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State Innovation Waivers:
The Efficacy of Federalist Approaches to the Affordable Care Act

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University of Mary Washington

Introduction

Healthcare in the United States is a complicated system of state and federal policies operating with various levels of consistency and innovation. Despite these varying circumstances, it is important to recognize that across the United States, healthcare is viewed as a commodity instead of a privilege. Federal programs like the Patient Protection and Affordable Care Act, Medicaid, and Medicare offer individuals assistance in paying for and accessing comprehensive coverage which, although significant, falls noticeably short in providing a guarantee of healthcare. Although primarily federal programs, the ACA and Medicaid also offer state level components that allow individual states to workshop the programs to best fit the needs of their citizens. State innovation waivers, the tools states can apply for to tweak ACA requirements so long as it improves care, have been accessible since January of 2017 and have the potential to change the healthcare landscape by reducing cost and improving coverage.¹ In this essay I will examine the efficacy of federalist approaches to changing the ACA through Section 1322 or “state innovation waivers” by discussing the background of waivers and analyzing case studies that illuminate the impacts of waivers on healthcare coverage in the United States.

The need for tangible improvements to the affordability and coverage of healthcare could not be more pressing as healthcare costs in the United States continue to skyrocket and remain higher than in most other developed countries. Additionally, projections show that healthcare spending is even outpacing GDP growth which is alarming.² In conjunction with the issue of

¹ United States of America, Department of Health and Human Services, Center for Medicaid & Medicare Services, The Center for Consumer Information and Insurance Oversight, *Section 1332: State Innovation Waivers*.

² Joshua Gordon, “Health Care Spending to Grow Faster Than Economy,” *The Concord Coalition*, February 25, 2019, <https://www.concordcoalition.org/blog-post/health-care-spending-grow-faster-economy?eType=EmailBlastContent&eld=eeb498df-79ee-4cdc-8b36-556a10f7c72a>, (accessed February 26, 2019).

cost, the federal government has been unable to make significant progress on healthcare since the passage of the ACA due to partisan fights and electoral concerns. Republicans have attempted to repeal the legislation upwards of 70 times without a credible replacement which shows the climate of Washington is far more interested in political victories than changing the landscape of healthcare.³ The combination of rising costs and a federal reluctance to act have set up an opportunity for states to take some initiative in the healthcare space as well created a demand for the administration to use its enforcement tools of approving waivers and overseeing federalist approaches to healthcare. Under the Trump administration however, it is unclear whether these tools will be used to support the ACA or incentivize its collapse.

Some states that have taken the initiative to change healthcare within their borders are Alaska, California, New Jersey and Oregon.⁴ Although not all of these states have succeeded with their approaches, they have demonstrated a willingness to act. Alternatively, more conservative states are also beginning to examine the efficacy of waivers under the Trump administration which will potentially create a new and unanticipated context for waivers. Like some Republican states have done for Medicaid waivers, states may be inclined to use state innovation waivers for the ACA to make healthcare less accessible or less appealing to vulnerable populations.⁵

³ Chris Riotta, "GOP Aims To Kill Obamacare Yet Again After Failing 70 Times," *Newsweek*, July 29, 2017, <https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832>, (accessed April 3, 2019).

⁴ "Tracking Section 1332 State Innovation Waivers," *The Henry J. Kaiser Family Foundation*, December 5, 2019, <https://www.kff.org/health-reform/fact-sheet/tracking-section-1332-state-innovation-waivers/>, (accessed December 9, 2018).

⁵ Jamila Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics*, (Cambridge, Cambridge University Press, 2018).

The contrasting uses of waivers in contemporary healthcare settings raises important questions and concerns about healthcare in the United States. Contrasting values and motivations on a state level mirror similar fights on the federal government over what healthcare should look like. Although Democrats created and passed the ACA with certain beliefs and values in mind regarding expanding access and affordability of coverage, not everyone in the United States shared that belief. Today, many believe that healthcare should continue to be a commodity and not a right. These debates also beg the question of what states role in healthcare should be. This complicated web of federal and state priorities is magnified by the differences in political ideology which raises the question of whether states are better actors than the federal government to provide healthcare tailored to their populations.

This project examines state efforts to exert control over the Affordable Care Act by requesting innovation waivers. I consider whether the flexibility afforded to states through state innovation waivers is likely to improve the nation's healthcare systems. For my research I define "improve" as related to the accessibility and affordability of healthcare. To answer my research question, I will first explain the history and creation of the Affordable Care Act. Then, I will outline the requirements and regulations for innovation waivers under both the Obama and Trump administrations. After discussing the necessary background and political conditions for waivers, I will examine three case studies that provide the basis for my findings that state innovation waivers under the Affordable Care Act do more to threaten healthcare than they do to improve it.

Section One: The Background of the Affordable Care Act and the Role of Waivers in the Political Process

The ACA was a piece of landmark legislation passed by a Democratic majority Congress and signed into law in March of 2010 that has continued to improve the lives of Americans by lowering healthcare costs. Despite being a core component of President Barack Obama's presidential platform, getting enough Congressional support to pass the ACA proved to be difficult. In order to secure a legislative victory, Obama was forced to make concessions and compromises that limited the size and scope of his healthcare plan.⁶ The beginnings of drafting the ACA were somewhat bipartisan as a few notable Republicans including Senator Chuck Grassley agreed with Democrats that the nation's healthcare system needed improvements. This bipartisanship ended up being short-lived as the coalition drafting legislation eventually collapsed and not a single Republican voted for the bill in either chamber of Congress.⁷ Despite having some of the best minds in the healthcare space to collaborate with, Obama's plan that prioritized patient access to healthcare through health insurance fell short in significantly limiting the cost of private insurance and drug prices.⁸ The ACA's shortcomings were largely due to the strong presence that private healthcare companies had in lobbying and government affairs. Their voices were extremely loud in the process to craft the ACA and their concerns were ultimately taken into consideration when trying to come to an agreement. The lack of consensus on how to improve the nation's healthcare and intense debates over whether healthcare was a right or a commodity contributed to this shortcoming. Debates over the scope of the ACA and American

⁶ Steven Brill, *America's Bitter Pill: Money, Politics, Backroom Deals, and the Fight to Fix Our Broken Healthcare System*, (New York, Random House, 2015).

⁷ Ibid.

⁸ Elisabeth Rosenthal, *An American Sickness: How Healthcare Became Big Business and How You Can Take It Back*, (New York, Penguin Press, 2017).

attachment to the status quo made it clear that healthcare reform legislation would not depart much from the well-established healthcare delivery system. Ultimately, affordability is not a central concern of the ACA. Instead, affordability is more of an intended consequence of mandating health insurance.⁹

It is important to recognize the partisanship that acted as a limiting condition of the Affordable Care Act in order to understand how waivers factored into the legislation. Waivers in healthcare legislation were not a new idea as federal Medicaid policy also allowed states to innovate health policy through waivers.¹⁰ States have embraced Medicaid waivers and the accompanying federal funds to create health policy strategies that work best for their unique populations and challenges. For example, states like Ohio and North Dakota have altered their Medicaid programs to allow for dental exams and cleanings. States like California went a step farther and created a yearly cap on dental spending for \$1,800 per person to ensure adequate dental care. Dental care is not required under federal Medicaid policy, but these states saw the necessity of comprehensive coverage and modified Medicaid to better fit the needs of their citizens.¹¹

This concept of federalism also extended as a political shield for state lawmakers and regulators who could use waivers to try new policies with limited public backlash. If policies associated with Medicaid waivers succeeded, local lawmakers could claim credit to foster electoral support for further reform and innovation. If innovation failed, lawmakers could blame the federal government for insufficient funds or overregulation of waiver provisions in order to avoid blame for trying new healthcare strategies. Avoiding local political blame and public

⁹ Ibid.

¹⁰ Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics*.

¹¹ Ibid., 52-53.

criticism means that lawmakers can continue to try new and innovative solutions which is a privilege not as easily afforded to lawmakers in Washington.¹² Ultimately however, federalist approaches to healthcare have experienced varied results because of the nature of federalism. While some states report positive results from changes made to expand coverage, citizens in other states report negative results from changes their state made to limit coverage. This makes it difficult to come up with an overall narrative of state approaches to healthcare because the consequences of state healthcare policies vary widely between states. These variations benefit some Medicaid recipients and harms others.¹³ One example of this can be found in states that have limited Medicaid benefits. Many states have circumvented the goals of Medicaid waivers to lower state investment into Medicaid which has lowered health outcomes for poor and disabled populations. One example of states circumventing Medicaid can be seen in Florida. Florida cut dental coverage to a significant degree in recent years for Medicaid recipients. Additionally, Florida has limited the types of prescriptions Medicaid will cover as well as increased restrictions on recipients' ability to schedule appointments with specialists.¹⁴ This coupled with examples of states imposing work requirements on Medicaid recipients as a means of limiting coverage demonstrate that states may use waivers as political tools or cost-saving measures instead of as tools to improve healthcare. It is important to note that these motivations and ideals are not exclusively tied to Medicaid waivers but will likely lay the basis for future ACA waivers and potential noncompliance down the road. It is important to examine Medicaid waivers and the

¹² Frank J. Thompson, *Medicaid Politics: Federalism, Policy Durability, and Health Reform*, (Washington DC, Georgetown University Press, 2012).

¹³ Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics*.

¹⁴ *Ibid.*, 66-67.

motivations behind them due to the lack of data about ACA waivers because of their recent availability.

Based on the political limitations Obama faced in attempting to pass his version of the Affordable Care Act, it should come as no surprise that he and his health policy team decided to push for state innovation waivers to be included in the legislation.¹⁵ The inclusion of waivers likely had two key motivations. First is that giving states power to control their own healthcare and health policy through waivers appeals to conservative support for federalism and federalist policies. Many conservatives opposed the ACA on the grounds that it massively increased the presence of the federal government in the lives of Americans with little focus on specific populations. Conservatives thought that putting the government in charge of healthcare would balloon the deficit and undermine the value of the free market.¹⁶ Including this provision to the law likely served as an olive branch to conservatives across the aisle who opposed the Affordable Care Act. Despite this appeal to conservative values, the Affordable Care Act did not receive a Republican vote in either chamber of Congress

The second motivation for including waivers was to expand the Affordable Care Act beyond its partisan restraints. As mentioned earlier, it was difficult to pass the ACA due to electoral concerns from both sides of the aisle. Because of the influence of centrist Democrats and healthcare corporations, Obama's approach had to be limited. Centrist Democrats were concerned of electoral defeat due to opposition towards the increased role of the government in individual's lives. Fear of losing a preferred doctor or a favored insurance industry made the ACA politically toxic so changing the delivery system was a step too-far for many Democrats.

¹⁵ Brill, *America's Bitter Pill: Money, Politics, Backroom Deals, and the Fight to Fix Our Broken Healthcare System*.

¹⁶ *Ibid.*

Ultimately, Democrats still had to convince their constituents that the Affordable Care Act was a good idea and to do so required maintenance of the status quo instead of massive overhauls.¹⁷

Although many Democrats failed to convince their constituents which can be seen with Democrats losing control of Congress in the 2010 midterm, difficulty associated with repealing and replacing the bill in contemporary politics have proved that some of its components have garnered widespread support since the law's enactment.¹⁸

Additionally, the private healthcare apparatus in the United States including insurance and pharmaceutical companies fought hard to prevent government intrusion for fear it would shrink their profits. Healthcare companies made it clear to lawmakers they would not accept large cuts in profits.¹⁹ It is important to recognize the political realities of the time to understand why waivers were included as part of the law. Waivers were viewed as avenues states could take to improve the nation's healthcare infrastructure with more political cover than those in Washington. Although Obama saw waivers as a way to improve the status of healthcare in the United States (based on robust requirements that needed to be met to receive waivers), his plan had unintended consequences realized under a new administration that will be discussed later in this essay.

Obama's appeal to conservatives through state innovation waivers was largely unsuccessful because not a single Republican voted for the bill. Republicans have repeatedly tried to undermine the ACA through votes to repeal it and even going so far as repealing the individual mandate, one of the key three pillars of the legislation which in turn, has dampened

¹⁷ Ibid.

¹⁸ Margot Sanger-Katz and Haeyoun Park, "Obamacare More Popular Than Ever, Now That It May Be Repealed," *The New York Times*, February 1, 2017, <https://www.nytimes.com/interactive/2017/02/01/us/politics/obamacare-approval-poll.html>, (accessed April 14, 2019).

¹⁹ Ibid.

the progress of lowering healthcare costs in the US. Many analysts worried that the repeal of the mandate would skyrocket premiums but for now, the repeal of the mandate seems have to have only slowed the decline of premiums and healthcare costs as opposed to increasing them.²⁰

Although Republicans were unable to fully repeal and replace the ACA, the sabotage done to the ACA through other means demonstrates that there is still lingering opposition to the bill.

To better understand Obama's vision for waivers, it is important to discuss the process states must follow in applying for waivers as well as the intended goal and scope of waivers. The expected rationale for waivers was that states would have ideas that could improve the landscape of healthcare beyond what the ACA outlined. Some potential rationales could be increasing subsidies for vulnerable populations, increasing the amount of the individual mandate penalty, or extending programs like reinsurance to go beyond what the federal government had implemented. Fundamentally however, the expected rationale for states applying for a waiver was that they would use federal funds and programs in an innovative way to improve the accessibility of healthcare in their state.

The statutory requirements of waivers consider coverage, affordability, comprehensiveness, and the impact on the federal deficit. Although these statutory requirements lay out specific requirements, regulations that further define them have altered their scope and meaning. Obama's regulations on waivers laid out specific requirements regarding individuals with preexisting conditions and other vulnerable groups. The Trump administration had different ideas about waivers. His administration promulgated regulation that focused on the entire state's

²⁰ Rabah Kamal, Cynthia Cox, Rachel Fehr, Marco Ramirez, Katherine Horstman, and Larry Levitt, "How Repeal of the Individual Mandate and Expansion of Loosely Regulated Plans are Affecting 2019 Premiums," *Kaiser Family Foundation*, October 26, 2018, <https://www.kff.org/health-costs/issue-brief/how-repeal-of-the-individual-mandate-and-expansion-of-loosely-regulated-plans-are-affecting-2019-premiums/>, (accessed April 14, 2019).

population with little attention to vulnerable groups. Trump has also shown an interest in expediting the waiver application and approval process and has made it easier for states to make changes due to the weakened waiver requirements.²¹

This section will examine waivers, their requirements and the differences in enforcement between the Obama and Trump administrations. After discussing the waiver application process and the requirements states must meet to obtain a waiver, I will critically evaluate state innovation waivers and their effectiveness in changing the healthcare landscape. In that discussion of waivers, I will also include a focus on what state lawmakers have hoped to do by altering ACA marketplaces to underscore the potential damage to healthcare waivers will create.

Section 1332 of the Patient Protection and Affordable Care Act gives states the ability to apply for a “state innovation waiver.” In order to apply for a waiver, a state must pass legislation or issue some other form of statutory language that authorizes the creation of a new program within the Affordable Care Act. That state-level statutory change is a prerequisite to applying for a waiver from the Centers for Medicare and Medicaid Services. In addition, the Department of Health and Human Services as well as the Department of Treasury must jointly approve waiver applications.²² The language of the federal statute sets up four requirements that a state innovation waiver must meet. As outlined earlier in this section, guidance has been created and recently modified for each statute that lays out what the federal government expects states to do if granted a waiver. It is also important to preface that Obama and Trump’s guidance although similar on face, has one important difference. Obama included specific regulatory requirements

²¹ Ryan J. Rosso, “State Innovation Waivers: Frequently Asked Questions,” *Congressional Research Service*, January 9, 2019, <https://crsreports.congress.gov/product/pdf/R/R44760/11>, (accessed February 10, 2019).

²² “Tracking Section 1332 State Innovation Waivers,” *The Henry J. Kaiser Family Foundation*, December 5, 2019, <https://www.kff.org/health-reform/fact-sheet/tracking-section-1332-state-innovation-waivers/>, (accessed December 9, 2018).

for assessments of proposed plans' effects on vulnerable communities in 2015 guidance. Trump has forgone requiring anything of the sort and thus has made it significantly easier for waiver approval through 2018 changes to regulations.²³ This is relevant because it means that states can rework their entire healthcare system and alter their implementation of federal law through one governor's executive order. Making waivers easier for states to obtain weakens deliberation and opposition making it easier for ideological reworking without legislative consent. These changes are distinct because under the Obama administration, the requirement of legislative involvement provided a limitation to divided governments and provided additional space for deliberation and constituent input.

The first statute outlining waiver requirements is related to coverage. The language of the law indicates, "The State's plan must provide coverage to at least a comparable number of individuals as the provisions of Title I of the Patient Protection and Affordable Care Act."²⁴ Obama-era guidance on this issue interpreted the statute to mean at least as many individuals who have minimum essential coverage without a waiver should have minimum essential coverage under a waiver-based system. Additionally, Obama-era guidance required that the impact of the plan authorized by the waiver be considered. This meant that states had to demonstrate that their plans would not negatively affect coverage for vulnerable populations in order to be approved for a waiver. Guidance for this statute has changed under the Trump administration, however. Current guidance as of January of 2019 requires that the number of people who had health insurance without a waiver must not decrease with a waiver. Although it may sound similar, there is a major difference in that states are no longer required to forecast

²³ Ryan J. Rosso, "State Innovation Waivers: Frequently Asked Questions," *Congressional Research Service*, January 9, 2019, <https://crsreports.congress.gov/product/pdf/R/R44760/11>, (accessed February 10, 2019).

²⁴ *Ibid.*

changes to vulnerable populations.²⁵ This means that if a state were to increase subsidies for short-term health insurance plans instead of subsidizing plans compliant with the ACA, they would likely be able to do so because they would only have to factor in the majority of health needs which ignores vulnerable populations that rely on full comprehensive coverage. The Trump administration regulation also does not require minimum essential coverage and instead only requires “health care coverage” which justifies the expansion of short-term and high-deductible health plans that do not provide full coverage.²⁶ Status quo guidance merely requires states to evaluate their plans’ impacts on the overall coverage of their population which ignores examining the impacts of state plans on low-income individuals and individuals with preexisting conditions.²⁷ Taken further, this means that state lawmakers who propose a plan to improve coverage only have to prove it is good for a majority. Only focusing on the majority however will allow states to ignore the impacts of their plans on vulnerable populations allowing plans that may improve coverage for the healthy majority while undermining coverage from those who need it the most.

The second statute of Section 1332 of the Affordable Care Act is related to the affordability of health insurance. The statute says, “The state’s plan must provide coverage and cost-sharing protections that are at least as affordable as the provisions of Title I of the ACA.”²⁸ Obama-era guidance explained this statute as requiring coverage in states with a waiver to be as affordable as the coverage would be without a waiver. Like the statute on coverage, states were required to demonstrate how their plan would impact all groups within a state. If it lowered costs

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

for most but raised costs for some, it would be rejected. This specific regulation was crafted by the Obama administration in order to ensure that states did not undermine protections for individuals with preexisting conditions.²⁹ New guidance from the Trump administration has changed these requirements. The only requirement for affordability now is that the same amount of people can afford coverage as before the waiver was granted. Contextually, this means that states no longer have to evaluate how vulnerable groups will be impacted by the program and instead need only evaluate the impact on coverage statewide with no special recognition of vulnerable populations. This means states can create policies that increase enrollment for young and healthy individuals that also decrease enrollment for people with preexisting conditions. If the results of the plan have the same or more people enrolled, it would be approved because the guidance does not require that the same people be covered before and after.³⁰

The third statute refers to the comprehensiveness of a state's healthcare coverage. The statute says, "The state's plan must provide coverage that is at least as comprehensive as the essential health benefits... as certified by the Office of Actuary of the Centers for Medicare & Medicaid Services (CMS)."³¹ Obama-era guidance describes this as meaning that healthcare coverage with the new state plan must be equal to or greater than the coverage afforded to the state's population prior to the waiver. Like the other statutes, Obama-era regulations required states to evaluate the impact of the waiver on all groups within the population. If the waiver was found to decrease the comprehensiveness of coverage for any group, it would be denied. Trump-era guidance altered guidance surrounding comprehensiveness like the previous statutes

²⁹ Jennifer Tolbert and Karen Pollitz, "New Rules for Section 1332 Waivers: Changes and Implications," Kaiser Family Foundation, December 10, 2018, <https://www.kff.org/health-reform/issue-brief/new-rules-for-section-1332-waivers-changes-and-implications/>, (accessed April 14, 2019).

³⁰ Ibid.

³¹ Ibid.

discussed. States no longer needed to examine the impact of the waiver on vulnerable populations with regards to their ability to have comprehensive coverage. Instead, only the effects of a waiver on a state's population writ large needed to be examined.³² Like other regulatory changes, this means that states need only provide plans that improve comprehensive coverage for healthy individuals even if it means weakening the comprehensiveness of coverage for those who rely on healthcare.

The final requirement that states applying for a waiver must meet is that the state's modified ACA plan must be deficit neutral. The statute defines this as, "The state's plan must not increase the federal deficit."³³ Both Obama and Trump administrations' guidance demonstrates the same requirement for this statute. If states are to be granted a waiver projected federal spending must not increase the federal deficit. Waivers can only be authorized for programs that spend less or equivalent federal funds than if the state did not have a waiver.³⁴ This is the only statute where regulations were not altered between administrations. Below is a table that outlines the four statutes on state innovation waivers as well as past and current regulatory interpretations of each statute.³⁵

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

Statute	Obama Administration Regulation	Trump Administration Regulation
<p>Coverage: The state’s plan must provide coverage to at least a comparable number of individuals as the provisions of Title I of the Patient Protection and Affordable Care Act (ACA; P.L. 111- 148, as amended) would provide.</p>	<p>At least as many individuals who had minimum essential coverage (MEC) absent a waiver must have MEC under the waiver. This requirement generally must be forecast to be met for each year the waiver is in effect. In considering whether this requirement is met, the plan’s impact on all state residents, regardless of coverage type, will be considered and the plan’s effects on different groups of individuals in the state, particularly those considered vulnerable, will be assessed. A state plan that satisfied this requirement in the aggregate but reduced coverage for vulnerable populations would not be approved. Whether the plan sufficiently prevents gaps in or discontinuations of coverage also will be considered.</p>	<p>At least as many individuals who had health care coverage absent a waiver must have health care coverage under the waiver. This requirement generally must be forecast to be met for each year the waiver is in effect, but a waiver may be approved if a temporary reduction in coverage would produce longer-term increases in coverage. In considering whether this requirement is met, the plan’s impact on all state residents, regardless of coverage type, will be considered. Whether the plan sufficiently prevents gaps in or discontinuations of coverage also will be considered.</p>
<p>Affordability: The state’s plan must provide coverage and cost-sharing protections that are at least as affordable as the provisions of Title I of the ACA.</p>	<p>An individual’s health care coverage under the waiver must be as affordable as coverage absent the waiver. Affordability is generally measured by comparing the sum of an individual’s premium contributions and cost-sharing responsibilities for a health plan to the individual’s income. Spending on health care services that are not covered by a health plan may be considered if the services are affected by the state’s plan. This requirement generally must be forecast to be met for each year the waiver is in effect. In considering whether this requirement is met, the plan’s impact on all state residents, regardless of coverage type, will be considered, and the plan’s effects on different groups of individuals in the state, particularly those considered vulnerable, will be assessed. A state plan that satisfied this requirement in the aggregate but reduced affordability for vulnerable populations would not be approved. In assessing the plan, the affordability of coverage on average will be considered, and how the plan affects the number of individuals who have large health</p>	<p>At least as many individuals who had access to affordable and comprehensive health care coverage absent a waiver must have access to affordable and comprehensive health care coverage under the waiver. Applications do not need to demonstrate that affordable and comprehensive coverage will actually be purchased by a comparable number of state residents. Affordability is generally measured by comparing the sum of an individual’s premium contributions and cost-sharing responsibilities for a health plan or direct payments for health care to the individual’s income. In considering whether this requirement is met, the plan’s impact on all state residents, regardless of coverage type, and the plan’s effects on all groups of individuals in the state, including low-income residents and those with high expected health care costs, will be considered. In assessing the plan, access to affordable coverage will be considered according to the number of individuals for whom available coverage has become</p>

	care spending burdens relative to their incomes will be examined.	more affordable and the magnitude of such changes.
Comprehensiveness: The state's plan must provide coverage that is at least as comprehensive as the essential health benefits (EHB), as certified by the Office of the Actuary of the Centers for Medicare & Medicaid Services (CMS)	Health care coverage under the state plan must be at least as comprehensive overall for individuals as coverage absent the waiver. Comprehensiveness is measured by comparing coverage under the plan to coverage under the state's EHB benchmark plan or coverage under the state's Medicaid program and/or the State Children's Health Insurance Programs (CHIP), as appropriate. This requirement generally must be forecast to be met for each year the waiver is in effect. In considering whether this requirement is met, the proposal's impact on all state residents, regardless of coverage type, will be considered, and the effects of the proposal on different groups of individuals in the state, particularly those considered vulnerable, will be assessed. A state plan that satisfied this requirement in the aggregate but reduced comprehensiveness for vulnerable populations would not be approved.	At least as many individuals who had access to affordable and comprehensive health care coverage absent a waiver must have access to affordable and comprehensive health care coverage under the waiver. Applications do not need to demonstrate that affordable and comprehensive coverage will actually be purchased by a comparable number of state residents. Comprehensiveness is measured by comparing coverage under the plan to coverage under the state's EHB benchmark plan, any other state's benchmark plan chosen by the state, or any benchmark plan chosen by the state that could potentially become its EHB benchmark plan. In considering whether this requirement is met, the proposal's impact on all state residents, regardless of coverage type, will be considered.
Deficit Neutral: The state's plan must not increase the federal deficit	Projected federal spending net of federal revenues must be equal to or lower than it would be absent the waiver. The state's plan must not increase the federal deficit over the period of the waiver or in total over the 10-year budget plan submitted by the state as part of its application.	Projected federal spending net of federal revenues must be equal to or lower than it would be absent the waiver. The state's plan must not increase the federal deficit over the period of the waiver or in total over the 10-year budget plan submitted by the state as part of its application.

The Trump administration's changes to guidance on state innovation waivers is significant and noteworthy when examining whether waivers are likely to improve or weaken the nation's healthcare system. As mentioned earlier, Trump opposed the ACA from the beginning of his time in office and GOP-led majorities have held no shortage of votes to repeal or

undermine the law.³⁶ Trump, seemingly unable to repeal the ACA, has turned to states to find avenues to dismantle the law by weakening the restrictions on waivers. By contrast, the Obama administration's guidance on waivers established strict requirements. Policymakers within the Obama administration also made specific requirements that states trying to alter their ACA marketplaces had to first examine the impact of policy changes on vulnerable populations. The Trump administration's guidance has relaxed many of these stringent requirements and potentially made it easier for states to ignore vulnerable communities in their decision calculus.³⁷ For example, if a state is only required to demonstrate a waiver's ability to lower healthcare costs for the entire population and not consider vulnerable populations, states may have the opportunity to apply for a waiver that allows them to subsidize cheaper plans to make those plans more affordable for some people while diverting funding away from more expensive plans relied on by sicker individuals causing their healthcare costs to spike.³⁸

Based on the description of the requirements for states to be granted a state innovation waiver, it is important to highlight the significance of waivers. If waivers meet the regulatory requirements listed in the section above, they have vast potential to change the healthcare landscape.³⁹ In short, state innovation waivers are meant to give states the option to tailor the Affordable Care Act to the specific needs and demands of their state's population. The federal legislation is the gold standard; however, it leaves room for states to modify the policy to fit their

³⁶ Chris Riotta, "GOP Aims To Kill Obamacare Yet Again After Failing 70 Times," *Newsweek*, July 29, 2017, <https://www.newsweek.com/gop-health-care-bill-repeal-and-replace-70-failed-attempts-643832>, (accessed April 3, 2019).

³⁷ Steven Porter, "States Gain Greater Flexibility Under New ACA Waiver Guidance," *Health Leaders*, October 22, 2018, <https://www.healthleadersmedia.com/innovation/states-gain-greater-flexibility-under-new-aca-waiver-guidance>, (accessed December 13, 2018).

³⁸ Ibid.

³⁹ Heather Howard and Galen Benshoof, "State Innovation Waivers: Redrawing the Boundaries of the ACA," *Journal of Health Politics, Policy and Law*, volume 40, no. 6. (2015): 1203-1212.

unique challenges that federal approaches cannot always consider. Five common expectations of waivers are that they will in some way, streamline healthcare, expand the enrollment base, enroll consumers in better and more comprehensive plans, lower costs, and perform other tweaks to maximize the benefits of the Affordable Care Act.⁴⁰ To what extent those expectations are realistically possible however, is up for debate.

When examining the difference between the Trump and Obama administrations' views on waivers, it is important to realize that their regulations correspond to their own beliefs about the ACA. The Obama administration's waiver requirements were much stricter. In a way, Obama-era waivers traded in flexibility for cooperation with the ACA. The Obama administration was not interested in approving waivers that did not uphold or improve the core tenets of the ACA, especially if those waivers underserved or hurt vulnerable communities or individuals with preexisting conditions. By contrast, the Trump administration has made it clear that they are more interested in states pursuing healthcare policies regardless of whether they adhere to the goal of the ACA. Although the ACA repeal vote fell short within Congress, Trump has continued to find ways to sabotage the law. One way was by convincing Republicans who supported the bill to repeal the individual mandate through the tax reform bill.⁴¹ Unable to fully repeal the law, it seems that Trump believes his best chance to undermine the ACA is to gut it from the inside. By no longer requiring states to assess how their healthcare plans will affect the most vulnerable, the Trump administration has shown that it believes waivers are a tool to gut the core components of the ACA rather than improve it.

⁴⁰ Ibid.

⁴¹ Rabah Kamal, Cynthia Cox, Rachel Fehr, Marco Ramirez, Katherine Horstman, and Larry Levitt, "How Repeal of the Individual Mandate and Expansion of Loosely Regulated Plans are Affecting 2019 Premiums," *Kaiser Family Foundation*, October 26, 2018, <https://www.kff.org/health-costs/issue-brief/how-repeal-of-the-individual-mandate-and-expansion-of-loosely-regulated-plans-are-affecting-2019-premiums/>, (accessed April 14, 2019).

One need not look further than 2019 to see how waivers have already changed the healthcare landscape in the United States. Currently, eight states have active waivers approved by the Department of Treasury and Health and Human Services. Hawaii, one of the states with an approved waiver, used the waiver process to alter the Small Business Health Options Program requirement of the ACA based on Hawaii already having a similar program mandated in state law.⁴² Hawaii already had state laws that matched up with many components of the Affordable Care Act and in 1974, Hawaii enacted the Prepaid Healthcare Act that allowed employers to provide better coverage than what was required under the ACA. In this instance, it made sense that the federal government waive some employer requirements of the ACA because the state had already exceeded them with its own healthcare legislation. Therefore, Hawaii's waiver request was a bit different because of instead of needing to authorize a new program, it was used to waive requirements based on an already existing program.⁴³ This makes it a noticeable outlier.

The seven other states that have implemented waiver-based programs have established statewide reinsurance programs.⁴⁴ A federal reinsurance program was a part of the Affordable Care Act rollout to minimize the costs of the transition to a new healthcare system for insurers but eventually phased out because the ACA only established it as a temporary program. Reinsurance programs allow insurers to pay towards a pool that the state administers. In the event of high-risk enrollees filing claims, insurance companies that pay into reinsurance can be authorized to receive government funds to keep premiums and deductibles consistent without

⁴² "Tracking Section 1332 State Innovation Waivers," *The Henry J. Kaiser Family Foundation*, December 5, 2019, <https://www.kff.org/health-reform/fact-sheet/tracking-section-1332-state-innovation-waivers/>, (accessed December 9, 2018).

⁴³ Ibid.

⁴⁴ Ibid.

having to charge consumers more. Reinsurance is a way to provide stability within insurance marketplaces.⁴⁵

Based on these political considerations, it is unclear what the future of waivers will look like. Although it is now significantly easier for states to apply for waivers, it is uncertain whether the quality, coverage, affordability, and accessibility of healthcare will improve overall.⁴⁶ Many of the Obama administration's requirements sought to protect vulnerable populations and to provide minimum essential coverage.⁴⁷ Without those priorities in the current administration, it seems that vulnerable populations and those with preexisting conditions may be disregarded by state lawmakers. Additionally, states no longer need to adhere to minimum essential coverage which may allow for increased short-term and high-deductible health plans which also undermine quality and comprehensive coverage. Another important change to note in federal regulation on state innovation waivers surrounds the application process. Prior to recent Trump administration guidance, states were required to pass a law signifying a statutory change to health insurance before a waiver could be requested. Now, the requirement is easier to achieve because governors looking to change their state's ACA marketplaces can do so with an executive order. Allowing executive orders to serve as the basis of waivers circumvents the role of state legislatures and potentially increases the likelihood that states with divided governments can obtain state innovation waivers.⁴⁸ This regulation was very popular with many Republican

⁴⁵ United States of America, Department of Health and Human Services, Center for Medicare & Medicaid Services, *Alaska: State Innovation Waiver under section 1332 of the PPACA*.

⁴⁶ Steven Porter, "States Gain Greater Flexibility Under New ACA Waiver Guidance," *Health Leaders*, October 22, 2018, <https://www.healthleadersmedia.com/innovation/states-gain-greater-flexibility-under-new-aca-waiver-guidance>, (accessed December 13, 2018).

⁴⁷ Ryan J. Rosso, "State Innovation Waivers: Frequently Asked Questions," *Congressional Research Service*, January 9, 2019, <https://crsreports.congress.gov/product/pdf/R/R44760/11>, (accessed February 10, 2019).

⁴⁸ Steven Porter, "States Gain Greater Flexibility Under New ACA Waiver Guidance," *Health Leaders*, October 22, 2018, <https://www.healthleadersmedia.com/innovation/states-gain-greater-flexibility-under-new-aca-waiver-guidance>, (accessed December 13, 2018).

lawmakers who saw this as an opportunity for states to find more opportunities to innovate. Innovation plans by conservative lawmakers in Idaho for example, seek to expand short-term plans which failed to meet Obama's standard of minimum essential coverage.⁴⁹ In the eyes of those lawmakers, they will make healthcare cheaper for many by offering smaller plans. To critics however, this is not an innovation but merely a way to divert healthy individuals from the ACA marketplace to "insurance in name only," increasing prices for those who rely on the comprehensive coverage provided under the ACA marketplace.⁵⁰ Some health policy experts argued that this increased flexibility will make it easier for states to implement policies that ignore the most disadvantaged.⁵¹

Before examining case studies, it is important to contextualize the theoretical costs and benefits to federalist approaches to healthcare via state innovation waivers. Although there is limited data on ACA waivers due to the recent accessibility of them, Medicaid waivers offer important examples of state action on healthcare.

The benefits of federalist approaches to healthcare is two-fold. First, federalism has the potential to make systems stronger by filling in gaps left by federal administrators or by redistributing federal funds to better fit the needs of the beneficiaries within a state. Federalism is an effective political tool for local lawmakers to use to blame the federal government for state-led innovation failures. Because of this however, if states fail and are able to blame the federal government, it allows them to continue to try and innovate with expanded political cover that

⁴⁹ Steven Porter, "States Gain Greater Flexibility Under New ACA Waiver Guidance," *Health Leaders*, October 22, 2018, <https://www.healthleadersmedia.com/innovation/states-gain-greater-flexibility-under-new-aca-waiver-guidance>, (accessed December 13, 2018).

⁵⁰ Nicholas Bagley, "Idaho is ignoring Obamacare rules. That could set off a catastrophic chain reaction," *Vox*, February 24, 2018, <https://www.vox.com/the-big-idea/2018/2/22/17040016/idaho-obamacare-ignore-rules-health-care-red-state-revolt>, (accessed February 1, 2019).

⁵¹ *Ibid.*

allows them more freedom to pursue new solutions without risking electoral backlash.⁵² The second benefit of federalist approaches to health policy is the potential to expand and tailor federal health policy on a local level to magnify its positive impacts on particular populations. A clear example of this is California expanding its Medicaid program to cover undocumented children.⁵³ Recognizing a large portion of undocumented immigrants within its borders, California has continued to work to expand access to care for immigrants as is demonstrated with their attempted state innovation waiver that will be discussed at length later in this essay. When examining Medicaid, it becomes clear that some states have used waivers to be generous to their populations and find ways to make coverage go farther in terms of quality and accessibility.⁵⁴ Leaving it up to states also has some unintended consequences. Just as states can be generous with their waivers, they can also be punitive and restrictive with their waivers.⁵⁵ This variability can lead to very different conditions based on where in the United States someone lives.

Examples of Medicaid waivers and their goals and consequences vary tremendously from state to state and administration to administration which will likely be predictive of ACA waiver programs as well. Although the initial goals of Medicaid waivers were to innovate at the state level and expand coverage, many states have used waivers to restrict coverage and find political victories. State innovation waivers are not immune from those same types of political calculations or conservative motivations. Understanding how both sides of the aisle have viewed Medicaid waivers is important for this research to better understand what the future of ACA waivers will likely look like.

⁵² Thompson, *Medicaid Politics: Federalism, Policy Durability, and Health Reform*.

⁵³ "Medi-Cal Expansion to Undocumented Children", *California Health Care Foundation*, May 13, 2016, <https://www.chcf.org/project/medi-cal-expansion-to-undocumented-children/>, (accessed April 15, 2019).

⁵⁴ Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics*.

⁵⁵ *Ibid.*

Nowhere is the punitive aspect of waivers clearer than in states like Kentucky and Arkansas. Both states have implemented work requirements for Medicaid recipients through Medicaid waivers after largely Republican led legislative initiatives.⁵⁶ Although these waivers are specific to Medicaid and not the Affordable Care Act, it is important to acknowledge that states may use waivers to undermine the goals of federal legislation and to tailor the law in ways that weaken coverage and access. This highlights the downsides to vague statutory language that can be easily reinterpreted depending on the administration. In the context of Medicaid, by not explicitly excluding work requirements and means-testing in the text of the legislation, lawmakers unintentionally opened the door for executive regulatory agencies to interpret the statutes in ways that justified the creation of these programs. Alternatively, many may view work requirements as a conservative innovation to healthcare. Work requirements are perceived as preventing freeriding and welfare abuse which is very popular among Republicans. In this sense, Republicans justify their innovation through framing the issue in a traditionally conservative way. The belief is, “if you want the state to provide for your healthcare, you need to provide for yourself in some way.”⁵⁷ Regardless of how popular this idea is among Republicans, restricting access to healthcare is contrary to the ideals outlined by healthcare programs like Medicaid and the ACA. Not all forms of state innovation improve access to healthcare which is a trend seen in both Medicaid and the ACA.

⁵⁶ Robin Rudowitz, MaryBeth Musumeci, and Cornelia Hall, “A Look at October State Data for Medicaid Work Requirements in Arkansas,” *The Henry J. Kaiser Family Foundation*, November 19, 2018, <https://www.kff.org/medicaid/issue-brief/a-look-at-october-state-data-for-medicaid-work-requirements-in-arkansas/>, (accessed December 7, 2018). ; Robin Rudowitz, MaryBeth Musumeci, and Cornelia Hall, “Re-approval of Kentucky Medicaid Demonstration Waiver,” *The Henry J. Kaiser Family Foundation*, November 29, 2018, <https://www.kff.org/medicaid/issue-brief/re-approval-of-kentucky-medicaid-demonstration-waiver>, (accessed December 7, 2018).

⁵⁷ Ibid.

Section Two: Case Studies

Based on the limited status of approved and active state innovation waivers to the Affordable Care Act and their nearly uniform purpose of establishing a reinsurance program, this essay will expand beyond the scope of approved waivers to also look at a rescinded waiver application as well as a state that attempted to undermine the mandates of the Affordable Care Act without a waiver which raises the question of the necessity of waivers and whether or not the current administration will enforce its own regulations and laws. This last consideration is relevant when discussing Idaho's approach to the ACA in which they attempted to move forward on a plan to offer noncompliant plans on the ACA marketplaces without prior federal approval and a delayed federal response.⁵⁸ I chose to study Alaska, California and Idaho for this essay. Alaska was an obvious choice because it was the first state to implement a waiver program and because it set a model that other states followed. California withdrew its waiver request, but I still felt that it was an interesting case study because its proposed program to allow undocumented immigrants to purchase insurance was well outside of federal law. While most states have used waivers to bolster already existing ACA programs, California found a truly innovative approach that I thought would be important to highlight. Finally, I chose to study Idaho because its actions, although ultimately halted, demonstrate the goals of conservative states when given control over federal healthcare programs. Idaho's noncompliance to federal law also provided a unique incentive for the Trump administration to change its ACA guidance to allow conservative states to play a more active role in undermining the law.

⁵⁸ Julie Appleby, "No-Go For Idaho: Back To The Drawing Board On State-Based Health Plans," *Kaiser Health News*, March 9, 2018, <https://khn.org/news/no-go-for-idaho-back-to-the-drawing-board-on-state-based-health-plans/>, (accessed April 4, 2019).

The first case study is Alaska's reinsurance program. Alaska is an important state to examine because it was the first state to establish its own reinsurance program and because it laid the basis for the six other states that applied for waivers to establish their own state-based reinsurance programs. This is the most significant and prominent example of the benefits ACA waivers can have on improving the affordability and accessibility of healthcare. Through reinsurance, Alaska was able to successfully lower healthcare costs for both insurance companies and customers by allowing insurers to stay afloat while insuring sick or costly individuals. Additionally, the reinsurance program allowed states to receive state money instead of forcing companies to raise the prices for consumers.⁵⁹

The second case study is California's withdrawn waiver that would have allowed undocumented immigrants to purchase health insurance plans from the ACA marketplaces. Although this waiver request was withdrawn after the election of Trump, it is important to acknowledge and discuss because of its innovative approach to healthcare that explored areas well beyond the scope of federal legislation. This waiver would have been an unprecedented step for the ACA and would fall in line with previous California led initiatives on healthcare like the expansion of Medicaid to include undocumented children.⁶⁰

The final case study is Idaho's attempted noncompliance to federal law. In early 2018, Idaho's governor authorized Blue Cross Blue Shield of Idaho to offer plans that did not provide the essential health benefits or meet the minimum essential coverage requirements laid out by the ACA. Although this case does not directly deal with a waiver, it is important to discuss because

⁵⁹ United States of America, Department of Health and Human Services, Center for Medicare & Medicaid Services, *Alaska: State Innovation Waiver under section 1332 of the PPACA*.

⁶⁰ Ana B. Ibarra and Chad Terhune, "California Withdraws Bid to Allow Undocumented To Buy Unsubsidized Plans," *Kaiser Health News*, January 20, 2017, <https://khn.org/news/california-withdraws-bid-to-allow-undocumented-immigrants-to-buy-unsubsidized-obamacare-plans/>, (accessed March 1, 2019).

it invites a discussion about what healthcare options states have now that guidance for waivers has been significantly relaxed. Examining Idaho’s plan will also foster a discussion on whether or not waivers will be anything more than rubberstamps that greenlight state policymakers to undermine the affordability and accessibility of health insurance mandated by the Affordable Care Act.⁶¹

These three case studies will reveal examples of state innovation in the status quo as well as illuminate the path for future healthcare innovation under the current administration and beyond. Before discussing the specifics of each case study, it is also important to examine the political conditions that led to the various waiver applications throughout the states. Party affiliation does not always indicate what sort of waivers states will apply for but it can be a helpful predictive tool. It may also provide some evidence that divided government is more likely to uphold the status quo and thus the ACA based on the case studies below. A chart is included below for reference to better display the political environments in which waivers are being requested.

State	Governor	Attorney General	State Legislature
Alaska ⁶²	Republican	Independent	Divided
California ⁶³	Democrat	Democrat	Democrat
Idaho ⁶⁴	Republican	Republican	Republican

⁶¹ Nicholas Bagley, “Idaho is ignoring Obamacare rules. That could set off a catastrophic chain reaction,” *Vox*, February 24, 2018, <https://www.vox.com/the-big-idea/2018/2/22/17040016/idaho-obamacare-ignore-rules-health-care-red-state-revolt>, (accessed February 1, 2019).

⁶² “Party control of Alaska state government,” *Ballotpedia*, 2019, https://ballotpedia.org/Party_control_of_Alaska_state_government, (accessed April 4, 2019).

⁶³ “Party control of California state government,” *Ballotpedia*, 2019, https://ballotpedia.org/Party_control_of_California_state_government, (accessed April 4, 2019).

⁶⁴ “Party control of Idaho state government,” *Ballotpedia*, 2019, https://ballotpedia.org/Party_control_of_Idaho_state_government, (accessed April 4, 2019).

Alaska

Alaska's waiver permitted the creation of a state-based reinsurance program. Although not particularly new or inventive, establishing a reinsurance program has created positive results with regards to affordability and accessibility of healthcare for Alaskan citizens as well as other citizens nationwide who live in states that have adopted Alaska's model.⁶⁵ Alaska's approved state innovation waiver is also an important case study when examining waivers writ large because it was the first approved waiver and thus created a model for other states interested in improving the ACA to follow.

Alaska's reinsurance program was approved in July of 2017 and therefore justified the creation of a reinsurance program in 2018. In July of 2016, the Alaska state legislature passed legislation that would justify the creation of a state reinsurance program. This legislation also authorized the governor to request a waiver from the federal government. The waiver requested sought to waive section 1312(c)(1) of the PPACA which required all enrollees in a market to be part of a single risk pool. Reinsurance as defined earlier allowed the state to create a fund that insurance companies could tap into in the event of high-cost consumer.⁶⁶

This may sound like a minor tweak to federal law, but it has had a meaningful impact on Alaskan consumers. It has increased the accessibility of health insurance for individuals as the stabilizing attributed to the reinsurance program has lowered costs. Improving the affordability and accessibility of healthcare can be seen in the lowering of premiums. Premiums in Alaska in 2018 were forecast to be 20% lower than they would have been without a reinsurance program.⁶⁷

⁶⁵ United States of America, Department of Health and Human Services, Center for Medicare & Medicaid Services, *Alaska: State Innovation Waiver under section 1332 of the PPACA*.

⁶⁶ Ibid.

⁶⁷ Ibid.

Actuaries also forecast that roughly 1500 additional people would have health insurance.⁶⁸ This demonstrates that in this instance, waivers have innovated to allow for improved affordability over improved accessibility which falls in line with goals of the ACA as well. Another important statistic regarding Alaska's health insurance marketplace was that prior to the enactment of reinsurance, premiums were expected to increase nearly 50% by 2017.⁶⁹ Instead, the reinsurance program allowed the state to avoid increasing premiums and managed to lower rates by about 7% in 2017. Although Alaska is geographically isolated and has a more sparse and low-density population than many other states, its waiver demonstrated to other states that state innovation could be an effective tool to prevent premium spikes and thus incentivize individuals to seek coverage.⁷⁰

State reinsurance programs make up most approved state innovation waivers and it is not surprising why. Alaska's reinsurance has demonstrated itself to lower healthcare costs and make strides to improve the accessibility of healthcare coverage. Additionally, by leading the pack, Alaska has shown how states should articulate their waiver requests in order to receive approval from the federal government. Despite changes in regulation surrounding waivers it is important to establish a timeline for their role in the ACA. Although waivers were included in federal ACA legislation and were subject to Obama administration regulation, they were only eligible from January 1, 2017 onward. The ACA included a grace period after its implementation before states could apply to ensure the ACA rollout was as uncomplicated as possible before allowing state changes to the law. This means that the process of applying for waivers is still relatively new and

⁶⁸ Ibid.

⁶⁹ Cheryl Fish-Parcham, "Alaska's Reinsurance 1332 Waiver: An Approach that Can Work," *FamiliesUSA*, August, 2017, <https://familiesusa.org/product/alaska-reinsurance-1332-waiver-approach-can-work>, (accessed February 28, 2019).

⁷⁰ Ibid

thus data is somewhat limited. However, with pending waivers to create more state reinsurance programs throughout the nation, one need not look further than Alaska to find an example of an effective federalist approach to healthcare.⁷¹

California

The second case study for examination is California's withdrawn waiver proposal to allow undocumented immigrants to purchase health insurance on the state's marketplace. Of proposed waivers thus far, California's best demonstrates the role that states can play in being laboratories for federal policy from a progress perspective. California's waiver also provides important insight into how the political leanings of state legislators impact their waiver applications. California legislators support the Affordable Care Act and Democratic policy platforms which explains why their proposed waiver existed within the scope of the Affordable Care Act. California's state lawmakers' motivations are contrary to the motivations of state lawmakers in more conservative states who oppose the Affordable Care Act and promote more Republican policies. California acknowledged its large population of undocumented immigrants and sought to include them by allowing them to purchase health insurance like every other American. Although the waiver proposal was ultimately withdrawn as a result of the election of Donald Trump, it is still an important case to highlight the potential states have to innovate and find solutions outside of the scope of federal law.⁷²

⁷¹ United States of America, Department of Health and Human Services, Center for Medicaid & Medicare Services, The Center for Consumer Information and Insurance Oversight, *Section 1332: State Innovation Waivers*.

⁷² Ana B. Ibarra and Chad Terhune, "California Withdraws Bid to Allow Undocumented To Buy Unsubsidized Plans," *Kaiser Health News*, January 20, 2017, <https://khn.org/news/california-withdraws-bid-to-allow-undocumented-immigrants-to-buy-unsubsidized-obamacare-plans/>, (accessed March 1, 2019).

California's proposed waiver would have allowed undocumented immigrants to purchase health insurance on the state's marketplaces without the ability to access subsidies.⁷³ Although legislation authorizing the waiver was passed and signed by the governor, the waiver application was withdrawn before it could be approved or denied by the Trump administration. If not withdrawn and approved however, California's waiver would have been an important step to better provide for the healthcare of immigrants. As mentioned in earlier sections, California has a history of trying to expand public services to include undocumented immigrant as demonstrated by expanding Medicaid to include undocumented children. These immigrant focused initiatives are not surprising considering California is home to between 2.35 and 2.6 million undocumented immigrants who constitute more than 6% of the state's population.⁷⁴ This plan however would really only change healthcare realities for middle-class undocumented adults leaving large portions of the undocumented immigrant population out of consideration.⁷⁵

Unlike ACA enrollees who were citizens, undocumented immigrants who wanted to purchase an insurance program would have to do so free of subsidies. The decision about restricting the expansion of subsidies to undocumented immigrants was likely due to the requirement that a waiver not increase the federal deficit. This provision, albeit important for some, would have still made healthcare unattainable for many undocumented immigrants because of the costs associated with an unsubsidized insurance plan.⁷⁶ California's healthcare

⁷³ Ibid

⁷⁴ Joseph Hayes and Laura Hill, "Undocumented Immigrants in California," *Public Policy Institute of California*, March 2017, <https://www.ppic.org/publication/undocumented-immigrants-in-california/>, (accessed April 15, 2019).

⁷⁵ Louise Norris, "How immigrants are getting health coverage," *Healthinsurance.org*, November 21, 2018, <https://www.healthinsurance.org/obamacare/how-immigrants-are-getting-health-coverage/>, (accessed March 3, 2019).

⁷⁶ Ana B. Ibarra and Chad Terhune, "California Withdraws Bid to Allow Undocumented To Buy Unsubsidized Plans," *Kaiser Health News*, January 20, 2017, <https://khn.org/news/california-withdraws-bid-to-allow-undocumented-immigrants-to-buy-unsubsidized-obamacare-plans/>, (accessed March 1, 2019).

actuaries estimated that only 17,000 undocumented immigrants would gain health insurance in California as a result of the waiver which is arguably a drop in the bucket.⁷⁷ California had roughly 4.1 million people enrolled in ACA marketplaces in 2018 with about three million uninsured.⁷⁸ By expanding healthcare to 17,000 people, California wouldn't lower the uninsured rate by a single percentage point. Additionally, this proposed change to ACA marketplaces would not do much to address other known variables that prevent immigrants from seeking healthcare such as language barriers and confusion about the complexities and nuances of the American healthcare system.⁷⁹ The residual difficulties faced by immigrants who seek healthcare coupled by the inability to access subsidies demonstrates that this plan by California was much more symbolic than anything else. Although symbolic, it was a powerful reflection of the integration of immigrants into the decision calculus of many California lawmakers and health administrators.

Although largely innovative and distinct from other state policies, California's waiver was ultimately withdrawn after the election of Donald Trump. The waiver was originally submitted based on a prediction that Hillary Clinton would win the presidential election in 2016 and would thus approve California's waiver to expand the scope of the Affordable Care Act. Another reason California withdrew the waiver is that state lawmakers feared a healthcare system inclusive of undocumented immigrants could be exploited by the Trump administration

⁷⁷ Ibid.

⁷⁸ Louise Norris, "California health insurance marketplace: history and news of the state's exchange," *HealthInsurance.org*, December 19, 2018, <https://www.healthinsurance.org/california-state-health-insurance-exchange/>, (accessed April 4, 2019).

⁷⁹ Amanda Salami, "Immigrant Eligibility For Health Care Programs in the United States," *National Conference of State Legislatures*, October 19, 2017, <http://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx>, (accessed February 28, 2019).

to find targets for deportation.⁸⁰ Because of Trump's anti-immigrant rhetoric and focus on curbing illegal immigration, state lawmakers were concerned that instead of providing healthcare, their waiver plan would provide the Trump administration with a list of targets for deportation. The perception of Trump being able to use the data maliciously would also likely undermine the goal of the waiver as many immigrants may have been unwilling to enroll for fear that the data would be misused. Despite the withdrawal, it is important to understand the implications that this waiver would have on the role of state innovation within the Affordable Care Act guidelines.

To examine the scope of the California waiver, it is important to outline its effects on affordability and accessibility of health insurance. Its effects on affordability would have been negligible as it did not expand subsidies or allow new enrollees to access any federal dollars. Additionally, by only increasing coverage by a few thousand immigrants, it would have only led to a marginal improvement of the overall accessibility of health insurance. By not offering subsidies for immigrants to purchase insurance or altering outreach programs, this waiver is not as robust as it sounds. It does however demonstrate that waivers do not always have to have tangible effects to be significant. This waiver was arguably more of a symbolic gesture than anything else. Supporters of the waiver in California argued that it was a small but necessary step to prevent discrimination against undocumented immigrants in the healthcare system as well as potentially opening the door toward broader expansions of coverage regardless of immigration status.⁸¹ This waiver is also important to examine because it signals how a progressive state like

⁸⁰ Ana B. Ibarra and Chad Terhune, "California Withdraws Bid to Allow Undocumented To Buy Unsubsidized Plans," *Kaiser Health News*, January 20, 2017, <https://khn.org/news/california-withdraws-bid-to-allow-undocumented-immigrants-to-buy-unsubsidized-obamacare-plans/>, (accessed March 1, 2019).

⁸¹ Ana B. Ibarra and Chad Terhune, "California Withdraws Bid to Allow Undocumented To Buy Unsubsidized Plans," *Kaiser Health News*, January 20, 2017, <https://khn.org/news/california-withdraws-bid-to-allow-undocumented-immigrants-to-buy-unsubsidized-obamacare-plans/>, (accessed March 1, 2019).

California is interested in spending its resources. California has tried to fundamentally change eligibility for social welfare which federally, is restricted to citizens or legal residents.

California's waiver was highly unique because it shows that unlike many other states who altered programs to make healthcare more difficult to access, California has continued trying to expand healthcare to noncitizens and thus meet the needs of its population. This makes California a noticeable outlier in state-based approaches to healthcare.⁸²

Idaho

The final case study for examination is Idaho and its recent changes to its ACA marketplaces. In January of 2018, Idaho's state health agency announced that Blue Cross Blue Shield of Idaho would begin offering short-term and high-deductible health plans that did not comply with the Affordable Care Act requirements that plans meet the essential health benefits. Idaho made this decision to offer cheaper and skimpier plans that would allow more people to purchase insurance even if the insurance coverage was only short-term or funded by high-deductibles. Although the Trump administration and specifically CMS stepped in and declared the health plan as illegal, Idaho continues to try and find ways to circumvent federal law and is increasing short-term plans in the status quo while they find legal avenues to erode the ACA requirements.⁸³ Idaho's noncompliance likely laid the groundwork for a future waiver application is important to analyze when discussing the necessity and efficacy of waivers under the Trump administration.⁸⁴

⁸² Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics*.

⁸³ Julie Appleby, "No-Go For Idaho: Back To The Drawing Board On State-Based Health Plans," *Kaiser Health News*, March 9, 2018, <https://khn.org/news/no-go-for-idaho-back-to-the-drawing-board-on-state-based-health-plans/>, (accessed April 4, 2019).

⁸⁴ Katie Keith, "Implementing the Idaho Executive Order On Noncompliant ACA Plans," *Health Affairs*, January 26, 2018, <https://www.healthaffairs.org/doi/10.1377/hblog20180126.6620/full/>, (accessed December 8, 2018).

When Idaho announced that it was allowing noncompliant plans on its state's marketplace, the federal government had to get involved. Seema Verma, the current head of the Center for Medicare & Medicaid Services who was nominated by Donald Trump, sent a letter to state lawmakers and administrators indicating that Idaho's plan, although appreciated by the Trump administration, was not compliant with federal law and Idaho needed to work within the confines of federal law.⁸⁵ It is important to note that Idaho did not have a waiver authorizing this action. In response to this letter in March, Idaho's Governor, Republican Brad Little, made clear that the letter from CMS signified that the federal government supported their idea and justified finding ways to move forward with Republican beliefs about the ACA. This plan openly violated federal law and threatened the stability of the state's insurance marketplace. By offering cheaper and weaker "health insurance in name only" plans, Idaho offered alternative and cheaper options only accessible by presumably young and healthy individuals. The Governor's office argued that their policy was a direct response to the rising costs of healthcare that Little blamed on the creation of the ACA.⁸⁶ Although this "more affordable" option may sound beneficial for young and healthy individuals, it has massive negative consequences for individuals with preexisting conditions and individuals who rely on robust health insurance. By allowing healthy people leave the main insurance pool to pay less for short-term or high deductible plans, insurance companies would lose large swaths of revenue from individuals who pay premiums but also have infrequent insurance claims. Less money coming into the system for insurance means that insurance companies will likely need to charge more for those who remain, who are predominantly sicker

⁸⁵ Paige Minemyer, "Idaho officials say they can still make noncompliant state plans work despite CMS' rejection," *FierceHealthcare*, March 12, 2018, <https://www.fiercehealthcare.com/payer/idaho-state-based-plans-cms-seema-verma-affordable-care-act-exchanges>, (accessed March 1, 2019).

⁸⁶Julie Appleby, "No-Go For Idaho: Back To The Drawing Board On State-Based Health Plans," *Kaiser Health News*, March 9, 2018, <https://khn.org/news/no-go-for-idaho-back-to-the-drawing-board-on-state-based-health-plans/>, (accessed April 4, 2019)..

and older individuals that require more healthcare services.⁸⁷ Essentially, Idaho's strategy seems to target the solvency of marketplace plans at the state level.

Idaho's plan to alter the Affordable Care Act marketplaces within its state demonstrates a form of conservative innovation. It has the potential to make health insurance cheaper for most while making it vastly more expensive for some. Idaho's plan also returned agency to individuals to determine how they planned to comply with the since-repealed individual mandate. Beyond that however, it lets individuals pick which kind of coverage they prefer without government determination of which programs and benefits are "essential." Idaho's plan also sought to encourage states to redraw their agreements with marketplace plans and create exchanges that states', not the federal government, saw fit.⁸⁸

Idaho's plan showed a mixed effect on affordability and accessibility which begs the question: how should states evaluate changes to their marketplaces? As mentioned earlier, regulatory changes under the Trump administration have allowed waivers to be authorized based on an executive order as opposed to legislation which was the requirement under the Obama administration. Idaho is also an important example in this regard because it shows that going forward with new federal guidance, it will be easier for Republican governors to implement healthcare plans without the consent of their state legislatures. After a few months of stalling and uncertainty, the Trump administration promulgated new guidance that allowed states to undermine waiver requirements so long as they could demonstrate that the effects on the overall population would be beneficial. This was a departure from Obama-era regulation that required

⁸⁷ Nicholas Bagley, "Idaho is ignoring Obamacare rules. That could set off a catastrophic chain reaction," *Vox*, February 24, 2018, <https://www.vox.com/the-big-idea/2018/2/22/17040016/idaho-obamacare-ignore-rules-health-care-red-state-revolt>, (accessed February 1, 2019).

⁸⁸ *Ibid.*

states to examine the effects of policy changes on the most vulnerable populations. Obama signaled that his administration would deny waivers if they had a positive effect overall but negatively impacted certain populations.⁸⁹ Trump has made the waiver approval process easier for states at both a procedural and a substantive level. Loosening restrictions will therefore likely incentivize conservative states to follow Idaho's conservative approach to the ACA.⁹⁰

Additionally, it is worth noting that Idaho was able to succeed at first despite its noncompliance with federal law due to limited federal consequences and a lack of political will to enforce the federal requirements. It can be argued that Trump's guidance on waivers was in response to Idaho's plan to give states a legal avenue to circumvent the will of the Affordable Care Act without putting the Republican administration in the difficult position of dealing with noncompliant states whose policies it may agree with on principle.

Going forward, Idaho's noncompliance has two major implications. First is that the federal government is very reluctant to pick fights with conservative states' approach to healthcare under the current Republican administration. Federal reluctance to intervene with healthcare plans it agrees with offers an important counter to the idea that waivers can be used to innovate and instead offers evidence that they are political tools that are only necessary if the government is willing to enforce the requirements of them. Although Idaho stalled to rework the language of their executive order, they have undermined the ACA by offering short-term plans which may mean that no matter how robust waivers and their guidance are, if the federal government is unwilling to encroach on federalism, the goals of waivers can be circumvented.

⁸⁹ Steven Porter, "States Gain Greater Flexibility Under New ACA Waiver Guidance," *Health Leaders*, October 22, 2018, <https://www.healthleadersmedia.com/innovation/states-gain-greater-flexibility-under-new-aca-waiver-guidance>, (accessed December 13, 2018).

⁹⁰ *Ibid.*

The second implication is that the federal government in its current form is highly interested in altering regulation to allow states to pursue whatever conservative interpretations of the Affordable Care Act they see fit. California's withdrawal of its waiver due to perceived conservative backlash and disapproval demonstrates that the waiver process, although intended to provide a federalist approach to healthcare that could avoid the pitfalls of Washington politics, is hyperpolitical. Obama's guidance was written so that plans like Idaho's could never move forward. It can also be argued that Obama would have taken more legal action against states that openly violated the mandates of federal law. The Trump administration has demonstrated through its loosened regulation that it is bending to the will of conservative states and allowing them avenues to undermine the components of the Affordable Care Act meant to protect vulnerable populations.

Conclusion

As Congress continues to stall on stabilizing premiums or lowering drug prices, looking to states to innovate out of these contemporary problems may be an attractive approach to resolving ballooning healthcare costs.⁹¹ Defenders of the ACA may justify their support for state innovation by looking at successful state reinsurance programs modeled on Alaska's success. New guidance lifting key restrictions on state's waiver programs and many states' attempts to undermine the core components of the ACA however paints a much darker picture for the future of federalist approaches to healthcare in the United States. The potential damage states can inflict to vulnerable populations and the longevity of the markets writ large under new Trump

⁹¹ Joshua Gordon, "Health Care Spending to Grow Faster Than Economy," *The Concord Coalition*, February 25, 2019, <https://www.concordcoalition.org/blog-post/health-care-spending-grow-faster-economy?eType=EmailBlastContent&eid=eeb498df-79ee-4cdc-8b36-556a10f7c72a>, (accessed February 26, 2019).

administration guidance prove that the hope the Obama administration placed in states was misplaced. The flexibility afforded to states through innovation waivers is unlikely to improve the nation's healthcare systems. The ability of states to apply for waivers to create local healthcare programs that ignore the plight of vulnerable groups mean that the accessibility and affordability of healthcare for those that need it the most will likely be significantly diminished by conservative states. New progressive ideas seen from states like California were mostly symbolic in working within the requirements of law and were withdrawn based on Trump's hostility to the idea. It is important to note that even if approved, California's model would have achieved insignificant improvements in coverage. One silver lining to note however is California's influence as a political bellwether. If California's waiver was not withdrawn and improved, it could influence other states to follow-on and implement similar policies.⁹² Although Alaska has succeeded and led a model for a few other states, the potential harm and national inconsistency, similar to what can be seen with state approaches to Medicaid, will serve to weaken coverage overall. Ultimately, regulations have to either be strict enough to ensure states uphold the ACA and meet difficult requirements which lowers their ability to make largescale innovations like in California, or they are loose enough to spur innovation that allows states to undermine the ACA through waivers.

It remains to be seen whether these conditions will change. Waivers have only been available for roughly two years and thus there is limited data on their overall impact to healthcare making this essay largely predictive based on what data exists now. It seems that the very nature of waivers needing federal approval is a good indicator about the nature of those proposals.

⁹² Jon Queally, "A New Year's Day Parade for 'Medicare for All' Signals Energized Battle Ahead in California," January 1, 2018, <https://www.commondreams.org/news/2018/01/02/new-years-day-parade-medicare-all-signals-energized-battle-ahead-california>, (accessed March 22, 2018).

Stricter requirements that aim to uphold the ACA may limit the number of approved waivers and require tougher standards for innovation which forces tangible improvements to healthcare.

Looser requirements that allow states to undermine core requirements make waivers easier to attain and thus have the potential to have severe consequences on the most vulnerable communities within a state. Ultimately however, this shift demonstrates that waivers are political tools that heavily rely on the role of the executive.

An external roadblock to successful state innovation to consider is the Employment Retirement Income Security Act of 1974 (ERISA). ERISA was passed to incentivize employers to provide benefit plans and avoid contradicting existing state laws. ERISA also means that regulation of employer-provided health insurance falls squarely into the jurisdiction of the federal government. In other words, states, with or without a state innovation waiver, cannot alter healthcare if the proposed change affects employer insurance. Unfortunately for states, significant healthcare reform will likely be impossible without facing ERISA preemption unless states target insurance regulation and reforms external from employer insurance. Although this roadblock will not limit minor changes to marketplace insurance, it will prevent largescale innovations such as creating a state-based single-payer or public-option programs because those ultimately affect employer insurance by requiring a change or modification to benefit types or payroll taxes (as a funding mechanism for a state-led healthcare overhaul). In order to overcome this, ERISA will likely need to be repealed or reworked. Congressional action on ERISA however is a highly unlikely task in the contemporary political climate.⁹³ As it stands now, it seems that Obama's vision for healthcare innovation at a state level will be impossible because

⁹³ Marea B. Tumber, "The ACA's 2017 State Innovation Waiver: Is ERISA a Roadblock to Meaningful Healthcare Reform?" *University of Massachusetts Law Review*: Vol. 10 : Iss. 2 , Article 5, (2015).

of ERISA preemption. Although this may also weaken conservative innovations to healthcare favored by the Trump administration, it still demonstrates the ineffectiveness and limitations of state innovation waivers overall.

Although waivers attempted to create more state involvement and solutions that could be separated from the politics of Washington, the president still wields significant control over the types of programs pursued by states and thus proves waivers are not as politically insulated as Obama may have hoped. Regardless of what Obama thought about this possibility when pushing for the inclusion of waivers in the ACA, it is important to note the same type of logic has threaded itself through both administrations. The Obama administration advocated for waivers in order to circumvent the lackluster will of Congress to innovate beyond the scope of the values of centrist Democrats and healthcare lobbying. Obama hoped that states (through the use of waivers) would do what Congress lacked political courage to do and potentially find new and innovative solutions to rising healthcare costs that could be implemented across the United States or spur federal adoption. The Obama administration's approach to state innovation waivers could not contrast more with his successor's approach. Instead of attempting to undermine and dismantle the healthcare law at every turn, Obama wanted to approve waivers that would improve the quality and accessibility of healthcare, thus strengthening the law.

By contrast, Trump entered office with the goal of replacing and repealing the ACA. When Congress was unable to do so, the Trump administration looked to states, and by eliminating core waiver requirements, allowed states to undermine core tenets of the ACA. The longer the ACA has remained in play at a federal level, the more popular it has become which

made it impossible for a unified Republican government to repeal the bill.⁹⁴ As such, both administrations have taken advantage of their unique role as the enforcer of waivers and the ACA to move the needle to where they want it to go. Trump has allowed states to weaken the law while Obama's stringent requirements mandated that states had to preserve and strengthen the law. Waivers, regardless of their goals or consequences, are a political tool of the executive that will likely remain in play as Congress continues to stall on making changes to the Affordable Care Act. Obama was unable to achieve a more sweeping and comprehensive health reform bill that dealt with affordability and not just access. With no legislative reprieve for either administration's problems, it seems that waivers have become the next best thing to achieve their healthcare goals.

⁹⁴ Margot Sanger-Katz and Haeyoun Park, "Obamacare More Popular Than Ever, Now That It May Be Repealed," *The New York Times*, February 1, 2017, <https://www.nytimes.com/interactive/2017/02/01/us/politics/obamacare-approval-poll.html>, (accessed April 14, 2019).

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