the hook for unpaid health bills*, WASH. POST (June 7, 2013), [https://www.washingtonpost.com/opinions/colbert-king-dc-taxpayers-on-the-hook-for-unpaid-health-bills/2013/06/07/07bb5952-cf79-11e2-8845-d970ccb04497\\_story.html](https://www.washingtonpost.com/opinions/colbert-king-dc-taxpayers-on-the-hook-for-unpaid-health-bills/2013/06/07/07bb5952-cf79-11e2-8845-d970ccb04497_story.html) [https://perma.cc/A5HH-5492].

KanCare program.<sup>85</sup> Given this alleged impropriety, it was ironic that Brownback also signed legislation surrendering to the Legislature his authority to *expand* Medicaid under the ACA.<sup>86</sup>

By November 2014, the *New York Times* was able to report that Medicaid expansion had been a boon to the commercial insurance industry, with the ubiquitous UnitedHealth Group alone accounting for over one million new Medicaid enrollees.<sup>87</sup> With so much of Medicare and Medicaid now run by commercial insurers, the *Times* noted that “federal officials are eager to collaborate with an industry they once demonized.”<sup>88</sup>

There is reason to be concerned about this trend, and the adequacy of provider payments.

In 2015, the Supreme Court gave the Obama administration what it asked for by denying Medicaid providers access to courts, stating, among other things, that “[w]e doubt, to begin with, that providers are intended beneficiaries (as opposed to mere incidental beneficiaries) of the Medicaid agreement, which was concluded for the benefit of the infirm whom the providers were to serve, rather than for the benefit of the providers themselves.”<sup>89</sup> Writing for a 5-4 majority, Justice Scalia struck a blow against the Medicaid poor that one Democratic appointee, Justice Stephen Breyer, joined in. In his concurrence, Breyer rhapsodized that no private right of action was needed as “[s]tates engage in time-consuming efforts to obtain public input on proposed plan amendments” to implement Medicaid cuts.<sup>90</sup>

Neither Scalia nor Breyer remarked upon the fact that the draconian cuts to *children* made by Idaho legislators in the underlying case were contrary even to the recommendations of a Republican governor’s state agency, or that court action had restored \$12 million in funding in 2013.<sup>91</sup> In dis-

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85. See Tim Carpenter, *Sources: FBI examines lobbying by Brownback loyalists*, TOPEKA CAP.-J. (Apr. 16, 2014), <https://www.cjonline.com/news/2014-04-26/sources-fbi-examines-lobbying-brownback-loyalists> [<https://perma.cc/PU82-HZQN>].

86. Bryan Lowry, *Brownback signs bill saying Medicaid expansion decision rests with Legislature*, WICHITA EAGLE (Apr. 18, 2014), <https://www.kansas.com/news/politics-government/article1140552.html> [<http://perma.cc/92P2-8W5L>].

87. Robert Pear, *Health Care Law Recasts Insurers as Obama Allies*, N.Y. TIMES (Nov. 17, 2014), <https://www.nytimes.com/2014/11/18/us/politics/health-law-turns-obama-and-insurers-into-allies.html> [<http://perma.cc/KDL7-788G>].

88. *Id.*

89. *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1387 (2015). This ignores the fact that the “infirm” Medicaid enrollees are impoverished and unlikely to bring suit, even assuming a conservative Court would allow that.

90. *Id.* at 1389 (Breyer, J., concurring). This was certainly news to me, as I had, in the past as a long-term care advocate, actually had to file public disclosure requests to simply see those documents.

91. See Brendan Williams, *How the Obama administration made it possible to gut Medicaid*, THE HILL (June 12, 2017), <https://thehill.com/blogs/pundits->



sent, joined by Justice Kennedy and two Democratic appointees, Justice Sonia Sotomayor noted that “[p]reviously, a State that set reimbursement rates so low that providers were unwilling to furnish a covered service for those who need it could be compelled by those affected to respect the obligation imposed by” federal law.<sup>92</sup>

It was telling when the Obama administration employed such forcefulness in arguing it is permissible to make providers operate at a loss in providing care to the poorest and most vulnerable citizens; this was a courage the administration lacked in controlling profits by health insurers even where government itself was the payer (such as Medicare Advantage).

The Obama administration even stalled inexcusably in moving forward on an ACA provision providing extra Medicaid reimbursement for primary-care physicians to begin in 2013. Yet, by May 2013, with only four states offering the incentive due to federal delay (even though every state had applied to offer it), a letter from physicians’ groups to the Obama administration cited “confusion both by state employees responsible for administering the program and the physician community.”<sup>93</sup>

The diffidence with which the incentive was acted upon by the federal government was unlikely to enlist new physicians in providing Medicaid care. And yet access to primary-care physicians is critical if health care reform is to succeed. Economic incentives drive physicians away from general practice; in Washington, D.C., for example, only 453 out of over 8,000 physicians were active primary-care practitioners in 2013.<sup>94</sup>

The federal incentive expired December 31, 2014, with the Urban Institute calculating an average 43 percent fee cut for primary-care physicians.<sup>95</sup> Even during its existence, far too many Medicaid patients had struggled to find access to care and were forced to endure long waits at best.

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blog/healthcare/337467-how-the-obama-administration-made-it-possible-to-gut-medicaid [http://perma.cc/L8XR-H895].

92. Armstrong, 135 S. Ct. at 1396 (Sotomayor, J., dissenting).

93. Phil Galewitz, *Increase in doctors’ pay for Medicaid services off to a slow start*, WASH. POST (May 18, 2013), [https://www.washingtonpost.com/national/health-science/increase-in-doctors-pay-for-medicaid-services-off-to-a-slow-start/2013/05/18/79745d88-bfce-11e2-9b09-1638acc3942e\\_story.html](https://www.washingtonpost.com/national/health-science/increase-in-doctors-pay-for-medicaid-services-off-to-a-slow-start/2013/05/18/79745d88-bfce-11e2-9b09-1638acc3942e_story.html) [https://perma.cc/M3NP-LEPE].

94. Lena H. Sun, *D.C.’s primary-care doctors in short supply, report finds*, WASH. POST (Sept. 25, 2013), [https://www.washingtonpost.com/national/health-science/shortage-of-primary-care-doctors-in-dc-new-report-finds/2013/09/25/2c05ccba-2592-11e3-b3e9-d97fb087acd6\\_story.html?utm\\_term=.5b402b4d5778](https://www.washingtonpost.com/national/health-science/shortage-of-primary-care-doctors-in-dc-new-report-finds/2013/09/25/2c05ccba-2592-11e3-b3e9-d97fb087acd6_story.html?utm_term=.5b402b4d5778) [https://perma.cc/87G4-PSFV].

95. Phil Galewitz, *Doctors face big cuts in Medicaid pay*, USA TODAY (Jan. 4, 2015), <https://www.usatoday.com/story/news/nation/2015/01/04/kaiser-health-news-docs-face-big-cuts-in-medicaid-pay/21227683/> [https://perma.cc/WGV5-43UZ].

Yet, Medicaid expansion has proved popular in states that have embraced it, and the program itself enjoys strong public support—in part, perhaps, due to attacks upon it in 2017 by congressional Republicans. June 2017 polling by the Kaiser Family Foundation found 74 percent of the public supporting Medicaid.<sup>96</sup> The idea of cutting funding overall only enjoyed the support of 12 percent of the public.<sup>97</sup>

#### MEDICAID EXPANSION IN 2018

The year 2018 brought considerable success in Medicaid expansion. In June, Virginia’s Democratic Governor Ralph Northam signed Medicaid expansion into law, bringing, as the *Washington Post* reported, “a Medicaid battle that raged for four years under his predecessor to an upbeat, bipartisan close.”<sup>98</sup> The Republican House speaker “backed expansion with work requirements, co-pays and other conservative strings attached.”<sup>99</sup> Virginia became the 33rd state (plus the District of Columbia) to expand Medicaid.<sup>100</sup>

Arkansas was the first state to implement a work requirement, of eighty hours a month, for its Medicaid expansion population.<sup>101</sup> The Trump administration is pushing for such work requirements, under a new policy where “work or participation in other community engagement activities –

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96. *Data Note: 10 Charts About Public Opinion on Medicaid*, KAISER FAMILY FOUND. (June 27, 2017), <https://www.kff.org/medicaid/poll-finding/data-note-10-charts-about-public-opinion-on-medicaid/> [<https://perma.cc/A33P-78SS>]. Opinion has held steady—in a February 2018 poll even 65 percent of Republicans had an opinion of Medicaid that was “somewhat favorable” or better. See Dylan Scott, *Poll: Medicaid is overwhelmingly popular, even as Trump looks to cut it*, VOX (Mar. 1, 2018), <https://www.vox.com/policy-and-politics/2018/3/1/17066578/medicaid-work-requirements-poll-kff> [<https://perma.cc/PG2B-NWL5>].

97. KAISER FAMILY FOUND., *supra* note 96.

98. Laura Vozzella, *Northam signs Medicaid expansion into law on steps of Virginia Capitol*, WASH. POST (June 7, 2018), [https://www.washingtonpost.com/local/virginia-politics/northam-signs-medicaid-expansion-into-law-on-steps-of-virginia-capitol/2018/06/07/2153af60-69a5-11e8-bf8c-f9ed2e672adf\\_story.html](https://www.washingtonpost.com/local/virginia-politics/northam-signs-medicaid-expansion-into-law-on-steps-of-virginia-capitol/2018/06/07/2153af60-69a5-11e8-bf8c-f9ed2e672adf_story.html) [<https://perma.cc/EM4S-NHH7>] (noting, though, “there were signs that the politics of ‘Obamacare’ expansion remained fraught for Republicans. Of the 23 Republicans who supported expansion between the House and Senate, only three attended[.]”).

99. *Id.*

100. *Id.*

101. See Jessica Greene, *Medicaid Recipients’ Early Experience With the Arkansas Medicaid Work Requirement*, HEALTH AFF. (Sept. 5, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180904.979085/full/> [<https://perma.cc/AY7L-YNXT>] (“What I found was a profound lack of awareness about the policy. A number of people were at risk for losing their Medicaid health coverage because of complex life circumstances, not because of a conscious decision related to the work requirement.”).

including skills training, education, job search, volunteering or caregiving” are “a condition for Medicaid eligibility for able-bodied, working-age adults.”<sup>102</sup> The federal head of the Medicaid program, Seema Verma, has been quoted saying that she has “heard the criticism and felt the resistance, but [she] reject[s] the premise and here is why: It is not compassionate to trap people on government programs or create greater dependency on public assistance as we expand programs like Medicaid....”<sup>103</sup>

In 2018, both Michigan and New Hampshire augmented their existing expansion programs with work requirements. In the case of Michigan, it was an eighty-hour monthly work requirement for adult enrollees.<sup>104</sup> In New Hampshire, in opposing work requirements, New Hampshire Legal Assistance noted “about 65 percent of the 52,000 people in the Medicaid expansion population are already working, and 77 percent come from working households.”<sup>105</sup> Wisconsin, which has *not* expanded Medicaid, even

102. U.S. Centers for Medicare & Medicaid Servs., *CMS announces new policy guidance for states to test community engagement for able-bodied adults*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS. (Jan. 11, 2018), <https://www.cms.gov/newsroom/press-releases/cms-announces-new-policy-guidance-states-test-community-engagement-able-bodied-adults> [<https://perma.cc/NC4T-XEDP>].

103. Virgil Dickson, *Verma touts Medicaid work requirement successes, despite coverage loss*, MOD. HEALTHCARE (Sept. 27, 2018), <https://www.modernhealthcare.com/article/20180927/NEWS/180929907> [<https://perma.cc/PTL2-P5H8>] (responding to news that “more than 4,300 Medicaid expansion enrollees in Arkansas are losing coverage because they did not comply with the state’s work requirement mandate. . . .”).

104. Jonathan Oosting, *Snyder signs 80-hour Medicaid work requirement law*, DETROIT NEWS (June 22, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/06/22/michigan-medicaid-work-requirement-law/726538002/> [<https://perma.cc/K8U8-JZQV>].

105. Kevin Landrigan, *Sununu signs 'landmark' Medicaid expansion legislation, reversing previous stance on program*, UNION LEADER (June 30, 2018), <http://201-ulweb.newscyclecloud.com/Sununu-signs-landmark-Medicaid-expansion-legislation&template=mobileart> [<https://perma.cc/2AAS-QECQ>]. Chris Sununu, New Hampshire’s Republican governor, had as recently as 2013 tweeted against Medicaid expansion: “Medicaid Expansion will seriously damage the #NH economy[.]” Chris Sununu (@ChrisSununu), TWITTER (Aug. 27, 2013, 9:08 PM), <https://twitter.com/chrissununu/status/372526125601148928> [<https://perma.cc/BV4J-VECB>]. It may be that work requirements provide cover for Republicans to support Medicaid expansion, and most would agree that conditional access to coverage is better than no access. However, there is no real evidence of the efficacy of such requirements. See, e.g., Rachel Garfield et al., *Implications of Work Requirements in Medicaid: What Does the Data Say?*, KAISER FAMILY FOUND. (June 12, 2018), <https://www.kff.org/medicaid/issue-brief/implications-of-work-requirements-in-medicaid-what-does-the-data-say/> [<https://perma.cc/8NWH-329U>] (reporting that only 6% “of adult Medicaid enrollees are not already working and unlikely to meet an exemption and thus are the stated target of work requirements. However, systems to track work reporting and to process exemptions would apply to much larger shares of enrollees, both workers and those seeking exemptions.”). In New Hampshire, critics “are concerned that small business owners could be negatively im-

won Trump Administration approval “to compel certain poor residents to disclose behavior such as drinking and exercise to qualify for Medicaid — and to charge more to people whose behavior the state judges as risky.”<sup>106</sup> The presumption seems to be that the medically-indigent are completely irresponsible.<sup>107</sup>

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pacted because self-employment hours do not count toward the work requirements. Additionally, there are concerns about the administrative burden for both the beneficiaries and the state that could result in the loss of coverage for many.” Paula S. Atkeson & David K. Jones, *The Sustainability And Vulnerability Of Medicaid Expansion: Four States To Watch In 2018*, HEALTH AFFAIRS (Aug. 16, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180813.571484/full> [<https://perma.cc/N6YR-38R7>]. Somehow in approving New Hampshire’s work requirements the Trump Administration made them *more* onerous, sparking outrage among Democrats. See Jason Moon, *Lawmakers Object to Trump Administration Changes to N.H.’s Medicaid Expansion Program*, NHPR (Dec. 20, 2018), <https://www.nhpr.org/post/lawmakers-object-trump-administration-changes-nhs-medicaid-expansion-program#stream/0> [<https://perma.cc/3JQ9-GVKB>].

106. Amy Goldstein, *Trump administration allows Wisconsin to question Medicaid applicants about risky behavior*, WASH. POST (Oct. 31, 2018), [https://www.washingtonpost.com/national/health-science/trump-administration-allows-wisconsin-to-question-medicaid-applicants-about-risky-behavior/2018/10/31/8bc2663e-dd36-11e8-b3f0-62607289efee\\_story.html?noredirect=on&utm\\_term=.d0fda7674e33](https://www.washingtonpost.com/national/health-science/trump-administration-allows-wisconsin-to-question-medicaid-applicants-about-risky-behavior/2018/10/31/8bc2663e-dd36-11e8-b3f0-62607289efee_story.html?noredirect=on&utm_term=.d0fda7674e33) [<https://perma.cc/D3CE-U4SS>].

107. Pennsylvania’s Democratic governor vetoed the attempt by his Republican legislature to add work requirements, drawing a conservative activist’s histrionic accusation that “[t]his opportunity to escape from the plantation of poverty has been shattered by Gov. Tom Wolf who vetoed the bill out of fidelity to an immoral belief in perpetual government dependency.” Lowman S. Henry, *Tom Wolf’s immoral approach to poverty*, THE MERCURY (Oct. 31, 2018), [https://www.pottsmmerc.com/opinion/lowman-s-henry-tom-wolf-s-immoral-approach-to-poverty/article\\_aa4e6064-dd75-11e8-8220-4ba9fdeec1e1.html](https://www.pottsmmerc.com/opinion/lowman-s-henry-tom-wolf-s-immoral-approach-to-poverty/article_aa4e6064-dd75-11e8-8220-4ba9fdeec1e1.html) [<https://perma.cc/DDD6-4XQC>]. In Illinois in October 2018, subsequently-defeated Republican Governor Bruce Rauner lamented his state’s Medicaid expansion:

Rauner, who previously said he would have vetoed the Medicaid expansion, told The State Journal-Register in a recent interview that he is concerned about the impact of the expansion on Illinois taxpayers and disturbed by the trend of more people getting publicly financed health insurance rather than employer-sponsored coverage.

The governor said the expansion “basically has dramatically increased costs for taxpayers, and it has increased the number of folks who are getting health care at the expense of taxpayers rather than through working, and I think that’s a wrong trend.”

Dean Olsen, *Rauner skeptical about value of ACA-funded Medicaid expansion to Illinois taxpayers*, STATE J.-REG. (Oct. 13, 2018), <https://www.sj-r.com/news/20181013/rauner-skeptical-about-value-of-aca-funded-medicaid-expansion-to-illinois-taxpayers> [<https://perma.cc/J8YR-9UZB>]. However, an expansion proponent was quoted stating Rauner’s remarks were consistent with a “very biased, conservative narrative that lazy people are on Medicaid” and it was also reported that “[i]n the current fiscal year, all but \$218 million of the estimated \$3.35 billion cost for the newly eligible Medicaid population will be

It may still be possible to go too far. Kentucky's far-right Republican Governor Matt Bevin saw his plan to impose work requirements and co-payments to Medicaid expansion rejected by a federal judge.<sup>108</sup> In vacating the Trump Administration's approval of Bevin's plan, a United States District Court judge in Washington, D.C. "found the federal government failed to consider the fact that an estimated 95,000 people would lose Medicaid coverage under the changes."<sup>109</sup> Adding insult to injury, a Kentucky United States District Court judge then "dismissed a lawsuit Bevin filed in Frankfort against the 16 Kentuckians who challenged his Medicaid changes in the Washington lawsuit."<sup>110</sup>

In 2018, Medicaid expansion was on the ballot in four states: Idaho, Montana, Nebraska, and Utah.<sup>111</sup> The push to get Medicaid before voters was led by a nonprofit organization called The Fairness Project, which "is funded by the SEIU United Healthcare Workers West, a California health care workers union."<sup>112</sup> In a misleading editorial, the *Wall Street Journal* urged voters to reject all four measures: "One of the worst deals in state spending is coming to a red state near you, and that's expanding Medicaid to adult men above the poverty line."<sup>113</sup>

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reimbursed to the state by the federal government." *Id.* It is hard to argue against the economics of that bargain.

108. Deborah Yetter, *Matt Bevin's attempt to sue Kentuckians over Medicaid plan is rejected*, LOUISVILLE COURIER J. (Aug. 20, 2018), <https://www.courier-journal.com/story/news/2018/08/20/judge-dismisses-matt-bevin-lawsuit-medicaid-overhaul-dispute/1042660002/> [<https://perma.cc/8BYK-6RXR>].

109. *Id.*

110. *Id.* Noting the animus of the Trump Administration toward Medicaid expansion – as expressed by the U.S. Department of Health and Human Services secretary – the district court judge in D.C. noted that in approving Kentucky's plan "[t]he Secretary at times suggests that he prioritized coverage for 'traditional' Medicaid populations. Even accepting that argument on its own terms, however, it would hardly justify his actions here." *Stewart v. Azar*, 313 F. Supp. 3d 237, 268 (D. D.C. 2018). As the judge pointed out: "In any event, the Secretary's focus on 'traditional' Medicaid populations was misplaced. Whatever the 'traditional' purpose of Medicaid, the program was amended by the Affordable Care Act." *Id.* at 269.

111. Alison Kodjak, *Voters In 4 States Set To Decide On Medicaid Expansion*, NPR (Oct. 31, 2018), <https://www.npr.org/sections/health-shots/2018/10/31/659452120/voters-in-4-states-set-to-decide-on-medicaid-expansion> [<https://perma.cc/FK79-BZDA>].

112. *Id.*

113. *ObamaCare's Red State Trap*, WALL STREET J. (Oct. 29, 2018), <https://www.wsj.com/articles/obamacares-red-state-trap-1540853774> [<https://perma.cc/785Q-5SUK>]. The gratuitous gender reference ignored the fact that adult women, too, would be beneficiaries – the editorial acknowledges that "poor mothers and babies" are already covered by traditional Medicaid which, even if true, makes a poor woman's access to health care conditional upon childbearing. *Id.* Similarly-misleading imagery came in an attack ad against Nebraska's expansion effort: "One of the ads said the measure would raise taxes by hundreds of millions of dollars and give free health care to able-bodied adults, showing an image of a young man slouched on a couch eating potato chips." Henry

In Montana, which had already expanded Medicaid, the question in Initiative 185 was simply “whether to approve a tobacco tax to continue that state's Medicaid expansion or let it roll back next year.”<sup>114</sup> Opponents of the measure vastly outspent supporters.<sup>115</sup> Yet, the economic sense of expansion was obvious, as an April 2018 article reported:

Montana’s Medicaid expansion that widened who can get health coverage is saving the state money. And while Montana’s cost could outpace its spending starting next year, a new report says the program’s boost to the economy will offset the difference and then some.

The University of Montana’s Bureau of Business and Economic Research released the independent analysis today. According to the analysis, even if people signing up for the program plateaus, the expansion will spit out \$350 million to \$400 million of new spending in Montana’s economy each year.<sup>116</sup>

In supporting Nebraska’s Initiative 427, the *Omaha World-Herald* editorialized that Medicaid expansion would help local economies by boosting the buying power of low-income households. The estimated \$570 million in federal funding by 2022 would spur job growth in Nebraska’s health care sector. Based on experience in other expansion states, Nebraska could see an estimated 5,500 new health care and social services jobs.<sup>117</sup>

J. Cordes, *Nebraskans approve expanding Medicaid to cover more of the state's low-income residents*, WORLD-HERALD (Nov. 7, 2018), [https://www.omaha.com/livewellnebraska/health/nebraskans-approve-expanding-medicaid-to-cover-more-of-the-state/article\\_389878a4-74a3-5a82-a482-3bc43bb1bb79.html](https://www.omaha.com/livewellnebraska/health/nebraskans-approve-expanding-medicaid-to-cover-more-of-the-state/article_389878a4-74a3-5a82-a482-3bc43bb1bb79.html) [https://perma.cc/5NF2-VNN7]. Actually, of the 2.2 million Americans in the “coverage gap” on non-expansion states, 48% are women according to the Kaiser Family Foundation. See *The Coverage Gap*, *supra* note 23.

114. *Id.*

115. Eric Whitney, *Record Spending Against Montana's I-185 Tobacco Tax*, MTPR (Oct. 28, 2018), <http://www.mtpr.org/post/record-spending-against-montanas-i-185-tobacco-tax> [https://perma.cc/Q7QZ-47X3] (“The ballot initiative to raise tobacco taxes and continue Medicaid expansion has drawn more than \$17 million in spending from tobacco companies. Most has come from cigarette maker Altria, and it’s more than the company has ever spent on any proposed ballot measure nationwide.”).

116. Katheryn Houghton, *Report shows Montana’s Medicaid expansion paying for itself*, BOZEMAN DAILY CHRON. (Apr. 11, 2018), [https://www.bozemandailychronicle.com/news/health/report-shows-montana-s-medicaid-expansion-paying-for-itself/article\\_de75d2c2-8da3-5ed4-835e-dbfbaedc8864.html](https://www.bozemandailychronicle.com/news/health/report-shows-montana-s-medicaid-expansion-paying-for-itself/article_de75d2c2-8da3-5ed4-835e-dbfbaedc8864.html) [https://perma.cc/N5A9-FW92].

117. Editorial, *Medicaid expansion is in Nebraska's best interest, deserves voter approval*, OMAHA WORLD-HERALD (Oct. 28, 2018), [https://www.omaha.com/opinion/editorial-medicaid-expansion-is-in-nebraska-s-best-interest-deserves/article\\_1e848661-b031-5e67-9e66-97b5f32036c8.html](https://www.omaha.com/opinion/editorial-medicaid-expansion-is-in-nebraska-s-best-interest-deserves/article_1e848661-b031-5e67-9e66-97b5f32036c8.html) [https://perma.cc/VRT2-W5H4].

An opposition group was shielded from disclosing its contributors.<sup>118</sup> The Republican governor, Pete Ricketts, had ardently opposed expansion, in dramatic terms:

History has shown that taking money from taxpayers and giving it to another group of individuals through an entitlement program does not result in real or sustainable economic development. If you could simply grow an economy through the transfer of wealth by government, poverty would not have existed under Soviet rule of Russia and our Federal Government could simply spend its way out of any recession. Expanding Medicaid will not result in the tax relief and good-paying jobs we need to grow Nebraska for the next generation.<sup>119</sup>

According to reporting, “[t]he Utah plan, as laid out on the ballot, is to fund the Medicaid expansion by adding 0.15 percent to the state's sales tax,

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118. Henry J. Cordes, *Opposition group is shielded from public disclosure on Medicaid expansion ads*, OMAHA WORLD-HERALD (Oct. 27, 2018), [https://www.omaha.com/livewellnebraska/health/opposition-group-is-shielded-from-public-disclosure-on-medicaid-expansion/article\\_3f043826-dd1a-5b0b-b5fc-f7c6ca5de0e6.html](https://www.omaha.com/livewellnebraska/health/opposition-group-is-shielded-from-public-disclosure-on-medicaid-expansion/article_3f043826-dd1a-5b0b-b5fc-f7c6ca5de0e6.html) [https://perma.cc/PB27-PU9Z] (“a spokesperson for the group said that since the ads are only informational — not specifically telling voters to oppose Initiative 427 — Nebraska laws governing the disclosure of campaign donations and how much is being spent do not apply.”). However, Nebraska’s most famous billionaire, Warren Buffett, openly gave \$200,000 in support of I-427. See Henry J. Cordes, *Warren Buffett, Walter Scott give big dollars to push Medicaid expansion in Nebraska*, LIVE WELL NEBRASKA (Nov. 1, 2018), [https://www.omaha.com/livewellnebraska/warren-buffett-walter-scott-give-big-dollars-to-push-medicaid/article\\_2a9f3084-da0a-5411-ad58-92cd54a774fe.html](https://www.omaha.com/livewellnebraska/warren-buffett-walter-scott-give-big-dollars-to-push-medicaid/article_2a9f3084-da0a-5411-ad58-92cd54a774fe.html) [https://perma.cc/E9Z5-NGQF].

119. Jacob Weindling, *Big News - Nebraska Will Get to Vote on Medicaid Expansion This November*, PASTE (Aug. 27, 2018), <https://www.pastemagazine.com/articles/2018/08/big-news-nebraska-will-get-to-vote-on-medicaid-exp.html> [https://perma.cc/N7Z3-ZGJS]. Ricketts’ history lesson, among other things, ignored the fact that the federal government typically *does* “spend its way out of any recession.” It’s called economic stimulus. Ricketts’ family was once threatened by then-candidate Trump on Twitter, until Ricketts pledged his support for Trump: “I hear the Ricketts family, who own the Chicago Cubs, are secretly spending \$’s against me. They better be careful, they have a lot to hide!” Martha Stoddard, *Ricketts says he will support Donald Trump's presidential bid*, OMAHA WORLD-HERALD (May 5, 2016), [https://www.omaha.com/news/politics/ricketts-says-he-will-support-donald-trump-s-presidential-bid/article\\_88c03d4f-88f9-5f49-8636-9a72064d3414.html](https://www.omaha.com/news/politics/ricketts-says-he-will-support-donald-trump-s-presidential-bid/article_88c03d4f-88f9-5f49-8636-9a72064d3414.html) [https://perma.cc/CM4K-UJ9J]. And, under Twitter pressure, the family then went on to heavily-fund Trump’s 2016 presidential campaign. See Brody Mullins & Rebecca Ballhaus, *After Failing in Costly Anti-Trump Effort, Ameritrade Founder Joe Ricketts to Back Nominee*, WALL STREET J. (Sept. 20, 2016), <https://www.wsj.com/articles/after-failing-in-costly-anti-trump-effort-ameritrade-founder-joe-ricketts-to-back-nominee-1474381503> [https://perma.cc/2VMM-2VTJ].

which works out to about 1.5 cents for every \$10 residents spend on non-food purchases.”<sup>120</sup> Proposition 3 was introduced as an alternative to a more modest expansion law signed by the Republican governor in 2018 that would have only brought access to coverage to fewer than half as many residents.<sup>121</sup> As the *New York Times* reported a month before the election:

Utah has asked the Trump administration for a waiver to permit the “partial expansion” of Medicaid. White House officials, who oppose any expansion of “Obamacare,” have resisted the idea, leaving Mr. Herbert, the governor, in an awkward position. He had been hoping by now to have federal approval for his preferred alternative to the ballot initiative.<sup>122</sup>

Thus, Gov. Herbert did not actively oppose the ballot measure, and the influential Church of Jesus Christ of Latter-day Saints took no position.<sup>123</sup>

120. *Id.*

121. See Luke Ramseth, *Utah governor signs Medicaid expansion bill. Now, Utah waits to see if the feds will approve it.*, SALT LAKE TRIB. (Mar. 28, 2018), <https://www.sltrib.com/news/health/2018/03/28/utah-governor-signs-medicaid-expansion-bill-now-utah-waits-to-see-if-the-feds-will-approve-it/> [<https://perma.cc/QA8T-GZK7>].

122. Robert Pear, *Medicaid Expansion Finds Grass-Roots Support in Conservative Utah*, N.Y. TIMES (Sept. 9, 2018), <https://www.nytimes.com/2018/09/09/us/politics/utah-medicaid-expansion.html> [<https://perma.cc/YE8U-29VL>].

123. *Id.* However, the church-owned newspaper urged support. See Editorial, *In our opinion: Proposition 3 would make a healthier Utah*, DESERET NEWS (Oct. 27, 2018), <https://www.deseretnews.com/article/900038991/in-our-opinion-proposition-3-would-make-a-healthier-utah.html> [<https://perma.cc/2A75-2EQ9>] (“Passing Proposition 3 is estimated to create 14,000 jobs across multiple industries and grow the economy by an estimated \$1.7 billion, according to the Utah Healthy Policy Project. In this way, Proposition 3 benefits all of Utah, not just those in need of health care.”). The secular *Salt Lake Tribune* also editorially supported Proposition 3:

If Prop 3 passes, Utah voters will have commanded their reticent state government to accept the expansion, take the money, and provide coverage to some 150,000 working and low-income Utahns who now, through no fault of their own, lack the kind of access to health care that the residents of 33 other states — and every nation considered civilized — take for granted.

Editorial, *Vote yes on Utah Propositions 2, 3 and 4*, SALT LAKE TRIB. (Oct. 14, 2018), <https://www.sltrib.com/opinion/editorial/2018/10/14/tribune-editorial-vote/>

[<https://perma.cc/9T2B-T28M>]. After the measure passed, the *Tribune* issued a warning:

Gov. Gary Herbert tried to craft a politically palatable way to bring much needed federal Medicaid dollars to Utah in 2014. But Healthy Utah failed in the 75-member House after getting only six votes. In the years since, Utah missed out on billions in health care dollars before the citizenry finally grabbed the wheel this week and passed Proposition 3. Be warned, lawmakers: Any attempt to kill Proposition 3 in the next session would be interpreted by the public as legislative malpractice.



However, it was reported that “thirty-seven Republican state legislators in Utah have formally opposed the ballot initiative.”<sup>124</sup> Moreover, “Utah is one of the reddest states in the country. It has not supported a Democrat for President since 1964.”<sup>125</sup>

Idaho’s Proposition 2 enjoyed last-minute, surprise support from a longtime ACA foe:

Outgoing Gov. C.L. “Butch” Otter, a conservative with an independent streak, announced his support and cut an ad for Idahoans for Healthcare, an organization advocating for expansion.

“We cannot continue to let hardworking Idahoans go without healthcare. I’m proud that the citizens of Idaho have come up with a solution to solve this long-standing problem,” Otter said in a release.

The ballot measure, Proposition 2, would cover up to 62,000 people and bring up to \$400 million from federal coffers to the state. Otter also said it would keep rural hospitals and clinics open.<sup>126</sup>

The opposition campaign was greatly-outgunned.<sup>127</sup>

Editorial, *Initiatives’ success is a shot across Legislature’s bow*, SALT LAKE TRIB. (Nov. 8, 2018), <https://www.sltrib.com/news/2018/11/08/tribune-editorial/> [https://perma.cc/2TY4-K3C4]. The *Deseret News* chimed in:

This is the full Medicaid expansion originally called for under Obamacare, and it comes with generous federal funding. The vote vindicates those who criticized state lawmakers for refusing to consider it in recent years. We may soon know, however, whether lawmakers were correct in worrying that this move would lead eventually to runaway costs.

Editorial, *In our opinion: Ballot initiatives aren’t turning Utah into California just yet*, DESERET NEWS (Nov. 8, 2018), <https://www.deseretnews.com/article/900040919/in-our-opinion-ballot-initiatives-arent-turning-utah-into-california-just-yet.html> [https://perma.cc/ZD8P-5BX7].

124. Amanda Schaffer, *The Grassroots Activists Who Got Medicaid on the Ballot in Utah*, NEW YORKER (Nov. 1, 2018), <https://www.newyorker.com/news/dispatch/the-grassroots-activists-who-got-medicaid-on-the-ballot-in-utah> [https://perma.cc/2DTL-LTR9].

125. *Id.*

126. Colby Itkowitz, *Republican governor of Idaho backs ballot measure expanding Medicaid*, WASH. POST (Oct. 30, 2018), [https://www.washingtonpost.com/politics/republican-governor-of-idaho-backs-ballot-measure-expanding-medicaid/2018/10/30/e485340e-dc6e-11e8-85df-7a6b4d25cfbb\\_story.html?utm\\_term=.c700d1bdac1b](https://www.washingtonpost.com/politics/republican-governor-of-idaho-backs-ballot-measure-expanding-medicaid/2018/10/30/e485340e-dc6e-11e8-85df-7a6b4d25cfbb_story.html?utm_term=.c700d1bdac1b) [https://perma.cc/V723-4XQF].

127. “In Idaho, a political-action committee called Work, Not Obamacare has raised almost \$30,000 and spent about \$10,000 opposing the state’s ballot initiative, according to a

Expansion won in Idaho, Nebraska, and Utah, while succumbing to Big Tobacco's spending in Montana.<sup>128</sup> The Montana outcome shows the challenge for states in coming up with even 10% of the costs of Medicaid

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campaign disclosure documents. A libertarian think tank, the Idaho Freedom Foundation, is a major donor." Stephanie Armour, *Medicaid-Expansion Fights Pit Hospitals, Labor Against Conservative Groups, Tobacco Companies*, WALL STREET J. (Oct. 20, 2018), <https://www.wsj.com/articles/medicaid-expansion-fights-pit-hospitals-labor-against-conservative-groups-tobacco-companies-1540051201> [<https://perma.cc/3B7B-FUKJ>]. In contrast:

Idahoans for Healthcare had raised more than \$500,000 and spent about \$260,000 through Sept. 3, and it received almost \$550,000 in start-up funds from The Fairness Project, a group with strong labor backing. Reclaim Idaho has spent almost \$79,000, disclosure forms show. Among their larger donors are the Idaho Academy of Family Physicians, the Idaho Medical Association, and the Idaho Hospital Association.

*Id.*

128. See Abby Goodnough, *Idaho, Nebraska and Utah Vote to Expand Medicaid*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/2018/11/07/health/medicaid-expansion-ballot.html> [<https://perma.cc/8546-4SLX>]. There is a caveat, however:

In Nebraska and Idaho, the ballot initiatives did not include a way to pay the state share of expansion costs. That could potentially make them vulnerable to the type of stalling that's happened in Maine, where Mr. LePage has grounded his resistance in the fact that the initiative did not include a funding mechanism.

*Id.* However, in Idaho, Republican Governor-elect Brad Little had stated during his gubernatorial campaign that "expanding Medicaid is not his first choice, but if voters approve Proposition 2 he'll work with lawmakers to implement it." *Idaho voters will select new governor, decide on Medicaid*, MOSCOW-PULLMAN DAILY NEWS (Nov. 5, 2018), [https://dnews.com/election\\_2018/idaho-voters-will-select-new-governor-decide-on-medicaid/article\\_be4226bf-c954-556d-bb55-b3d116493fa2.html](https://dnews.com/election_2018/idaho-voters-will-select-new-governor-decide-on-medicaid/article_be4226bf-c954-556d-bb55-b3d116493fa2.html) [<https://perma.cc/Z87H-JKSN>]. Not everyone was inclined to be as cooperative:

The morning after Idahoans voted to pass expansion, the Idaho Freedom Foundation said it's going to keep fighting the plan.

The conservative political organization said the ballot measure was "poorly worded and likely unconstitutional."

Audrey Dutton, *Idahoans made Medicaid expansion the law. What happens next?*, IDAHO STATESMAN (Nov. 7, 2018), <https://www.idahostatesman.com/news/politics-government/state-politics/article221290050.html> [<https://perma.cc/BTA5-TTCM>]. In Nebraska, as one newspaper reported:

Nebraska Gov. Pete Ricketts promised Wednesday to follow the will of voters who chose to expand Medicaid under the federal health care law, but warned that he will oppose any effort to pay for it with tax increases.

The Republican governor said the measure will have to be covered by existing state tax revenue, even if that means less money for K-12 schools, roads or lowering property taxes.

Grant Schulte, *Ricketts: Medicaid expansion must come from existing budget*, AP NEWS (Nov. 7, 2018), <https://www.apnews.com/31e7c9fb078549d7adfe274b6ac857df> [<https://perma.cc/3C5J-H6US>].

expansion.<sup>129</sup> A “sin tax” on cigarettes may have seemed like a sure thing, but every discrete revenue source will have its opponents.

In Utah, however, victory was not enough. The *Washington Post* reported that “the Utah legislature rushed to shred that initiative” and Gov. Herbert signed an amended law that “expands Medicaid only to people earning up to the poverty line” (as opposed to up to 138 percent of the poverty line) and yet expects “the federal government to pay the state the more generous reimbursement reserved for a full expansion under the ACA.”<sup>130</sup>

Where Medicaid has been expanded, it has reduced not just economic, but racial, disparities in access to health care—a 2017 study found that “Hispanics – notably, the group with the greatest barriers to access – tended to

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129. In Montana, the failure of the ballot measure meant “the expanded Medicaid program covering 96,000 people will expire next year unless the Montana Legislature renews it. That sets up a potential repeat of the 2015 battle between the Republican-led Legislature and Democratic Gov. Steve Bullock before compromise legislation passed with bipartisan support.” Matt Volz, *Montana voters reject paying for Medicaid expansion with tobacco tax*, MONTANA STANDARD (Nov. 7, 2018), [https://mtstandard.com/news/state-and-regional/montana/montana-voters-reject-paying-for-medicaid-expansion-with-tobacco-tax/article\\_3a54175c-82b8-5dbe-b24d-b7de2c7cf04b.html](https://mtstandard.com/news/state-and-regional/montana/montana-voters-reject-paying-for-medicaid-expansion-with-tobacco-tax/article_3a54175c-82b8-5dbe-b24d-b7de2c7cf04b.html) [https://perma.cc/NDB4-MG6J]. One key Republican House member stated “conservatives in the Legislature want recipients of expansion benefits to face a tougher work requirement, and for means testing, so those with low incomes who also have significant assets like real estate won't qualify.” Eric Whitney, *After Midterm Defeat, Advocates For Montana's Medicaid Expansion Turn To Legislature*, NPR (Nov. 8, 2018), <https://www.npr.org/sections/health-shots/2018/11/08/665770578/after-midterm-defeat-advocates-for-montanas-medicaid-expansion-turn-to-legislature> [https://perma.cc/D36S-RQ43]. As the 2019 legislative session began, Gov. Bullock touted Medicaid expansion as positive for the state's businesses. See Phil Drake, *Governor says Medicaid expansion good for business*, GREAT FALLS TRIB. (Jan. 8, 2019), <https://www.greatfallstribune.com/story/news/2019/01/08/montana-governor-discuss-medicaid/2512260002/> [https://perma.cc/2E5S-MNUF]. A continuation of Medicaid expansion did pass the legislature in 2019: “The Medicaid expansion bill adds 80 hours of work or community engagement requirements per month, strengthens an asset test and increases premiums for people who remain on the program for more than two years.” Amy Beth Hanson, *Montana Legislature adjourns after passing \$10.3B budget*, WRAL.COM (Apr. 25, 2019), <https://www.wral.com/montana-legislature-nears-passage-of-10-3b-budget/18348064/>.

130. Amy Goldstein, *Utah lawmakers scale back voter-approved Medicaid expansion*, WASH. POST (Feb. 11, 2019). The *Salt Lake Tribune* declared the amendment effort “little more than a wanton act of cruelty.” Editorial, *Targeting Prop 3 is an act of cruelty*, SALT LAKE TRIB. (Jan. 28, 2019), <https://www.sltrib.com/opinion/editorial/2019/01/28/tribune-editorial/> [https://perma.cc/9K5U-8YKD]. In Idaho, the Republican legislature and governor also added their own touches to the expression of the people's will: “Idaho Gov. Brad Little has signed a bill that adds work requirements and other controversial sideboards to Idaho's Medicaid expansion.” Audrey Dutton, *Idaho Gov. Little signs bill to put work requirements on Medicaid expansion*, IDAHO STATESMAN (APR. 9, 2019), <https://www.idahostatesman.com/news/politics-government/state-politics/article229018249.html#storylink=cpy>.

see greater improvements in expansion versus nonexpansion states.”<sup>131</sup> According to another study, among Mississippi’s “Hispanics the uninsured number was 53 percent, the highest in the country.”<sup>132</sup> Race-baiting by President Trump is unlikely to increase the appetite of some conservatives to expand Medicaid; his falsehoods have included many claims that undocumented immigrants would receive, or are receiving, Medicaid.<sup>133</sup>

What is the future for Medicaid expansion? The election results would suggest it is bright, although it is troubling that two of the nation’s three most-populous states, Florida and Texas, have not expanded Medicaid.<sup>134</sup> In Texas, Republican Gov. Greg Abbott has crowed about a reduction in the number of uninsured residents, but it has been noted that “health care experts and studies . . . have largely attributed the decline in uninsured residents to the Affordable Care Act, which Abbott and his allies have fought.”<sup>135</sup> The reality is that Texas “continues to lead the nation with the highest rate of uninsured residents.”<sup>136</sup> And “Texas still had more than 750,000 *children* who lacked health insurance as of 2016,” according to one report.<sup>137</sup> One study found that “[h]ospitals in states that expanded Medicaid were about 6 times less likely to close than hospitals in non-expansion

131. Susan L. Hayes et al., *Reducing Racial and Ethnic Disparities in Access to Care: Has the Affordable Care Act Made a Difference?*, COMMONWEALTH FUND (Aug. 24, 2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/aug/reducing-racial-and-ethnic-disparities-access-care-has> [<https://perma.cc/4LBP-BSDV>].

132. Larrison Campbell, *Study rates Mississippi 49th in healthcare access and affordability*, MISS. TODAY (Dec. 22, 2016), <https://mississippitoday.org/2016/12/22/study-rates-mississippi-49th-in-healthcare-access/> [<https://perma.cc/2PTK-7WZQ>].

133. See, e.g., Glenn Kessler, *A witches’ brew of over-the-top Trump attacks*, WASH. POST (Oct. 24, 2018), [https://www.washingtonpost.com/politics/2018/10/24/president-trumps-witches-brew-over-the-top-attacks/?utm\\_term=.ccf591b421e2](https://www.washingtonpost.com/politics/2018/10/24/president-trumps-witches-brew-over-the-top-attacks/?utm_term=.ccf591b421e2) [<https://perma.cc/V723-4XQF>] (Quoting Trump: “The Democrat plan to destroy American health care includes free health care and education to illegal aliens paid for by you, thank you very much, the American taxpayer.”).

134. Although Florida Gov. Scott had at least feigned support for Medicaid expansion at one point, his successor, Republican Congressman Ron DeSantis, ruled it out: DeSantis has said he would not push to expand Medicaid.

“Expanding Medicaid would extend to able-bodied adults,” he said in a statement. “That’s not what Medicaid was designed for, that’s not what taxpayers pay for, and that’s not how healthcare or government should work.”

Emily L. Mahoney, *What’s in the details of the healthcare plans of Florida’s candidates for governor?*, MIAMI HERALD (Oct. 31, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article220870545.html> [<https://perma.cc/Y563-TEJD>].

135. Allie Morris & Austin Bureau, *Despite Gov. Abbott’s ‘progress’ claim, Texas still No.1 for uninsured residents*, SAN ANTONIO EXPRESS-NEWS (Oct. 2, 2018), [https://www.expressnews.com/news/politics/texas\\_legislature/article/Despite-Gov-Abbott-s-progress-claim-13275614.php](https://www.expressnews.com/news/politics/texas_legislature/article/Despite-Gov-Abbott-s-progress-claim-13275614.php) [<https://perma.cc/4MRB-RVUH>].

136. *Id.*

137. *Id.* (emphasis added).

states”—while the payments are not great, they are certainly better than providing uncompensated care.<sup>138</sup>

The U.S. General Accounting Office, in an October 2018 report, noted that “[n]ine percent of low-income adults in expansion states reported that they could not afford needed medical care, compared with 20 percent of low-income adults in non-expansion states.”<sup>139</sup> Similarly, “[t]wenty-six percent of low-income adults in expansion states reported having any unmet medical needs, compared with 40 percent of those in non-expansion states.”<sup>140</sup> An inability to access preventive health care can lead the uninsured to go to emergency rooms, which cannot turn them away under the Emergency Medical Treatment and Labor Act of 1986.<sup>141</sup> Moreover, Medicaid expansion helps address the opiate misuse epidemic ravaging many parts of the nation.<sup>142</sup>

Janet Mills, Maine’s Democratic successor to Gov. LePage, promised to end his intransigent opposition to the voters’ will; indeed, as attorney general, her office was backing a *lawsuit* against him over the issue.<sup>143</sup> And on her first day as governor “Mills signed an executive order directing the Maine Department of Health and Human Services to ‘swiftly and efficient-

138. John Daley, *Hospitals In States That Expanded Medicaid Less Likely To Close*, NPR (Jan. 8, 2018), <https://www.npr.org/sections/health-shots/2018/01/08/576448351/hospitals-in-states-that-expanded-medicaid-less-likely-to-close> [<https://perma.cc/7GNU-WNP2>].

139. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-607, ACCESS TO HEALTH CARE FOR LOW-INCOME ADULTS WITH AND WITHOUT EXPANDED ELIGIBILITY 15 (2018) (footnote omitted).

140. *Id.*

141. *See* 42 U.S.C. §1395dd (2018).

142. *See, e.g.*, German Lopez, *Republicans claimed Medicaid made the opioid epidemic worse. A new study proves them wrong.*, VOX (Aug. 28, 2018), <https://www.vox.com/science-and-health/2018/8/28/17761462/medicaid-expansion-opioid-epidemic-obamacare> [<https://perma.cc/Q6KQ-DGP8>]; (noting that a “study found that the Medicaid expansion may help combat the opioid crisis by expanding or maintaining access to addiction treatment.”); *see also* Scott Malone, *Cuts to Medicaid could worsen U.S. opioid crisis, governors warn*, REUTERS (July 13, 2017), <https://www.reuters.com/article/us-usa-governors-opioids/cuts-to-medicaid-could-worsen-u-s-opioid-crisis-governors-warn-idUSKBN19Y2XH> [<https://perma.cc/A9LJ-ABY2>] (“Democratic and Republican governors meeting in Rhode Island warned that many residents of their states were relying on Medicaid to get treatment for opioid addiction, which grips an estimated 3 million Americans and killed 33,000 people in the United States in 2015, according to federal data.”).

143. *See* Joe Lawlor, *Mills says she’ll implement Medicaid expansion as soon as she’s governor*, PORTLAND HERALD (Nov. 8, 2018), <https://www.pressherald.com/2018/11/07/mills-says-shell-implement-medicaid-expansion-immediately/> [<https://perma.cc/GHT5-DXG6>] (“Governor-elect Janet Mills showed up at the Medicaid expansion lawsuit hearing in Maine Superior Court on Wednesday morning and said she would implement expansion immediately upon taking office.”).

ly' begin implementing voter-approved Medicaid expansion."<sup>144</sup> Laura Kelly, the new Democratic governor of Kansas, has promised to support the Medicaid expansion her predecessor vetoed.<sup>145</sup> Not every new Democratic governor will be able to bring expansion to a non-expansion state—Wisconsin's Republican House Speaker Robin Vos immediately vowed to block any such effort by Governor-elect Tony Evers.<sup>146</sup> Hospitals and other health care advocates continue to actively push for expansion even in con-

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144. Alex Acquisto & Michael Shepherd, *Mills signs order to expand Medicaid in Maine*, BANGOR DAILY NEWS (Jan. 3, 2019), <https://bangordailynews.com/2019/01/03/politics/mills-signs-order-to-expand-medicaid-in-maine/> [https://perma.cc/R3DT-EV5L].

145. See Mitch Smith, *Laura Kelly, a Kansas Democrat, Tops Kobach in Governor's Race*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/us/laura-kelly-wins-kansas-governors-race.html> [https://perma.cc/YP59-5ZAB]. According to one post-election account, "Republicans on Wednesday expressed fears that Kelly will propose significant new spending they view as unaffordable. Still, others said that on some issues, such as Medicaid expansion, Kelly likely will prevail." Jonathan Shorman, *Medicaid expansion? School funding? Kelly's plans face skeptical GOP Legislature*, WICHITA EAGLE (Nov. 8, 2018), <https://www.kansas.com/news/politics-government/article221308915.html> [https://perma.cc/APP3-V9U6].

146. See Patrick Marley & Molly Beck, *GOP Assembly Speaker Robin Vos threatens to take power away from Tony Evers before January*, MILWAUKEE J.SENT. (Nov. 7, 2018), <https://www.jsonline.com/story/news/politics/elections/2018/11/07/wisconsin-elections-tony-evers-likely-face-gridlock/1918875002/> [https://perma.cc/TRF7-JUYV]. As the article reports of Evers:

One of his goals is to take hundreds of millions of dollars in additional federal aid under the Affordable Care Act to expand BagderCare, the state's Medicaid program that provides health care to low-income people. Under such an arrangement, the state could cover more people and free up state taxpayer funds for other purposes.

Vos said last month he would never go along with such a plan.

"Not going to happen. No way. Never," Vos told reporters Oct. 2 after a forum hosted by Wispolitics.com.

He said he wouldn't be willing to accept the money even if Evers included it in a package to cut taxes, a top Republican goal.

"Medicaid right now does not pay the cost of your provider," Vos said.

"So the more people we put into Medicaid, the more the private sector will have to pay to subsidize those who are on Medicaid. So all it does is make the private system less stable."

*Id.* As providers (except for hospitals for which the alternative is *no* compensation) are under no obligation to take expansion patients, this assertion by Speaker Vos ignores economic realities.

servative states like Alabama,<sup>147</sup> Mississippi,<sup>148</sup> and Oklahoma.<sup>149</sup> Interestingly, research suggests Medicaid expansion increases voter turnout, at

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147. See Brian Lyman, *Alabama hospitals launch campaign for Medicaid expansion*, MONTGOMERY ADVERTISER (Sept. 21, 2018), <https://www.montgomeryadvertiser.com/story/news/politics/2018/09/21/alabama-hospitals-launch-campaign-medicaid-expansion/1382909002/> [<https://perma.cc/C25V-8V34>]. In Alabama:

Once focused on health, advocates of Medicaid expansion in Alabama will try wealth.

The Alabama Hospital Association has launched a campaign touting the potential economic benefits of expansion, which could extend health insurance to tens and possibly hundreds of thousands of working people in Alabama. While advocates have emphasized both elements in the past, Danne Howard, the executive vice president and chief policy officer of the AHA, said potential business benefits would be the focus of the campaign.

*Id.*

148. In Mississippi, “Medicaid expansion’s most ardent champion in the Legislature is Democrat Derrick T. Simmons, one of three state senators representing the gerrymandered Delta districts. Simmons, a native of Greenville in the heart of the Delta, has pushed for expansion against political tides since 2013.” Susannah Luthi, *Could deep-red Miss. expand Medicaid? 2019 will tell*, MODERN HEALTHCARE (Sept. 22, 2018), <https://www.modernhealthcare.com/article/20180922/NEWS/180929960/could-deep-red-miss-expand-medicaid-2019-will-tell> [<https://perma.cc/2K6Q-9LJ8>]. In 2018, “an April statewide poll that showed more than 52% of Mississippians support expanding Medicaid,” suggesting that, when a new governor is elected in 2019, “Simmons’ proposal now could have a chance.” *Id.* However, in a sign of how controversial the issue is, “[a]n early lobbying effort by hospitals resulted in a shakeup of the state hospital association, according to several observers of Mississippi politics, and hospital executives don’t want to talk about it.” *Id.* A 2018 House Democrat’s effort to amend a bill and allow Medicaid expansion revealed the odds against it:

As Johnson explained his amendment, he never said the phrase “Medicaid expansion,” which has become a lightning rod to many Republicans who oppose the Patient Protection and Affordable Care Act, known as Obamacare.

The Republican majority tabled the amendment (effectively killing it) by a 70-43 margin without its leaders engaging in debate on the issue on the House floor.

Bobby Harrison, *House rejects Medicaid expansion*, DAILY J. (Feb. 9, 2018), [https://www.djournal.com/news/house-rejects-medicaid-expansion/article\\_5841535f-7dfd-5741-aec6-1e6a4b483dc9.html](https://www.djournal.com/news/house-rejects-medicaid-expansion/article_5841535f-7dfd-5741-aec6-1e6a4b483dc9.html) [<https://perma.cc/RB7M-GDQH>]. Yet after the 2018 election Gov. Bryant was reported to be in secret conversations about expansion. See Paul Demko, *Mississippi’s Republican governor quietly considering Medicaid expansion*, POLITICO (Dec. 22, 2018), <https://www.politico.com/story/2018/12/22/mississippi-medicaid-expansion-phil-bryant-obamacare-1050178> [<https://perma.cc/AEP8-SEG6>] (“The behind-the-scenes move comes as a surprisingly viable Democratic gubernatorial candidate is planning to make Medicaid expansion a central issue in the 2019 election.”).

least in the near-term, perhaps as a result of feeling more connected to government.<sup>150</sup> And some states' policymakers are willing to go further than expansion alone: in Nevada, the Republican governor had, in 2017, vetoed a "Medicaid-for-all" bill.<sup>151</sup> But there are some caveats.

It is reasonable to be concerned about the largely-unchecked power of the Medicaid managed care insurers that the Obama Administration first allowed to flourish.

In Texas, the *Dallas Morning News* ran an exhaustive 2018 investigative series entitled "Pain & Profit," highlighting the vast amount of money paid to insurers to run the state's Medicaid program, and the arbitrary coverage denials that Medicaid beneficiaries received. As the paper noted, "years of inept state regulation have allowed corporations to profit as they skimp on care for sick kids and disabled adults in the program known as Medicaid managed care. And Texas health officials have hidden the full

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149. See Jackie Fortier, *Oklahoma's Rural Hospitals See A Lifeline In Medicaid Expansion*, KGOU (Nov. 1, 2018), <https://www.kgou.org/post/oklahoma-s-rural-hospitals-see-lifeline-medicaid-expansion> [<https://perma.cc/84QU-VMCZ>].

In Oklahoma hospitals are especially in danger:

As more GOP-led states with vast rural areas consider Medicaid expansion, supporters in Oklahoma are watching. They say it's the best solution to make sure rural hospitals survive.

"Because other states have found ways to accept these federal funds, they are moving forward, their hospitals are in better shape because of it," said Patti Davis, director of the Oklahoma Hospital Association.

Oklahoma's rural hospitals are in trouble: Four have closed in the past eight years, and the hospital association estimates that half of rural to mid-sized hospitals in the state are in danger of shuttering. Pauls Valley Regional Medical Center grabbed headlines for its recent closure.

It's a perfect storm for Oklahoma hospitals, Davis said.

*Id.* "About 250,000 people would have access to health insurance if Medicaid were expanded in Oklahoma," according to an article. *Id.* However, the incoming far-right Republican governor, Kevin Stitt, "opposes Medicaid expansion and says that too many Oklahomans are already enrolled." Catherine Sweeney, *Stitt wins governor's race*, J. RECORD (Nov. 6, 2018), <http://journalrecord.com/2018/11/06/stitt-wins-governors-race/> [<https://perma.cc/D2ZU-BJPR>].

150. Margot Sanger-Katz, *When Medicaid Expands, More People Vote*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/upshot/medicaid-expansion-voting-increase.html> [<https://perma.cc/DK3C-BT8R>] (theories abound as to why, including that "[p]erhaps enrollment in the program simply connected people with information about registration and voting, as it brought them into contact with government websites and case workers.").

151. David Montero, *Nevada governor vetoes Medicaid-for-all bill*, L.A. TIMES (June 17, 2017), <https://www.latimes.com/nation/la-na-nevada-medicaid-2017-story.html> [<https://perma.cc/7WLK-PJY2>].



extent of the problems from the public.”<sup>152</sup> The money involved is staggering: “Texas and the federal government pay about \$11.7 billion a year for the programs that care for the state’s sickest citizens. Nine out of 10 of those patients rely on five giant corporations: Superior, Amerigroup, Cigna, Molina and United Healthcare.”<sup>153</sup>

In Iowa, Medicaid managed care has been an objective disaster since it was first implemented by former Gov. Branstad. As the *Des Moines Register* editorialized: “A recent analysis from the Legislative Services Agency found per-member costs have risen an average of 4.4 percent since privatization, compared to 1.5 percent when Medicaid was managed by the state.”<sup>154</sup> And yet providers have had to sue to get paid.<sup>155</sup> It is inauspicious that the nation’s leader on Medicaid in the Trump Administration was the architect, while a private consultant, of this debacle.<sup>156</sup>

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152. J. David McSwane & Andrew Chavez, *As patients suffer, companies profit*, DALLAS MORNING NEWS (June 3, 2018), <https://interactives.dallasnews.com/2018/pain-and-profit/part2.html> [<https://perma.cc/5EMQ-G6AG>].

153. *Id.* One columnist notes that “[b]ehind the scenes, health plans that help administer Medicaid are also lobbying with hospitals to expand coverage in the 17 holdout states. Expanding Medicaid would boost companies like Anthem, Centene, Aetna, Molina Healthcare and UnitedHealth Group.” Bruce Japsen, *As Hospitals Close, Medicaid Expansion Rises In Deep South*, FORBES (Sept. 30, 2018), <https://www.forbes.com/sites/brucejapsen/2018/09/30/as-hospitals-close-medicaid-expansion-rises-in-deep-south/#77da2d962e44> [<https://perma.cc/94JQ-FKCK>].

154. *See, e.g.*, Editorial, *Iowa Medicaid director again dodges questions about his \$5 billion program*, DES MOINES REG. (Sept. 20, 2018), <https://www.desmoinesregister.com/story/opinion/editorials/2018/09/20/iowa-medicaid-privatization-financial-impact-cost-health-care-unknown-savings/1341951002/> [<https://perma.cc/HT3L-L6P2>]; *see also* Bruce Japsen, *Iowa GOP's Medicaid Troubles Could Hit Anthem And UnitedHealth Group*, FORBES (Oct. 28, 2018), <https://www.forbes.com/sites/brucejapsen/2018/10/28/iowa-gops-medicaid-troubles-could-slow-u-s-managed-care-shift/#79f15bcf1db7> [<https://perma.cc/F862-9F94>] (“One poll last month showed support for Medicaid privatization in Iowa has dipped below 30% support.”). However, Iowa voters did not hold the Republicans in control of state government accountable in 2018. *See* Kevin Hardy, *Iowa Democrats stunned, confused after Fred Hubbell loses, but others make big gains*, DES MOINES REG. (Nov. 7, 2018), <https://www.desmoinesregister.com/story/news/politics/2018/11/07/iowa-election-2018-fred-hubbell-kim-reynolds-governor-democrat-republican-cindy-axne-finkenauer/1732311002/> [<https://perma.cc/8MHV-K7JH>].

155. *See, e.g.*, Michaela Ramm, *Lawsuit against Medicaid insurers moves to federal court*, GAZETTE (Oct. 30, 2018), <https://www.thegazette.com/subject/news/health/medicaid-lawsuit-insurers-federal-court-iowa-vinton-hospital-20181030> [<https://perma.cc/B8CF-7APV>] (“Virginia Gay Hospital, a 25-bed facility in Vinton, is suing the three managed-care organizations that provided health care coverage for nearly 618,000 poor and disabled Iowans in the privatized Medicaid program.”).

156. *See* Brendan Williams, *Medicaid cuts are the real 'death panels': Column*, USA TODAY (Apr. 28, 2017), <https://www.usatoday.com/story/opinion/2017/04/28/medicaid-cuts-real-death-panels-column/100939932/> [<https://perma.cc/FJ5W-HYDP>]. In a September 2018 speech at the 2018 Medicaid Managed Care Summit, Verma stated:

The adequacy of provider payments is also an issue. Are they sufficient to incentivize providers to take Medicaid expansion patients? Under the 2015 *Exceptional Child Center* decision there is no legal redress for Medicaid providers. And under the guise of “cutting the red tape” the Trump Administration has announced that, where managed care insurers are in charge (“an overall Medicaid managed care penetration rate of 85% or greater”), it will effectively spare from scrutiny “[r]eductions to provider payments of less than 4% percent in overall service category spending during a State fiscal year (and 6% over two consecutive years)[.]”<sup>157</sup> It is very easy to imagine cuts of that magnitude in an economic downturn.

These are important questions to consider as we move forward and celebrate the success of states in bringing access to health care to millions of poor, uninsured Americans.

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It is great to be back in front of a room full of professionals dedicated to improving the lives of Medicaid beneficiaries. For me, it’s a little like coming home. I see the faces of the people out working on the front lines, of transforming the American health care system, working to making Medicaid a stronger and more sustainable program.

Press Release, SPEECH: Remarks by Administrator Seema Verma at the 2018 Medicaid Managed Care Summit, U.S. Centers for Medicare & Medicaid Services (Sept. 27, 2018), <https://www.cms.gov/newsroom/press-releases/speech-remarks-administrator-seema-verma-2018-medicare-managed-care-summit> [<https://perma.cc/N4D5-MWT2>]. Unmentioned by Verma in “coming home” were the excesses of insurers like Centene, the behemoth Medicaid carrier: “People who bought policies from Centene, a large for-profit health insurance company, filed a federal lawsuit on Thursday claiming the company does not provide adequate access to doctors in 15 states.” Reed Abelson, *Health Insurer Centene Is Sued Over Lack of Medical Coverage*, N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/health/centene-health-insurance-lawsuit.html> [<https://perma.cc/9PLN-G289>]; see also Shelby Livingston, *Centene’s profit from Obamacare plans more than doubles*, MODERN HEALTHCARE (Apr. 24, 2018), <https://www.modernhealthcare.com/article/20180424/NEWS/180429953/centene-s-profit-from-obamacare-plans-more-than-doubles> [<https://perma.cc/DQV2-DPW9>] (“The insurer serves about 1.1 million members through the Medicaid expansion.”).

157. Press Release, U.S. Centers for Medicare & Medicaid Services, CMS Proposes Regulation to Alleviate State Burden (Mar. 22, 2018), <https://www.cms.gov/newsroom/press-releases/cms-proposes-regulation-alleviate-state-burden> [<https://perma.cc/PC8H-KACF>].