Article

Optional Legislation

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INTRODUCTION

Not since the nineteenth century has partisanship been this intense.[1] The only thing that Democrats and Republicans can agree upon, it seems, is that "Washington is broken."[2] Indeed,

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1. *See infra* Part I.

2. *See, e.g.*, Stephen Collinson, *Washington Is Broken*, CNN (Jan. 19, 2018), https://edition.cnn.com/2018/01/19/politics/washington-shutdown-broken/index.html [https://perma.cc/5C4C-XSKR]; *Rick Scott: Washington Is Broken*, SENATOR RICK SCOTT (Dec. 21, 2020), https://www.rickscott.senate.gov/sen-rick-scott-washington-broken [https://perma.cc/NY4T-YBM4]; *Plan to Fix a Broken Washington*, CONGRESSMAN JARED GOLDEN, https://golden.house.gov/plan-fix-broken-washington [https://perma.cc/4ZKS-VUE8]; Sean Alfano, *Biden: Washington Is "Broken"*, CBS NEWS (Feb. 17, 2010), https://www.cbsnews.com/news/biden-washington-is-broken [https://perma.cc/A4XK-EVFM]; ROBERT WUTHNOW, *Washington Is Broken: Politics and the New Populism*, *in* SMALL-TOWN AMERICA: FINDING COMMUNITY, SHAPING THE FUTURE

for years now, Congress has been unable to pass legislation on issues that pose serious risk to the nation and on which there is broad consensus for a federal solution of some kind. Aside from stimulus bills[3] and tax cuts,[4] Congress has enacted very little substantial legislation in almost a generation, with Obamacare and the recent but long-delayed infrastructure bill being the

291 (2013); Burgess Everett, Heather Caygle & Sarah Ferris, *'Get Off Our Damn Asses': Stimulus Debacle Exposes Broken Washington*, POLITICO (Dec. 10, 2020), https://www.politico.com/news/2020/12/10/coronavirus-stimulus-relief-impasse-444320 [https://perma.cc/S979-YXGG]; *Meet Mark: Why I'm Running*, MARK KELLY U.S. SENATE, https://markkelly.com/why-im-running [https://perma.cc/JXZ3-ZXG8] ("I'm running for the United States Senate because Washington is broken and Arizonans deserve independent leadership focused on solving the problems we face."); Todd S. Purdum, *Washington, We Have a Problem*, VANITY FAIR (Aug. 16, 2010), https://www.vanityfair.com/news/2010/09/broken-washington-201009 [https://perma.cc/4PXB-JN37] ("How broken is Washington?"); *Truth Integrity Report*, BRIAN ALLEN FOR U.S. CONG., [https://perma.cc/WML6-PBUG] ("In short, Washington is broken and people no longer trust their elected officials."); Jesse McKinley, *In Upstate New York House Race, Republican Makes Her Youth a Selling Point*, N.Y. TIMES (Oct. 28, 2014), https://www.nytimes.com/2014/10/29/nyregion/in-upstate-new-york-house-race-republican-makes-her-youth-a-selling-point.html [https://perma.cc/WTL7-6S5R] ("'I understand firsthand that Washington is broken,' said Ms. Stefanik . . . ."); Steve Holland, *Jeb Bush Endorses Ted Cruz for Republican Nomination*, REUTERS (Mar. 23, 2016), https://www.reuters.com/article/us-usa-election-bush-cruz-idUSKCN0WP11V [https://perma.cc/G5AJ-QQRA] ("'Washington is broken . . . ,' Bush said."); Steven Thomma, *Poll: 80 Percent of Americans Think Washington Is Broken*, MCCLATCHY NEWSPAPERS (Mar. 2, 2010), https://www.mcclatchydc.com/news/politics-government/article24575314.html; *Pres. Obama: Washington Is Broken*, CHI. TRIB. (Jan. 24, 2021), https://www.chicagotribune.com/nation-world/67612235-132.html [https://perma.cc/U965-PDDV]; *Democrats Opposing Pelosi*, NBC NEWS (Aug. 10, 2018), https://www.nbcnews.com/politics/elections/democrats-opposing-pelosi-n899536 [https://perma.cc/4LFQ-ARP7] (reporting Rep. Mel Hall's statement that "Washington is broken – and career politicians in both parties are to blame.").

3. *See, e.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, Pub. L. No. 116-123, 134 Stat. 146; Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

4. *See, e.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, 117 Stat. 752; Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.

most notable exceptions.[5] Entire policy areas have been left essentially untouched, including poverty, the environment, education, immigration, and so forth, with Presidents often struggling to fill in the regulatory gaps with executive orders.[6] The simple number of bills enacted is telling. The last five Congresses (representing ten calendar years) have passed an average of 339 bills, whereas the twenty-five Congresses between 1935 and 1985 passed an average of 1,249 bills, including such monumental legislation as the Social Security Act, the Voting Rights Act, and the Civil Rights Act.[7]

Beyond the chimeras of bipartisanship or enduring one-party rule, this Article proposes a new solution to legislative dysfunction in Washington: *optional legislation*. Imagine that states could opt in to a federal program—say, a scheme for universal basic income—on the condition that they alone foot a higher tax bill to pay for the plan. States that opt out are completely unaffected since they do not have to contribute funds. Given that each party controls its own set of states, optional legislation enables each party to govern at the federal level with a degree of independence from the other. By comparison to nationwide bills that have the support of a single party, optional legislation would not only be more politically viable and resilient, but would also lead to more innovative and democratic policies. This Article thus presents a new form of federalism engineered for eras of extreme partisan discord. Indeed, optional legislation embodies the twin virtues of what Heather Gerken envisions as the federalism of the future.[8] First, optional legislation conceives of the states and

5. *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

6. *See Executive Orders*, FED. REG., https://www.federalregister.gov/presidential-documents/executive-orders [https://perma.cc/SS9H-5PEM] (listing all executive orders since 1994).

7. *See United States Statutes at Large*, U.S. GOV'T PUBL'G OFF., https://www.govinfo.gov/app/collection/STATUTE [https://perma.cc/RLH5-LL8Q] (collecting all laws and resolutions enacted during each session of Congress). Earlier Congresses passed considerably more "private" bills, which affect particular individuals and corporations. However, the 1935 to 1985 Congresses still passed an average of 738 "public" bills, which impact the general public or classes of citizens, by comparison to the 338 public bills passed on average by the last five Congresses.

8. *See* Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1697 (2017) ("[M]y focus is on the future—what *should* federalism policy and doctrine look like in the twenty-first century?").

the federal government as "cooperative"[9] or "braided"[10] governance regimes, eschewing the traditional New Deal understanding of them as autonomous and competitive sovereigns.[11] Second, it rejects the premise of the civil rights era that decentralization necessarily favors conservative interests.[12] When expressed through optional legislation, decentralization can promote the agendas of both Democrats and Republicans, and it can help mend what is assuredly a broken Washington.

Consider Democratic proposals for an expanded public healthcare system, such as the various forms of Medicare for All[13] and "the public option."[14] What unites all such plans is their political fragility in Congress. In truth, they exist more as academic proposals for a future America than as live political projects, at least on a national scale. Finding sixty votes in the current Senate for even the public option is a non-starter. But what about fifty Democratic votes? First, for that question to matter, Democrats would have to eliminate the filibuster, so that healthcare reform could pass with a simple majority vote. However, only twenty-one out of fifty Democratic Senators have committed themselves to such a filibuster plan.[15] Regardless, even if healthcare reform *could* pass with fifty votes, finding fifty Democratic Senators in the current Congress to vote for either Medicare for All or the public option is almost certainly impossible.[16]

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9. *See infra* notes 168–72 and accompanying text (discussing cooperative federalism).

10. *See* Robert Cooter, *Gerken's Federalism 3.0: Better or Worse Than It Sounds?*, 105 CALIF. L. REV. 1725, 1728 (2017) ("My term for vertical interdependence of governments is 'braided federalism'—different levels of government twisted together like a rope.").

11. *See infra* notes 164–67 and accompanying text (discussing competitive federalism).

12. *See* Gerken, *supra* note 8, at 1708–17.

13. *See infra* notes 127–38 and accompanying text.

14. *See infra* notes 138–45 and accompanying text.

15. J.M. Rieger & Adrian Blanco, *Where Democratic Senators Stand on Changing or Eliminating the Filibuster*, WASH. POST (Jan. 20, 2022), https://www.washingtonpost.com/politics/interactive/2021/filibuster-vote-count [https://perma.cc/VE9U-5ZJF].

16. *See* Sarah Kliff & Margot Sanger-Katz, *With New Majority, Here's What Democrats Can (and Can't) Do on Health Care*, N.Y. TIMES: THE UPSHOT (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/upshot/biden-democrats-heath-plans.html [https://perma.cc/J7HW-9DBT] ("[U]nanimity among 50 Democratic senators may be a big political challenge in any case. When Congress last debated the public option in 2010, it split the Democratic caucus and couldn't garner enough support to pass.").

With consensus support within the party only for a much milder expansion of benefits,[17] it is unsurprising that President Biden has not included healthcare reform among his major policy proposals.[18]

Enter optional legislation. Twenty-eight states are represented among the fifty Senators who caucus with the Democrats.[19] While finding a majority or supermajority in Congress for healthcare reform is unlikely, the chances improve dramatically at the state level. It is doubtful that all twenty-eight states would opt in to Medicare for All or the public option, but it is not hard to imagine that some number of them—say, five to fifteen states at first—would choose to join some version of an expanded insurance program. In this way, optional legislation takes its cue from Otto von Bismarck, who once remarked that politics is "the art of the next best."[20] While a nationwide law would, of course, cover many more people, there are likely millions of individuals living in those five to fifteen states who are uninsured or underinsured, and who would stand to benefit greatly from an optional program. Is it not better to help some people rather than none? Another possibility yet is a *hybrid* optional bill, by which a baseline of federal programming is guaranteed to all, while allowing for states to opt in to additional forms of support.

Regardless, if the optional program is succeeding in participating states, then additional states can and, we think, *will* opt in. Optional bills hypercharge the "laboratories of democracy"[21]

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17. *Id.*; Paige Winfield Cunningham, *The Health 202: Senate Democrats Announce Budget Deal to Expand Medicare Benefits*, WASH. POST (July 14, 2021), https://www.washingtonpost.com/politics/2021/07/14/health-202-senate-democrats-announce-budget-deal-expand-medicare-benefits [https://perma.cc/652B-XA57].

18. *See* Dylan Scott, *Why Democrats' Ambitions for Health Care Are Shrinking Rapidly*, VOX (May 7, 2021), https://www.vox.com/policy-and-politics/22422793/joe-biden-health-care-plan-obamacare-medicare-public-option [https://perma.cc/3SJP-GTXH].

19. *See Senators, 117th Congress*, U.S. SENATE, https://www.senate.gov/senators/index.htm [https://perma.cc/3RXS-U6V6]. This article was finalized before the November 2022 midterm elections, which may shift the partisan balance of power. The effects of such a shift in electoral power are unaccounted for in the present piece, which focuses on the party division in the 117th Congress.

20. *See* Nicholas Southwood, *The Feasibility Issue*, 13 PHIL. COMPASS 1, 4–6 (2018) (discussing Bismarck and the normative significance of "feasibility").

21. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and

afforded by our federal system, given that they enable states to experiment with programming that they would be unable or unwilling to administer on their own.[22] As such, well-managed optional programs may be an effective means of convincing people who are skeptical of progressive demands for a more socialized system. For instance, the Medicaid expansion associated with Obamacare, which the Supreme Court converted into an option for the states,[23] has now been adopted by thirty-eight states, many of which were initially vehemently opposed to the policy.[24] This is "proof of concept" for the notion that states, even red states, will eventually join a successful, progressive program.

Moreover, nationwide bills that have the support of only one party are brittle. The American welfare state, in particular, is durable only when it is bipartisan. The Social Security Act of 1935 and the 1965 amendments that created Medicaid and Medicare passed with very large majorities.[25] By comparison, Obamacare moved forward on strict party lines in 2010,[26] only for Republicans to regain control of the House a few months

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try novel social and economic experiments without risk to the rest of the country."); Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part and dissenting in part) ("Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.").

22. *See infra* notes 153–56 and accompanying text.

23. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–85 (2012).

24. *See infra* notes 208–10 and accompanying text.

25. *1935 Congressional Debates on Social Security*, SOC. SEC. ADMIN., https://www.ssa.gov/history/tally.html [https://perma.cc/6VBK-X9Y9] (reporting that the Social Security Act of 1935 passed 372-33 in the House and 77-6 in the Senate); *To Pass H.R. 6675, a Bill to Provide a Hospital Insurance Program for the Aged Under the Social Security Act*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/h35 [https://perma.cc/2JTV-2AAZ] (reporting that the Social Security Amendments of 1965 passed 313-115 in the House); *To Pass H.R. 6675, the Social Security Amendments of 1965*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/s151 [https://perma.cc/996J-SUN2] (reporting that the Social Security Amendments of 1965 passed 68-21 in the Senate).

26. *Final Vote Results for Roll Call* 887, HOUSE OF REPRESENTATIVES CLERK (Nov. 7, 2009), https://clerk.house.gov/evs/2009/roll887.xml [https://perma.cc/HP54-K3L3] (showing that the Affordable Care Act passed 220-215 in the House, with the support of one Republican representative); *Roll Call Vote 111th Congress – 1st Session*, U.S. SENATE (Dec. 24, 2009), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396 [https://perma.cc/Z8M3-65TX] (showing that the Affordable Care Act passed 60-39 in the Senate, with the support of zero Republican Senators).

later.[27] Since that point, Republicans have destroyed much of the Affordable Care Act,[28] even if their many legal[29] and legislative[30] efforts to repeal it entirely have thus far failed. Optional legislation sidesteps all the partisan drama, which has been escalating unsustainably.[31] If Republicans don't like the policy, they don't have to have it—and they don't have to pay for it.

But, if the alternative is no bill at all, why would Republican Congresspeople support an optional version? There are several reasons. They may want to hedge against or undercut a future nationwide bill. The optional bill may help them win an election in a swing district or state. Or perhaps they are principled federalists. Further, optional legislation goes both ways, and Republicans may want to employ it reciprocally to promote their own platform. For instance, Republicans may be able to use optional legislation to opt out of portions of the existing welfare state, or to advance their policies on, say, school choice or reli-

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27. *See* Devin Dwyer, *Republicans Win Control of House with Historic Gains*, ABC NEWS (Nov. 2, 2010), https://abcnews.go.com/Politics/republicans-win-control-house-abc-news-projects-vote-2010-election-results/story?id=12035796 [https://perma.cc/CB88-H4FE].

28. *See* Perry Bacon, Jr., *Republicans Killed Much of Obamacare Without Repealing It*, FIVETHIRTYEIGHT (Dec. 18, 2018), https://fivethirtyeight.com/features/republicans-killed-much-of-obamacare-without-repealing-it [https://perma.cc/M55G-PSG8]; Frank J. Thompson, *Six Ways Trump Has Sabotaged the Affordable Care Act*, BROOKINGS: FIXGOV (Oct. 9, 2020), https://www.brookings.edu/blog/fixgov/2020/10/09/six-ways-trump-has-sabotaged-the-affordable-care-act [https://perma.cc/4PFF-PVD7].

29. *See* Peter Hamby & Jim Acosta, *14 States Sue to Block Health Law*, CNN (Mar. 23, 2010), http://www.cnn.com/2010/CRIME/03/23/health.care.lawsuit/index.html [https://perma.cc/R4UM-3YRY] (reporting that a group of Republicans filed suit against the Affordable Care Act within minutes of President Obama signing it into law); Emma Platoff, *Texas Is Suing—Again—to End Obamacare. This Time It Has Some Advantages.*, TEX. TRIB. (Aug. 8, 2018), https://www.texastribune.org/2018/08/08/texas-suing-end-obamacare-new-advantages-trump [https://perma.cc/NRL4-8ZEZ].

30. *See* Robert Pear, *House G.O.P. Again Votes to Repeal Healthcare Law*, N.Y. TIMES (Feb. 3, 2015), https://www.nytimes.com/2015/02/04/us/politics/house-gop-again-votes-to-repeal-health-care-law.html [https://perma.cc/MC9D-TJ8K]; Dylan Scott & Sarah Kliff, *Why Obamacare Repeal Failed. And Why It Could Still Come Back.*, VOX (July 31, 2017), https://www.vox.com/policy-and-politics/2017/7/31/16055960/why-obamacare-repeal-failed [https://perma.cc/LU9B-GNJA].

31. *See* Jacob Bronsther & Guha Krishnamurthi, *The Iron Rule*, 42 CARDOZO L. REV. 2889, 2897–903 (2021) (explaining the logic of partisan escalation in a realm of reciprocally self-applied norms of cooperation).

gious freedom, which would never otherwise pass through a divided Congress. In this manner, optional bills are more strategic than single-party nationwide bills, but they are also more democratic in the most basic sense that more people—both in red and blue states—will be able live under the set of laws and regulations that they actually want.[32] Optional legislation thus embraces the constitutional principle of local control to democratically advance progress in a politically fragmented time.[33]

This Article proceeds as follows. Part I outlines the history of American partisanship, focusing on the factors that enabled the uniquely bipartisan period in the decades following World War II, and explaining how these factors are absent from our current political environment. Part II introduces optional legislation by presenting case studies of universal basic income and public healthcare expansion. It then articulates the merits of such legislation as a matter of politics, policymaking, democracy, and federalism. Based on that discussion, Part II considers which policy areas are good candidates for optionality, and which are not; assesses existing legislative models that share certain features with optional legislation; and explains why various types of states and legislators would be motivated to support such bills. Finally, Part III replies to four potential constitutional objections to optional legislation, in particular, whether such legislation is in accordance with the requirements of uniform taxation, sovereign immunity, the Privileges and Immunities Clause, and the unconstitutional conditions doctrine.

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32. *See infra* notes 157–62 and accompanying text (discussing how optional legislation realizes two types of democratic values).

33. Local control and, indeed, state optionality is deeply embedded in the Constitution. As presented to the original thirteen states, the Constitution required the assent of only nine of those states to come into force. U.S. CONST. art. VII ("The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."). Any states that declined the option of joining the federation would have remained as independent sovereigns. *See* THE FEDERALIST NO. 39, at 244 (James Madison) (Clinton Rossiter ed., 1961) ("Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act."); *see also* SIGNE REHLING LARSEN, THE CONSTITUTIONAL THEORY OF THE FEDERATION AND THE EUROPEAN UNION 24–26 (2021) (discussing the constitutional archetype of a "federation" as exemplified by the Founding Era).

I. THE PARTISAN PROBLEM

Many political actors, from President Biden on down, have called for a return to bipartisan compromise in Washington.[34] Such demands are often premised on the notion—which is shared by much of the scholarly literature—that the rancor of recent decades is an exception to the historical norm of respectful and effective cooperation amongst the parties.[35] This is a misreading of American history. Unfortunately, George Washington and James Madison's famous protestations on the dangers of faction have always been confined to the realm of ideas.[36] While the "Era of Good Feelings" from 1817 to 1825 was an effectively *nonpartisan* burst of American history,[37] since 1776, there has been only one period of sustained bipartisanship: the three decades after World War II.[38]

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34. *See, e.g.*, Gerald F. Seib, *Biden Talks Up Bipartisanship; He Has Three Good Reasons*, WALL ST. J. (Dec. 21, 2020), https://www.wsj.com/articles/biden-talks-up-bipartisanship-he-has-three-good-reasons-11608565014 [https://perma.cc/HAP9-VEN3]; Ashley Parker, *Facing GOP Opposition, Biden Seeks to Redefine Bipartisanship*, WASH. POST (Apr. 11, 2021), https://www.washingtonpost.com/politics/biden-bipartisan/2021/04/11/65b29ad8-96f0-11eb-b28d-bfa7bb5cb2a5_story.html [https://perma.cc/4EQU-EVVZ].

35. *See* Hahrie Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization after the Second World War*, 37 BRIT. J. POL. SCI. 505, 512 (2007) ("[M]ost research has sought to explain the final decades of the twentieth century as the unique period. Because the 1950s were an unusual period in congressional history, however, present-day polarization should be understood in the light of this broader historical context.").

36. *See* George Washington, *Farewell Address (Sept. 17, 1796)*, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1914, at 205, 219 (James D. Richardson ed., 1908) ("The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism. But this leads at length to a more formal and permanent despotism. The disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual, and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation on the ruins of public liberty."); THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961) ("Among the numerous advantages promised by a wellconstructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

37. *See infra* note 39.

38. *See* Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, *in* POLITICAL NEGOTIATION: A HANDBOOK 37, 39–40 (Jane Mansbridge & Cathie Jo Martin eds., 2016) ("Since the 1970s . . . there has been a steady and steep increase in the polarization of both the House and Senate.");

This Part examines the factors that led to the rise and fall of that unique period in American governance. It then demonstrates that the variables that made that era possible are absent from our current political system, thus revealing the need for new solutions—beyond the false promises of bipartisanship or one-party rule—for governing a divided nation.

A. AN AMERICAN ANOMALY

America has been riven with partisanship since the Founding.[39] But party competition waned dramatically during the Progressive Era of 1896 to 1932. The Republican Party housed much

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Clio Andris, David Lee, Marcus J. Hamilton, Mauro Martino, Christian E. Gunning & John Armistead Selden, *The Rise of Partisanship and Super-Cooperators in the U.S. House of Representatives*, 10 PLOS ONE 1, 4–10 (2015) (concluding that "Congressional partisanship has been increasing exponentially for over [sixty] years," and that "voters have been selecting increasingly partisan representatives for [forty] years"); Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict within the American Electorate*, 58 POL. RSCH. Q. 219, 219 (2005) ("After declining throughout the 1950s and 1960s, partisanship began to reassert itself in Congress during the 1970s."); Pietro S. Nivola, *Partisanship in Perspective*, 48 NAT'L AFFS. 91, 94 fig.1 (2010) (documenting a drastic increase in partisanship beginning in the 1970s).

39. In the eighteenth century, Alexander Hamilton and John Adams's Federalists battled Thomas Jefferson and James Madison's Republicans (officially known as the Democratic-Republicans). Their disagreements ranged over such fundamental issues as the legality of state nullification of federal law, the existence of a national bank, the status of the judiciary as a coequal branch, the right to criticize the federal government, whether to have a standing American army and navy, and the allegiance of America in the war between a royal Britain and a revolutionary France. *See* Nivola, *supra* note 38, at 97–98; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 471–519 (1998). Importantly, nobody held the assumption that America would maintain a two-party system. *See* RICHARD HOFSTADTER, *A Constitution Against Parties*, *in* THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780–1840, at 40, 40–73 (1969). Organized parties were seen as a temporary problem, given the perceived inability of the system to maintain partisan strife. *Id.* That is to say: each party hoped to destroy the other and install a one-party system in America. The conflict reached a crescendo during the 1800 election, when Jefferson soundly defeated Adams's bid for reelection. JOHN C. MILLER, THE FEDERALIST ERA: 1789–1801, at 251–78 (1960). The Federalists soon faded from national prominence, a process which was accelerated by the accusation that they were calling for the secession of New England during the "Hartford Convention" of 1814–15. Donald Hickey, *New England's Defense Problem and the Genesis of the Hartford Convention*, 50 NEW ENG. Q. 587, 587 (1977).

The demise of the Federalists, when combined with a rise in nationalist sentiment following the War of 1812, brought about the "Era of Good Feelings" during the 1817–25 presidency of James Monroe. *See generally* ROBERT V.

internal disagreement but ruled without much of any external opposition, as Democrats controlled the South, and Republicans essentially had one-party rule everywhere else.[40] However, the Great Depression—and the ineffectual response to it by Republican President Herbert Hoover—created an opening for Democrats. Franklin Delano Roosevelt responded by organizing the "New Deal Coalition" of union members and blue-collar workers, racial and religious minorities, socialists, and poor Southern whites.[41] This bloc of voters led the Democrats to victory in seven out of nine presidential elections between 1932 and 1964,[42] as well as to control of both houses of Congress during all but four

REMINI & EDWIN A. MILES, THE ERA OF GOOD FEELINGS AND THE AGE OF JACKSON, 1816–1841 (1979). The nation entered an effectively *non-partisan* period—its first and only. Without any viable opposition to contend with, the Republican Party's congressional caucus stopped meeting, and Monroe ran unopposed in 1820. THOMAS H. NEALE, CONG. RSCH. SERV., R40504, CONTINGENT ELECTION OF THE PRESIDENT AND VICE PRESIDENT BY CONGRESS: PERSPECTIVES AND CONTEMPORARY ANALYSIS 5 (2009). The comity did not endure. The "Age of Jackson," forged in the contested 1824 election, was the beginning of a stable and modern two-party system, as the agrarian and populist Democrats, led by Andrew Jackson and Martin van Buren, battled the capitalist and constitutionalist Whigs, led by Henry Clay and Daniel Webster, in every single county. *See* PAUL F. BOLLER, JR., PRESIDENTIAL CAMPAIGNS 33–41 (1985); HARRY L. WATSON, ANDREW JACKSON VS. HENRY CLAY: DEMOCRACY AND DEVELOPMENT IN ANTEBELLUM AMERICA 19–22 (1998).

When slavery became a fully raging political issue in the middle of the nineteenth century, the Jacksonian party system collapsed. The Whigs fractured into the Republican Party (different from Jefferson's Democratic-Republicans) and other factions, and the Democrats split along sectional lines. JOSEPH W. PEARSON, THE WHIGS' AMERICA: MIDDLE-CLASS POLITICAL THOUGHT IN THE AGE OF JACKSON AND CLAY 152–60 (2020). During this period, Congresspeople had lost faith in the political process and were routinely armed; congressional "bullies," especially from the South, emerged from within their ranks to carry out an aggressive and often physically confrontational form of politics. *See generally* JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR (2018).

40. One exception to this trend was the election of Democrat Woodrow Wilson to the Presidency, an event enabled by the third-party candidacy of former Republican Theodore Roosevelt. *See generally* JOHN MILTON COOPER, JR., THE WARRIOR AND THE PRIEST: WOODROW WILSON AND THEODORE ROOSEVELT (1983).

41. *See, e.g.*, RICHARD L. RUBIN, PARTY DYNAMICS: THE DEMOCRATIC COALITION AND THE POLITICS OF CHANGE 11–83 (1976); V.O. KEY, JR., POLITICS, PARTIES & PRESSURE GROUPS 249 (5th ed. 1964) (arguing that the urbanizing process in America enabled party cleavages along class lines).

42. CONG. Q., PRESIDENTIAL ELECTIONS 1789–1996, at 59–67 (1997).

years during that period.[43] It was amidst this epoch of Democratic power, especially in the decades after World War II, that America realized some of its greatest bipartisan successes. Examples include the 1935 Social Security Act,[44] which, along with its 1965 amendments,[45] created Medicaid and Medicare; the 1964 Civil Rights Act,[46] which forbade discrimination in hiring and in public accommodations; the 1965 Voting Rights Act,[47] which assured minority registration and voting rights; the 1965 Immigration and Nationality Services Act,[48] which abolished national-origin quotas; the 1968 Civil Rights Act,[49] which banned housing discrimination and extended constitutional protections to Native Americans living on reservations; and the 1965 Elementary and Secondary Education Act,[50] which, for the first time, provided significant federal funding for education. All these bills passed with large bipartisan majorities in both houses of Congress.[51]

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43. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/7L8U-52K8]; *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART, & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions [https://perma.cc/S2RA-538V].

44. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

45. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286.

46. Civil Rights Act of 1964, Pub. L. No. 88-352, 77 Stat. 124.

47. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

48. Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

49. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73.

50. Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965).

51. *See* sources cited *supra* note 25 (reporting Senate and House votes on 1935 Social Security Act and 1965 amendments); *H.R. 7152. Passage*, GOVTRACK, https://www.govtrack.us/congress/votes/88-1964/s409 [https://perma.cc/2E2L-DM35] (Civil Rights Act of 1964 passes 73-27 in the Senate); *H.R. 7152. Civil Rights Act of 1964*, GOVTRACK, https://www.govtrack.us/congress/votes/88-1964/h182 [https://perma.cc/BGC6-HYER] (Civil Rights Act of 1964 passes 289-126 in the House); *To Agree to the Conference Report on S. 1564, The Voting Rights Act of 1965*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/s178 [https://perma.cc/PBJ9-VF62] (Voting Rights Act passes 79-18 in the Senate); *To Agree to Conference Report on S. 1564, The Voting Rights Act*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/h107 [https://perma.cc/P94S-M7RL] (Voting Rights Act passes 328-74 in the House); *To Pass H.R. 2580, Immigration and Nationality Act Amendments*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/s232 [https://perma.cc/8LEH-9VXX] (INA passes 76-18 in the Senate); *To Agree to the Conference Report on H.R. 2580, The Immigration and Nationality Act*, GOVTRACK,

There are several factors responsible for this bipartisan era. First, and maybe most importantly, is the sheer dominance of the Democratic Party.[52] Republicans had no rational hope of making legislation unless they added their voice to compromises within the Democratic Party or, as with the Civil Rights Act, joined a faction within the Democratic Party.[53]

Second, for much of this period, the ideological differences between the parties had narrowed. The nature of their disagreement over such major issues as the Soviet Union and civil rights was largely undefined in the 1950s, and even the class-based voting that brought FDR to prominence declined to a degree.[54] Consider that in the 1900 and 1904 elections, only 3.4% and 1.6% of Congressional districts split their Presidential and House votes between the parties.[55] In 1948, the number rose to 21.3%, peaking at 44.1% in 1972—before slowly falling back to 6% in the 2012 election.[56] Using established benchmarks of political ideology,[57] the data indicates that, in the House in 1949, nearly 10% of Democrats were more conservative than 10% of Republicans.[58] The overlap reached its apex in the House around 1967:

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https://www.govtrack.us/congress/votes/89-1965/h177 [https://perma.cc/FME8-D6AE] (Immigration and Nationality Act passes 320-70 in the House); *To Pass H.R. 2516, a Bill to Prohibit Discrimination in Sale or Rental of Housing, and to Prohibit Racially Motivated Interference with a Person Exercising His Civil Rights, and for Other Purposes*, GOVTRACK, https://www.govtrack.us/congress/votes/90-1968/s346 [https://perma.cc/C64X-NVN6] (Civil Rights Act of 1968 passes 71-20 in the Senate); *To Pass H. Res. 1100*, GOVTRACK, https://www.govtrack.us/congress/votes/90-1968/h295 [https://perma.cc/QSJ8-7CDP] (Civil Rights Act of 1968 passes 250-172 in the House); *To Pass H.R. 2362, The 1965 Elementary and Secondary Education Act*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/s48 [https://perma.cc/Z6CX-67BR] (ESEA passes 73-18 in the Senate); *To Pass H.R. 2362, The Elementary and Secondary Education Act of 1965*, GOVTRACK, https://www.govtrack.us/congress/votes/89-1965/h26 [https://perma.cc/2QRJ-H2M2] (ESEA passes 263-153 in the House).

52. *See supra* notes 42–43 and accompanying text.

53. Brian Balogh, *Political Partisanship in the U.S.*, C-SPAN, at 25:20-26:20 (Jan. 29, 2016), https://www.c-span.org/video/?403876-1/political-partisanship-us [https://perma.cc/MH7U-G7TB].

54. Han & Brady, *supra* note 35, at 515–16.

55. *Vital Statistics on Congress Chapter 2: Congressional Elections*, BROOKINGS INST. 35 (2021), https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-2.pdf [https://perma.cc/X2FB-JV37].

56. *Id.*

57. We reference first-dimension DW-Nominate scores and Americans for Democratic Action (ADA) scores here. Both scores are metrics for political-ideological alignment along the spectrum of political beliefs.

58. Han & Brady, *supra* note 35, at 509.

more than 13% of Democrats were more conservative than 10% of Republicans, and nearly 7% of Democrats were more conservative than 25% of Republicans.[59]

Incredible though it may be to a student of contemporary American politics, intellectuals of the time were actually worried about the *lack of partisanship*. The American Political Science Association (APSA) released a report in 1950, *Toward a More Responsible Two-Party System*, that lamented the decline in accountability and the rise of political malaise caused by the blurring of the parties.[60] The political scientists looked back fondly on the more participatory electorate of the nineteenth century that was engendered by stark partisan competition. Further, as a normative matter, they believed that politics should represent a competition of ideas rather than a pluralistic division of spoils. As such, they called upon the parties to "develop and define policy alternatives on matters likely to be of interest to the whole country."[61] Two decades later, David Broder echoed the APSA when he argued that "The Party's Over" and that America required "some unvarnished political partisanship" to sustain an ambitious legislative agenda and reenergize the political system.[62]

A third reason for the bipartisanship of the postwar era was the presence of Congresspeople who were pulled in two political directions. In the 1960s, the parties began slowly to drift apart from each other ideologically, especially at the national level of presidential candidates, with the most notable example being the libertarian candidacy of Barry Goldwater in 1964.[63] This process enabled what Hahrie Han and David Brady refer to as

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59. *Id.*

60. Am. Poli. Sci. Ass'n, *Toward a More Responsible Two-Party System, Part I. The Need for Greater Party Responsibility*, 44 AM. POL. SCI. REV. 15, 15 (Supp. 1950).

61. *Id.* at 20.

62. David Broder, *The Party's Over*, ATLANTIC (Mar. 1972), https://www.theatlantic.com/magazine/archive/1972/03/the-partys-over/307016 [https://perma.cc/Y89X-WDPK] (lamenting the effect of compromise on President John F. Kennedy's legislative agenda); *see also* DAVID BRODER, THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA 33 (1972); NORMAN H. NIE, SIDNEY VERBA & JOHN R. PETROCIK, THE CHANGING AMERICAN VOTER 47 (1976) ("Perhaps the most dramatic change in the American public over the past two decades has been the decline of partisanship.").

63. *See* BARRY GOLDWATER: THE CONSCIENCE OF A CONSERVATIVE, at xxi–xxiv (CC Goldwater ed., 2007) (distinguishing conservatism from liberalism on

"cross-pressured" members of Congress.[64] These were Democrats from conservative districts or states (voting more than 55% Republican at the presidential level) and Republicans from liberal constituencies (voting more than 55% Democrat at the presidential level).[65] For these members, the politics of their constituents contradicted to some degree with the politics of their national party. Between 1960 and 1972, the House had approximately thirty to eighty cross-pressured members per term, and the Senate had approximately eight to twenty.[66] Han and Brady demonstrate how this special group of Congresspeople voted in a less partisan manner than their colleagues, and how crucial they were to bipartisan bills.[67] However, starting in the 1970s, as the parties began to move further apart ideologically, these cross-pressured members were not able to insulate themselves through the advantages of incumbency and the "personal vote."[68] They began to lose elections, change parties, or retire. By 1990, there were *zero* cross-pressured members of Congress.[69]

B. DIAGNOSING THE PROBLEM: PARTISANSHIP AND LEGISLATIVE INEFFICACY

While partisan rancor is an American tradition,[70] we do believe that the feud between the present-day parties has become unsustainable, with dire consequences for the legislative process as the nation returns to pre-twentieth century norms of partisan conflict.[71] Our focus in this section is on the causes of Congress's

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the basis of values like respect for hard work and states' rights, and opposition to communism).

64. Han & Brady, *supra* note 35, at 506.

65. *Id.* at 519.

66. *Id.* at 530.

67. *Id.* at 517–21.

68. *Id.* at 529. On the incumbency advantage in the postwar era, see Robert Erickson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234, 1239–42 (1972) (discussing the decline in the Republican gerrymander postwar and the incumbency advantage gained by Democratic representatives after the 1966 election); DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 36, 50–52, 84–85 (1974) (noting the incumbency advantages that result from the structural units of Congress); Morris Fiorina, *Parties and Partisanship: A 40-Year Retrospective*, 24 POL. BEHAV. 93, 96 (2002) (discussing "candidate-centered politics").

69. Han & Brady, *supra* note 35, at 530.

70. *See supra* note 39 and accompanying text.

71. *See* Larry Bartels, *Electoral Continuity and Change, 1868–1996*, 17 ELECTORAL STUD. 275, 281–83 (1998) (demonstrating with aggregate level anal-

inability to pass legislation on issues that pose a serious risk to the nation and on which there is broad consensus for some variety of solution at the federal level. As discussed at the outset, Congress has enacted very little substantial legislation in recent decades, leaving entire policy areas effectively untouched.[72] Both parties have lamented the disfunction.[73] Why is it that—unlike the post-World War II Congress—our generation of leaders has such a hard time coming together to govern? In this section, we identify four features of our current political order that have exacerbated the problem of partisanship and consequent legislative inefficacy: (1) ideological division; (2) electoral equipoise; (3) counter-majoritarian and dilatory rules; and (4) a fear of creating new interest groups.

First, we have an increasingly ideologically divided nation, with separate and distinct visions for the nation's future.[74] The intellectual consonance of the 1950s and 60s collapsed. While the parties always disagreed on the role of the government in managing the economy and economic inequality,[75] they increasingly detached from one another as Ronald Reagan and the GOP embraced Goldwater's libertarian principles.[76] Further, their disagreement spread to issues of race[77] and then—with accelerating

yses that partisan forces were present in late twentieth century elections at levels that had not been present for almost a century).

72. *See supra* notes 1–7 and accompanying text.

73. *See supra* note 2 and accompanying text.

74. Brewer, *supra* note 38, at 220 (collecting empirical studies indicating that, since the 1970s, the ideological distance between the parties has increased, while the distance between members within each party has decreased); JEFFREY M. STONECAS, MARK D. BREWER & MACK D. MARIANI, DIVERGING PARTIES: SOCIAL CHANGE, REALIGNMENT, AND PARTY POLARIZATION 1–50 (2003) (examining the causes of resurgent polarization).

75. *See* JOHN GERRING, PARTY IDEOLOGIES IN AMERICA, 1828–1996, at 125–58 (1998) (providing a history of party ideologies).

76. *See* James W. Ceaser, *The Theory of Governance of the Reagan Administration*, *in* THE REAGAN PRESIDENCY AND THE GOVERNING OF AMERICA 57 (Lester M. Salamon & Michael S. Lunds eds., 1984) (examining the Reagan administration's political philosophy); Nicol C. Rae, *Class and Culture: American Political Cleavages in the 20th Century*, 45 W. POL. Q. 629, 637–44 (1992) (discussing the unraveling of the New Deal policies after 1952); DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 142–44 (1991) (noting Republican reactions to Carter-era Democratic policies); Brewer, *supra* note 38, at 220.

77. *See generally* EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989) (discussing the role of race in the realignment of the parties); Andrew J. Taylor, *The Ideological Development of the Parties in Washington, 1947–1994*, 29 POLITY

force in the 1980s—culture.[78] The parties began to offer wholly distinct packages on all three types of issues: economy, race, and culture. Geoffrey Layman and Thomas Carsey discuss the development of "conflict extension" within the American electorate,[79] and how the positions advocated by each set of party elites are now "packaged together for public consumption."[80] Matt Grossmann and David Hopkins downplay the significance of "ideology" for the Democrats.[81] They argue that the Democratic Party "is fundamentally a group coalition" composed of "single-issue interest groups and social movements," whereas the Republicans "perceive themselves as mainstream Americans defending the values of individual liberty and traditional morality against the encroachment of left-wing ideas."[82] For our purposes, we are agnostic on these precise characterizations; for example, we acknowledge that what is "ideological" and what is rational is itself controversial. What is important, however, is recognizing that Democrats and Republicans champion two rival visions for

273, 286–88 (1996) (demonstrating the effect of African Americans' political mobilization and concentration into majority-minority districts on congressional politics and party ideology); Brewer, *supra* note 38, at 220; ROHDE, *supra* note 76, at 58–60.

78. *See generally* Geoffrey C. Layman, "*Culture Wars" in the American Party System: Religious and Cultural Change Among Partisan Activists Since 1972*, 27 AM. POL. Q. 89 (1999) (documenting the religious polarization of the parties); GEOFFREY C. LAYMAN, THE GREAT DIVIDE: RELIGIOUS AND CULTURAL CONFLICT IN AMERICAN PARTY POLITICS (2001) (providing data on the religious beliefs and practices of delegates to the Democratic Conventions from 1972 to 1992); Rae, *supra* note 76; Geoffrey C. Layman & Edward G. Carmines, *Cultural Conflict in American Politics: Religious Traditionalism, Postmaterialism, and U.S. Political Behavior*, 50 J. POL. 751 (1997) (arguing that cultural orientations have come to exert a substantial influence on American political life, and noting that the relevant cultural divisions are those between religious traditionalists and those rejecting faith-based value systems); JOHN B. JUDIS & RUY TEIXEIRA, THE EMERGING DEMOCRATIC MAJORITY (2002) (arguing that cultural changes in America, as well as economic and demographic trends, will lead to Democratic political control); Kara Lindaman & Donald P. Haider-Markel, *Issue Evolution, Political Parties, and the Culture Wars*, 55 POL. RSCH. Q. 91 (2002) (highlighting the political impact of cultural differences, especially as they relate to environmental and gun regulations).

79. Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and "Conflict Extension" in the American Electorate*, 46 AM. J. POL. SCI. 786, 787 (2002).

80. *Id.* at 788.

81. MATT GROSSMAN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 3 (2016).

82. *Id.*

America that are difficult, if not practically impossible, to harmonize.

It is not just party elites. Studies indicate that the voting public itself is more polarized such that each party can rely on well-defined constituencies that map almost perfectly onto their ideological agenda.[83] For instance, before 1980, the difference between religious and non-religious whites in terms of their party identification was negligible[84]; however, religious whites are now dependably Republican, with 81% of white protestants voting for Donald Trump in the 2020 election.[85] Meanwhile, in the other direction, the civil rights era turned African Americans solidly Democratic and, unsurprisingly, 87% of Black voters supported Joe Biden.[86] The ideological divide among the populace has been nurtured by deeply partisan content on television, the internet, and radio.[87] Many people obtain their news exclusively from sources that echo their own normative predispositions and vilify those who disagree.[88]

Beyond our access to politicized media sources, the political science literature has identified a number of other variables—such as growing economic inequality—that have increased the ideological distance between the parties, and decreased the distance within the parties.[89] The result is that voters and politicians tend to see political party affiliation as the key feature of

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83. Nivola, *supra* note 38, at 95.

84. Alan I. Abramowitz, *How Race and Religion Have Polarized American Voters*, WASH. POST (Jan. 20, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/20/how-race-and-religion-have-polarized-american-voters [https://perma.cc/FC8C-EPYL]; *see also* Thomas A. Hirschl, James G. Booth & Leland L. Glenna, *The Link Between Voter Choice and Religious Identity in Contemporary Society: Bringing Classical Theory Back*, 90 SOC. SCI. Q. 927, 940 (2009) (analyzing elections from 1980 to 2000 and finding that the effect of religious identity on voter choice was strongest within the upper class).

85. Frank Newport, *Religious Group Voting and the 2020 Election*, GALLUP (Nov. 13, 2020), https://news.gallup.com/opinion/polling-matters/324410/religious-group-voting-2020-election.aspx [https://perma.cc/9QTZ-BCGS].

86. Sean Collins, *Trump Made Gains with Black Voters in Some States. Here's Why.*, VOX (Nov. 4, 2020), https://www.vox.com/2020/11/4/21537966/trump-black-voters-exit-polls [https://perma.cc/RHM6-EQK2].

87. Nivola, *supra* note 38, at 95.

88. *Id.*

89. *See* Barber & McCarty, *supra* note 38 (assessing putative causes of political polarization, such as an increasingly polarized electorate, the Southern realignment, gerrymandering, primary elections, economic inequality, money in politics, the media environment, Congressional rule changes, majority-party agenda control, and a breakdown of bipartisan norms); *see also* Andris et al.,

their (political) identity,[90] and they distrust the other party in its ability to govern the nation.[91] As David Moss writes: "Policy making in America is approaching all-out war, where victory is paramount, 'compromise' is a dirty word, and virtually any issue or development can become a weapon for bludgeoning the other side."[92] It is not much of an exaggeration to say that America is ruled today by two tribal nations, each with its own worldview and culture, and each believing that they must destroy the other to save their homeland.[93]

Second, the fact that each party can reasonably hope for total victory, at least in the short term, has propelled the discord and intransigence in Washington. For instance, the Republicans controlled both houses of Congress and the Presidency from 2016–18, only for Democrats to gain such power for the 2020–22

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supra note 38, at 1–2 (surveying the literature on the causes of American partisanship).

90. *See* DANIEL J. HOPKINS, THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 4–7 (2018) (discussing how nationalization has profoundly impacted American politics, and increased the relevance and power of national parties at all levels of governance); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 765–67 (2017) (observing that national partisanship has led to partisan voting at the state and local levels); Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 366 (2013) ("[N]ot all voters see and respond to parties in informational terms. Many have an essentially affective rather than instrumental relationship to their party of choice. Partisanship for them is largely an incident of upbringing, one which resembles nothing so much as felt ties to family, religion, clan, or tribe."); Robert F. Nagel, *Nationalized Political Discourse*, 69 FORDHAM L. REV. 2057, 2057–58 (2001) (lamenting the contemporary focus on nationwide, as opposed to state-level politics).

91. *See Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public [https://perma.cc/ZE2B-YKA4].

92. David A. Moss, *Fixing What's Wrong with U.S. Politics*, HARV. BUS. REV. (Mar. 2012), https://hbr.org/2012/03/fixing-whats-wrong-with-us-politics# [https://perma.cc/P6CU-6WMZ].

93. PEW RSCH. CTR., *supra* note 91 ("Republicans and Democrats are more divided along ideological lines – and partisan antipathy is deeper and more extensive – than at any point in the last two decades."); Nate Cohn, *Polarization Is Dividing American Society, Not Just Politics*, N.Y. TIMES: THE UPSHOT (June 12, 2014), https://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-politics.html [https://perma.cc/7SVN-6MW9] (providing statistics on the increasing relevance of partisan affiliation for both political and personal decisions, impacting not only who one votes for but also, for instance, who they will marry or live near to).

term.[94] However, the Democratic majority in Congress is historically thin, with the Vice President breaking the fifty–fifty tie in the Senate and a 220 to 211 seat lead in the House.[95] Meanwhile, the Presidential elections in recent years have been incredibly close.[96] In a contest with more than 156 million ballots cast, only 44,000 votes in Georgia, Arizona, and Wisconsin separated Biden and Trump from an Electoral College tie.[97] If the parties are rational organizations, which seek to enact as much of their agenda as possible, this equipoise of power means that compromise is neither necessary nor desirable in most cases.[98] The pursuit of total victory may indeed be the most efficient and rational means of bringing about their favored policies and preventing their disfavored policies—especially when the distance to an acceptable compromise is so far. In this way, the political risk profiles of the contemporary parties are completely different from that of the post-World War II Republican Party, which had no chance of gaining power and therefore had to work with the Democrats (or Democratic factions) if it wanted to impact the federal code.

Third, the problems of polarization are exacerbated by the bevy of counter-majoritarian rules in Congress. First and foremost is the bicameral structure of Congress.[99] That structure can

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94. *Party Government Since 1857*, HIST., ARTS, & ARCHIVES, U.S. H.R., https://history.house.gov/Institution/Presidents-Coinciding/Party-Government [https://perma.cc/YW8Z-RVQV]

95. *U.S. House of Representatives, 117th Congress Lineup*, U.S. H.R. PRESS GALLERY, https://pressgallery.house.gov/member-data/party-breakdown [https://perma.cc/BCW8-N6ZH].

96. Dante Chinni, *Are Close Presidential Elections the New Normal?*, NBC (Dec. 6, 2020), https://www.nbcnews.com/politics/meet-the-press/are-close-presidential-elections-new-normal-n1250147 [https://perma.cc/EFA9-YTHG].

97. *Narrow Wins in These Key States Powered Biden to the Presidency*, NPR (Dec. 2, 2020), https://www.npr.org/2020/12/02/940689086/narrow-wins-in-these-key-states-powered-biden-to-the-presidency [https://perma.cc/GVN6-BLUB].

98. Along these lines of strategy, then-Senate majority leader Mitch McConnell said: "The single most important thing we want to achieve is for President Obama to be a one-term president." Glenn Kessler, *When Did Mitch McConnell Say He Wanted to Make Obama a One-Term President?*, WASH. POST (Jan. 11, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/11/when-did-mitch-mcconnell-say-he-wanted-to-make-obama-a-one-term-president [https://perma.cc/P39W-PBLY].

99. *See* Jacob S. Hacker & Paul Pierson, *The Republican Devolution: Partisanship and the Decline of American Governance*, 98 FOREIGN AFFS. 42, 44

create more chances of divided government, even if it is just due to the randomness of elections. And divided government can stop or substantially delay legislation.[100]

Beyond the bicameral nature of Congress, the Senate itself is unrepresentative of the electorate.[101] Because each state gets two Senators, and because the states themselves are very different in population, this results in greatly disproportionate representation. California, with a population nearing forty million[102], and Wyoming, with a population barely over 500,000, each have two Senators.[103] Indeed, California's population is greater than the population of the twenty-two smallest states combined.[104] And this also has an impact along partisan lines. The fifty–fifty Republican Senate that ruled from 2000 to 2002 represented only 42% of the population.[105] And this is no rarity. Despite having held the Chamber for over fourteen of the last twenty-two

(2019) ("The U.S. system of checks and balances, with its separate branches and levels of government, requires a high level of compromise to function.").

100. *See generally* Tyler Hughes & Deven Carlson, *Divided Government and Delay in the Legislative Process: Evidence from Important Bills, 1949–2010*, 43 AM. POL. RSCH. 771 (2015) (examining the relationship between divided government and delay in the consideration of important legislation); *see also* George C. Edwards III, Andrew Barrett & Jeffrey Peake, *The Legislative Impact of Divided Government*, 41 AM. J. POL. SCI. 545 (1997) (examining how divided government affects the policymaking process).

101. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 49 (2008) (discussing the unrepresentative nature of the Senate); Hans Noel, *The Senate Represents States, Not People. That's the Problem.*, VOX (Oct. 13, 2018), https://www.vox.com/2018/10/13/17971340/the-senate-represents-states-not-people-constitution-kavanaugh-supreme-court [https://perma.cc/E7JR-RRN6] (discussing the merits of the Senate's equal representation of states and not people).

102. Hans Johnson, Eric McGhee & Marisol Cuellar Mejia, *California's Population*, PUB. POL'Y INST. CAL., https://www.ppic.org/publication/californias-population [https://perma.cc/YC9H-TMS6].

103. *Quick Facts, Wyoming*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/WY [https://perma.cc/8NMF-ZUYK].

104. *Just How Big Is California?*, ECON. DEV. RESULTS, LLC (May 5, 2017), http://econdevresults.com/just-how-big-is-california [https://perma.cc/SU2Q-AXDY].

105. Ed Kilgore, *Republican Senators Haven't Represented a Majority of Voters Since 1996*, N.Y. MAG: INTELLIGENCER (Feb. 25, 2021), https://nymag.com/intelligencer/2021/02/gop-senators-havent-represented-a-majority-since-1996.html [https://perma.cc/BJD9-5QPX].

years, Republican Senators together have not represented a majority of the country since 1996.[106] Here, the cohesiveness of parties and their tribalism can have a substantial impact in preventing legislation. A minority of the population, which is highly organized and highly skeptical of progressive legislation, has the inbuilt institutional power to prevent such bills, even if they are desired by a majority of the population. A prime example of this has been the inability of Congress to pass very meaningful legislation further regulating firearms, like universal background checks and bans on high-capacity magazines and assault weapons, despite broad support for such bills.[107]

Moreover, we have the actual procedural rules, which provide minority parties with substantial power over the proceedings. The foremost such rule is the Senate's filibuster rule, which requires sixty Senators to vote to pass most legislation.[108] The filibuster does not apply to all Senate decisions, or even to all legislation. There are important exceptions, including for confirming Presidential nominations[109] and for funding bills passed through the reconciliation process.[110] Because it is rare for a party to obtain sixty Senate seats, legislation requires some

106. *Id.*

107. Rani Molla, *Polling Is Clear: Americans Want Gun Control*, VOX (June 1, 2022), https://www.vox.com/policy-and-politics/23141651/gun-control-american-approval-polling [https://perma.cc/P4SF-9CE9]; Laura Santhanam, *Most Americans Support These 4 Types of Gun Legislation, Poll Says*, PBS (Sept. 10, 2019), https://www.pbs.org/newshour/politics/most-americans-support-stricter-gun-laws-new-poll-says [https://perma.cc/RD7H-QBLV]; Leigh Ann Caldwell, *Bipartisan Senate Talks on Expanded Gun Background Checks Break Down*, NBC (June 9, 2021), https://www.nbcnews.com/politics/congress/bipartisan-senate-talks-expanded-gun-background-checks-break-down-n1270227 [https://perma.cc/64WG-YGES]. Congress recently passed a gun control bill which was very modest but nonetheless historic given nearly three decades of inaction. Emily Cochrane, *Congress Passes Bipartisan Gun Legislation, Clearing It for Biden*, N.Y. TIMES (June 24, 2022), https://www.nytimes.com/2022/06/24/us/politics/gun-control-bill-congress.html [https://perma.cc/2NCV-82DM]. The bill enhances background checks for those under the age of twenty-one, and provides federal funding for the implementation of "red flag" laws, among other measures. *Id.*

108. Tim Lau, *The Filibuster, Explained*, BRENNAN CTR. FOR JUST. (Apr. 26, 2021), https://www.brennancenter.org/our-work/research-reports/filibuster-explained [https://perma.cc/U5EF-7JKS].

109. Molly E. Reynolds, *What Is the Senate Filibuster, and What Would It Take to Eliminate It?*, BROOKINGS (Sept. 9, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it [https://perma.cc/TY7F-Y4GZ].

110. *Id.*

party crossover. However, it is precisely that phenomenon that is becoming rarer. Beyond the filibuster, there are a number of dilatory rules,[111] which provide so much protection to individual Senators and minority groups of Senators that the Senate often needs to set them aside as a matter of unanimous consent or custom in order to function.[112] But if the minority party refuses to consent and insists on strict adherence to the rules, it can essentially bring the Senate to a standstill.[113]

These Senate rules are not set in stone. In fact, rule changes can be accomplished with a simple majority vote.[114] But such changes are considered to have a significant gravity. Amending or eliminating the filibuster has been termed the "nuclear option," for example.[115] Not to be undone, similar procedures may be employed in the House of Representatives, but there are more effective ways to combat them in that body.[116]

Finally, a fear of creating new interest groups can further constrain the legislative process. Federal bills benefit certain groups of individuals and corporations more than others, sometimes to a transformative degree.[117] These groups—banks, the elderly, drug companies, homeowners, etc.—are extremely motivated to maintain their statutory patrons, and their influence

111. Ian Millhiser, *Minority Rules*, CTR. FOR AM. PROGRESS (Sept. 28, 2010), https://www.americanprogress.org/issues/general/news/2010/09/28/8328/minority-rules [https://perma.cc/R2TZ-EN8H] (setting forth ten such dilatory practices in the U.S. Senate).

112. STANLEY BACH, CONGRESSIONAL RSCH. SERV., RL30850, MINORITY RIGHTS AND SENATE PROCEDURES 1 (2005) (reporting changes to Senate rules).

113. *See id.*; *see also* ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY (2021) (critiquing the status quo of Senate inaction enabled by the filibuster).

114. CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., LN10875, EIGHT MECHANISMS TO ENACT PROCEDURAL CHANGE IN THE U.S. SENATE, (2020) (listing recommended procedural changes to Senate rules).

115. Andrew Prokop, *The State of the Filibuster, Explained*, VOX (Mar. 12, 2021), https://www.vox.com/22319564/filibuster-reform-manchin-democrats-nuclear-option [https://perma.cc/DR6Z-4GG2]; Reynolds, *supra* note 109.

116. *See, e.g.*, Amihai Glazer, Robert Griffin, Bernard Grofman & Martin Wattenberg, *Strategic Vote Delay in the U.S. House of Representatives*, 20 LEGIS. STUD. Q. 37, 37–45 (1995) (analyzing legislators' strategic voting delays).

117. *See* ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 68 (1956) ("In a rough sense, the essence of all competitive politics is bribery of the electorate by politicians . . . . The farmer . . . supports a candidate committed to high support prices, the businessman . . . supports an advocate of low corporation taxes . . . the consumer . . . votes for candidates opposed to a sales tax.")

often outstrips larger groups of people that would stand to benefit from a hypothetical change in policy.[118] It is thus politically resource-intensive to disappoint the current beneficiaries of a policy regime; and, in the other direction, it is politically momentous to create a class of *future* beneficiaries. This all has the result of raising the stakes of federal legislation, especially since the boom in political lobbying that started in the 1970s.[119] Federal bills are not naturally and inherently permanent, as some recent commentators have pretended,[120] but Washington will likely be prejudiced to some degree in favor of their continuation—irrespective of the policy merits. In combination with the partisan divide, where any compromise is seen as surrender, and the potent procedural mechanisms for halting or delaying legislation, an awareness of the interest groups of the future makes it all the more rational for the opposition to choose legislative standstill.

II. THE SOLUTION OF OPTIONAL LEGISLATION

We contend that we can mitigate the problems of partisanship and consequent legislative inefficiency by embracing the solution of optional legislation. The basic idea is simple enough: Congress would pass legislation; states would choose to avail themselves of that program, or not; and participating states

118. *See generally* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 428 (2015) (discussing the functional entrenchment of certain types of legislation, including benefits regimes like Social Security); FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE (1998) (providing case studies measuring the influence of interest groups); THOMAS T. HOLYOKE, INTEREST GROUPS AND LOBBYING: PURSUING POLITICAL INTERESTS IN AMERICA (2d ed. 2021) (discussing the role of interest groups in American politics and arguing that such groups are central to the process of representative democracy); THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) (surveying literature on political parties and interest groups).

119. *See generally* ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2009) (providing a history of American lobbying and arguing that the industry undermines effective legislation and discourages the most capable from serving in office).

120. *See* Marc A. Thiessen, Opinion, *Why Do Democrats Shun Bipartisanship? Just Look at Obamacare.*, WASH. POST (June 22, 2021), https://www.washingtonpost.com/opinions/2021/06/22/democrats-know-big-government-is-one-way-ratchet-just-look-obamacare [https://perma.cc/XGF2-RCKD] ("Once a new entitlement program is created, it never gets dismantled.").

would fund its implementation while nonparticipating states would *not* contribute funds. The federal legislation here principally plays an organizational and coordinating role of managing what may be a large legislative regime in the participating states. Importantly, states that have no interest in the legislation are none the worse. They are not in any way subject to the legislation, and their resources do not contribute to the regime.

This Part introduces optional legislation in five sections. First, as case studies, we explain how optional bills might apply in the contexts of universal basic income and public healthcare expansion. Second, we analyze the merits of such bills on the dimensions of politics, policymaking, democracy, and federalism. Third, we consider the appropriate scope of optional bills by examining which policy areas are good candidates for optional legislation, and which are not, as well as the advantages and disadvantages of opt-in versus opt-out bills. Fourth, we examine three approximate models of optional legislation already in existence: state compacts, conditional spending bills, and model codes. Finally, we close by discussing why various political actors and institutions would be motivated to propose and accept such bills.

A. CASE STUDIES

Consider a simple example: universal basic income (UBI).[121] This is a rather controversial idea, and it is unlikely to command enough support in Congress to pass nationwide legislation.[122] But we could imagine a world in which majorities in some number of states—we imagine blue states—would come to support the idea of UBI, especially in a post-COVID world. These states could individually come up with UBI regimes, but perhaps they

121. Katelyn Peters, *Universal Basic Income (UBI)*, INVESTOPEDIA, https://www.investopedia.com/terms/b/basic-income.asp [https://perma.cc/M5C6-9JC3] (defining UBI as a government program in which every citizen receives a set amount of money regularly with the goal of relieving poverty and replacing need-based social programs).

122. *See, e.g.*, Lorie Konish, *New Stimulus Proposals Look Like a Guaranteed Income Experiment. Early Results Show Whether It Will Work*, CNBC (Mar. 7, 2021), https://www.cnbc.com/2021/03/07/will-us-experiments-with-guaranteed-income-work.html [https://perma.cc/32SQ-3NBR]; LyLena Estabine, *One Size Does Not Fit All: A Case Against the UBI in America*, HARV. POL. REV. (Jan. 19, 2021), https://harvardpolitics.com/against-ubi-in-america [https://perma.cc/BF4E-35EH]; Milton Ezrati, *Universal Basic Income: A Thoroughly Wrongheaded Idea*, FORBES (Jan. 15, 2019), https://www.forbes.com/sites/miltonezrati/2019/01/15/universal-basic-income-a-thoroughly-wrongheaded-idea/?sh=5fa1e02145e1 [https://perma.cc/QPW2-97RC].

want to think bigger and band together. So their congressional delegations propose the following legislation: states that want to be part of the UBI-Pact will contribute to a collective fund, to be administered by a new federal agency called the U.S. Department of UBI. That fund will distribute monthly payments to any qualifying resident of a participating state. And there will be an additional progressive tax assessed on any qualifying resident of a participant state. Once the legislation is passed, the UBI-Pact will take effect in some period of time. If a state decides to participate, then it may later exit the UBI-Pact, but with some requisite period of notice during which it remains in the program.

If a state declines the option to join, there will be no supplemental tax on its residents, nor will its residents qualify for the monthly UBI payments. This point about the source of funding is critical, for it ensures that the optional legislation is *genuinely optional*. If the federal government were to fund the benefit payments in the traditional manner, then residents from nonparticipant states would also contribute funds for the program. Nonparticipant states might then feel pressured to opt in. But, more importantly, such states would then have a rational reason to oppose such legislation in the first place, thus defeating the purpose of the original framework. So, the funding must come exclusively from the participants.[123]

Another candidate for optional legislation is public healthcare expansion. There are almost thirty million people without health insurance in America.[124] By some estimates, 43.4% of adults were inadequately insured in the first half of 2020, including the uninsured (12.5%), those who experienced a coverage gap (9.5%), and those who were "underinsured" (21.3%), such that they had high deductibles or out-of-pocket expenditures relative to their income.[125] These numbers were almost exactly the same in

123. As we discuss below, optional legislation is distinct from conditional spending mechanisms, because conditional spending mechanisms are funded by the federal treasury—to which residents of nonparticipant states contribute. *See infra* pp. 143–44. Optional legislation is a mechanism that aims to ensure only participant states—and their residents—contribute to the implementation of the legislation. That's what makes it optional.

124. *CDC Reports on Uninsured in First Six Months of 2021*, AM. HOSP. ASS'N (Nov. 17, 2021), https://www.aha.org/news/headline/2021-11-17-cdc-reports-uninsured-first-six-months-2021 [https://perma.cc/2UFG-J25G].

125. Sara R. Collins, Munira Z. Gunja & Gabriella N. Aboulafia, *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*, THE COMMONWEALTH FUND (Aug. 19, 2020), https://www.commonwealthfund.org/

2018.[126] Democrats have proposed a number of solutions. The most dramatic is Medicare for All, as outlined by Senator Bernie Sanders[127] and Representative Pramila Jayapal.[128] Their plan calls for the elimination of existing private health insurance plans, along with insurance premiums, co-payments, and deductibles.[129] Coverage would be comprehensive, including all medical, prescription drug, and dental costs.[130] In our current system, most doctors work for nongovernmental entities, like privately held practices or hospitals.[131] Technically, that would not change under Medicare for All, but government insurance would in effect become their only source of revenue.[132] Sanders proposes to finance the program primarily through a large payroll tax that would be paid by medium and large corporations, and families earning more than $29,000, as well as through a higher tax rate on corporations and the wealthy.[133] Other Medicare for All bills look a bit different.[134] For instance, one gives

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publications/issue-briefs/2020/aug/looming-crisis-health-coverage-2020-biennial [https://perma.cc/RD2D-DZM3].

126. *Id.*

127. Medicare for All Act of 2019, S. 1129, 116th Cong. (2019).

128. Medicare for All Act of 2019, H.R. 1384., 116th Cong. (2019).

129. Sarah Kliff, *Bernie Sanders's Medicare-for-All Plan, Explained*, VOX (Apr. 10, 2019), https://www.vox.com/2019/4/10/18304448/bernie-sanders-medicare-for-all [https://perma.cc/SY38-3FTZ].

130. *Id.*

131. *See* Laura Dydra, *70% of Physicians Are Now Employed by Hospitals or Corporations*, BECKER'S ASC REV. (July 1, 2022), https://www.beckersasc.com/asc-transactions-and-valuation-issues/70-of-physicians-are-now-employed-by-hospitals-or-corporations.html [https://perma.cc/5NK7-B47Q]; *Fast Facts on U.S. Hospitals, 2022*, AM. HOSP. ASS'N, https://www.aha.org/statistics/fast-facts-us-hospitals [https://perma.cc/JJ33-KWEW]; Carol K. Kane, *Recent Changes in Physician Practice Arrangements: Private Practice Dropped to Less than 50 Percent of Physicians in 2020*, AM. MED. ASS'N (2021), https://www.ama-assn.org/system/files/2021-05/2020-prp-physician-practice-arrangements.pdf [https://perma.cc/KKJ5-MSXU].

132. Kliff, *supra* note 129.

133. *Primary Care: Estimating Democratic Candidates' Health Plans*, COMM. FOR A RESPONSIBLE BUDGET (Feb. 26, 2020), https://www.crfb.org/papers/primary-care-estimating-democratic-candidates-health-plans [https://perma.cc/8LTK-79G5]; *Choices for Financing Medicare for All*, COMM. FOR A RESPONSIBLE BUDGET (Mar. 17, 2020), https://www.crfb.org/papers/choices-financing-medicare-all#Sanders [https://perma.cc/J8LH-W4VN].

134. *Compare Medicare-for-All and Public Plan Proposals*, KAISER FAM. FOUND. (May 15, 2019), https://www.kff.org/interactive/compare-medicare-for-all-public-plan-proposals [https://perma.cc/K4QM-UC54].

individuals the right to opt out,[135] others cover only those aged fifty to sixty-four,[136] and another yet covers only those who don't qualify for Medicaid as currently constructed.[137]

Meanwhile, President Biden and other leaders in Washington favor a more limited proposal: the public option.[138] Private health insurance would not disappear, nor would the government become the system's "single-payer."[139] Rather, people would have the option to buy into Medicare, which currently covers only those aged sixty-five and up. A public option was included in early Obamacare drafts, but it was meant to be limited to those without employer coverage (out of a concern that some people would not have access to acceptable private plans on the newly created insurance markets).[140] The Biden plan, however, would be available to all people, even those who are covered by their employer.[141] Further, employers could enroll their employ-

135. Medicare for America Act of 2019, H.R. 2452, 116th Cong. (2019) (sponsored by Rep. Rosa L. DeLauro).

136. Medicare at 50 Act, S. 470, 116th Cong. (2019) (sponsored by Sen. Debbie Stabenow); Medicare Buy-In and Health Care Stabilization Act of 2019, H.R. 1346, 116th Cong. (2019) (sponsored by Rep. Brian Higgins).

137. State Public Option Act, S. 489 (sponsored by Sen. Brian Schatz); State Public Option Act, H.R. 1277 (sponsored by Rep. Ben Ray Lujan).

138. Keeping Health Insurance Affordable Act of 2019, S. 3, 116th Congress (2019) (sponsored by Sen. Benjamin L. Cardin); Choose Medicare Act, S. 1261, 116th Congress (2019) (sponsored by Sen. Jeff Merkley); Choose Medicare Act, H.R. 2463, 116th Congress (2019) (sponsored by Rep. Cedric L. Richmond); Medicare-X Choice Act of 2019, S. 981, 116th Congress (2019) (sponsored by Sen. Michael Bennet); Medicare-X Choice Act of 2019, H.R. 2000, 116th Congress (2019) (sponsored by Rep. Antonio Delgado); The CHOICE Act, S. 1033, 116th Congress (2019) (sponsored by Sen. Sheldon Whitehouse); The CHOICE Act, H.R. 2085, 116th Congress (2019) (sponsored by Rep. Janice Schakowsky).

139. Robert H. Frank, *Why Single-Payer Health Care Saves Money*, N.Y. TIMES: THE UPSHOT (July 7, 2017), https://www.nytimes.com/2017/07/07/upshot/why-single-payer-health-care-saves-money.html [https://perma.cc/7TBW-HJLM] ("[S]ingle-payer is a system in which a public agency handles health care financing while the delivery of care remains largely in private hands.").

140. Samantha Liss, *Biden's Most Ambitious Health Policy: A Public Option Plan*, HEALTHCARE DIVE (Jan. 20, 2021), https://www.healthcaredive.com/news/bidens-most-ambitious-health-policy-a-public-option-plan/593342 [https://perma.cc/K2BJ-E92R].

141. *See* Allison K. Hoffman, Howell E. Jackson & Amy B. Monahan, *An Employer-Focused Public Option Offers Biden a Path Forward on Health Care*, HILL (July 30, 2020), https://thehill.com/opinion/healthcare/508924-an-employer-focused-public-option-offers-biden-a-path-forward-on-health [https://perma.cc/V58L-FGLG].

ees in the public option plan for around 20% of their employee salary cost.[142] Whereas Sanders's plan has a price tag of $32 trillion over ten years,[143] Biden's is projected to cost $800 billion.[144] Biden proposes to pay for his plan in part through increased capital gains taxes, as well as by using an expanded Medicare pool to negotiate for better medical and drug prices.[145]

As suggested above, what unites all such Democratic plans for an expanded public healthcare system is their political infeasibility in Congress. While there is support for such plans within a broad array of constituencies,[146] finding sixty votes in the current Senate for even the public option is a non-starter. But what about fifty Democratic votes? For that question to matter, Democrats would have to eliminate the filibuster, so that healthcare reform could pass with a simple majority vote. However, as stated above, only twenty-one out of fifty Democratic Senators have committed themselves to eliminating the filibuster.[147] The notion that filibuster reform depends on, and only on, Senator Joe Manchin is a fantasy.[148] Further, it is doubtful that Congress could use the fifty-vote budget reconciliation process to pass ma-

142. John S. Toussaint, George Halvorson, Laurence Kotlikoff, Richard Scheffler, Stephen M. Shortell, Peter Wadsworth, & Gail Wilensky, *How the Biden Administration Can Make a Public Option Work*, HARV. BUS. REV. (Nov. 25, 2020), https://hbr.org/2020/11/how-the-biden-administration-can-make-a-public-option-work [https://perma.cc/CF69-CF7D].

143. Dylan Scott, *Bernie Sanders's $32 Trillion Medicare-for-All Plan Is Actually Kind of a Bargain*, VOX (July 30, 2018), https://www.vox.com/policy-and-politics/2018/7/30/17631240/medicare-for-all-bernie-sanders-32-trillion-cost-voxcare [https://perma.cc/LB4U-2AG6].

144. Dylan Scott, *Why Democrats' Ambitions for Health Care Are Shrinking Rapidly*, VOX (May 7, 2021), https://www.vox.com/policy-and-politics/22422793/joe-biden-health-care-plan-obamacare-medicare-public-option [https://perma.cc/R5JM-CLCX].

145. *Id.*

146. *Public Opinion on Single-Payer, National Health Plans, and Expanding Access to Medicare Coverage*, KAISER FAM. FOUND. (Oct. 16, 2020), https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage [https://perma.cc/4W9E-UTWE]; *Poll: 69 Percent of Voters Support Medicare for All*, HILL (Apr. 25, 2020), https://thehill.com/hilltv/what-americas-thinking/494602-poll-69-percent-of-voters-support-medicare-for-all [https://perma.cc/DK2N-PMA6].

147. Rieger & Blanco, *supra* note 15.

148. *Id.*

jor healthcare reform, given that it is generally limited to matters of spending, revenue, and debt.[149] Regardless—and this is a crucial point—there do not exist fifty Democratic Senators in the current Congress who would vote for either Medicare for All or the public option.[150] When you combine America's libertarian streak with the power of interest groups that benefit from the current system, such as the healthcare industry and senior citizens who are happy with Medicare as it is, it becomes a Herculean political task to convince Washington, even a Democratic Washington, to pass the dramatic new taxes as well as the spending cuts (for instance, cuts to Medicare payments) that are necessary to afford a robust public health insurance system.[151]

Optional legislation changes everything. As stated above, twenty-eight states are represented amongst the fifty Senators who caucus with the Democrats.[152] It is not hard to envision that some number of these states—say, five to fifteen at first—would choose to join an expanded insurance program. For those who support additional public healthcare, optional legislation represents a more feasible political path than a nationwide bill. While a nationwide bill would be preferable given that it would cover people in all states, there are likely millions of individuals who are uninsured or underinsured who live in those five to fifteen

149. *See* Nicole Huberfeld, *Possibilities and Pitfalls of Health Reform Through Budget Reconciliation* (May 20, 2021), https://blog.petrieflom.law.harvard.edu/2021/05/20/budget-reconciliation-health-reform [https://perma.cc/H8YS-SV7D] (discussing how Democrats can, and cannot, use budget reconciliation to expand insurance coverage).

150. (Peter Sullivan, *Battle Looms over Biden Health Care Plan if Democrats Win Big*, HILL (Aug. 15, 2020), https://thehill.com/policy/healthcare/511909-battle-looms-over-biden-health-care-plan-if-democrats-win-big [https://perma.cc/AQ6U-6UTF] (reporting that a shift to a Democrat-led majority in the Senate would likely result in modest fixes to Obamacare but not a public option); Kliff & Sanger-Katz, *supra* note 16.

151. *See* Dylan Scott, *Democrats in Congress Aren't Giving Up on a Public Option*, Vox (May 26, 2021), https://www.vox.com/policy-and-politics/2021/5/26/22454638/congress-joe-biden-public-option-health-care [https://perma.cc/SM7Z-KT34] (reporting on the challenging politics of a public insurance plan); Sarah Kliff, *The Lessons of Washington State's Watered Down "Public Option": A Big Health Care Experiment for Democrats Shows How Fiercely Doctors and Hospitals Will Fight*, N.Y. TIMES: THE UPSHOT (June 27, 2019), https://www.nytimes.com/2019/06/27/upshot/washington-state-weakened-public-option-.html [https://perma.cc/AW6G-U5AR] (discussing how interest groups have successfully lobbied to limit the scope of Washington State's public option).

152. *See Senators, 117th Congress*, U.S. SENATE, *supra* note 19.

states. Why wait to help them when the politics of nationwide bills are so foreboding?

Further, if the optional program is succeeding in participating states, then additional states can and, we think, *will* join in the plan. In this way, optional bills accelerate the "laboratories of democracy" enabled by our federal system.[153] They allow states to experiment with programming that they would be unable or unwilling to administer on their own for myriad reasons, such as concerns about fiscal solvency or policy expertise at the state level, collective action problems amongst the states, and a political culture which often looks to Washington for policy leadership.[154] As such, optional bills may be the most effective means of convincing the many American citizens and politicians who are skeptical of progressive demands for a more socialized system of government.

As discussed below, the Medicaid expansion associated with Obamacare, which the Supreme Court converted into an option, has now been adopted by thirty-eight states, many of which were initially disparaging of the policy.[155] This is "proof of concept" for the idea that states, even red states, will eventually join a successful, progressive program. Thus, rather than abandoning the poor and the working class in states that would decline progressive optional legislation, we believe that such legislation represents their best hope. Or, at least, it represents a better hope than watered-down compromise bills engineered with political strategy rather than good policy in mind; bills which, no matter how diluted, are increasingly unlikely to pass through a divided Washington. Moreover, if they are somehow enacted, such bills will face immediate and severe opposition from the losing side, so that whatever benefits they do provide are uncertain to last.[156]

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153. *See* cases cited *supra* note 21 and accompanying text.

154. *See infra* pp. 145–48 (discussing the motivations of states that might participate in optional legislation); *see also* Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article 1, Section 8*, 63 STAN. L. REV. 115, 135–44 (2010) (arguing that many government programs require a strong federal policy and financial role due to collective action problems among the states).

155. *See infra* notes 208–10 and accompanying text.

156. *See supra* notes 26–28 and accompanying text.

B. DEMOCRATIC VALUES AND FEDERALISM

Optional bills are also more democratic than nationwide bills that would be passed with the support of only fifty senators or only one party. Optional bills are more democratic in the most basic sense that more people—both in blue and red states—will be able live under the set of laws and regulations that they actually want.[157] To be sure, this includes a large portion of those people who would stand to benefit from progressive legislation, but who nonetheless vote for politicians opposed to redistributive policies.[158] Why so many poor and working-class Americans vote for conservative leaders is an enduring American query.[159] But the existence of that puzzle does not alter the fact that those people have expressed their policy preferences very clearly.

Under optional regimes, we envision that the preferences of individual citizens would be expressed through both their federal *and* their state representatives. While their federal representatives would pass the legislation, ultimately a state would signal participation in an optional regime via the same process that it would pass equivalent state legislation. So, if such legislation required passage by the state legislature and signing by the governor, then a state would agree to participate in optional legislation in the same way. If the state allowed for legislative override of a governor's veto, then that same process could be used to participate in optional legislation as well. Thus, optional

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157. *See* CAROL C. GOULD, RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY 45–85 (1988) (discussing the connection between democracy and individual self-governance); PETER SINGER, DEMOCRACY AND DISOBEDIENCE 30–41 (1973) (arguing that when people insist on rival policies, they each claim the right to be dictator over their shared lives, and that democratic decision-making embodies a compromise that respects each person's point of view by giving each an equal say about what to do in cases of disagreement); JEREMY WALDRON, LAW AND DISAGREEMENT 56–60 (1999) (discussing the history of "lex terrae," the law of the land or the law of a people, as opposed to the law of a king or price).

158. *See* Andrew Gelman, Lane Kenworthy & Yu-Sung Su, *Income Inequality and Partisan Voting in the United States*, 91 SOC. SCI. Q. 1203, 1204 (2010).

159. *See* ROBERT REICH, THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT 77–90 (2020); ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY ch. 1 (2020); Nigel Barber, *Why Do Many Poor People Vote Republican?*, PSYCH. TODAY (July 31, 2020), https://www.psychologytoday.com/us/blog/the-human-beast/202007/why-do-many-poor-people-vote-republican [https://perma.cc/5SNR-U9ZL] ("One of the most puzzling features of U.S. political life is why many of those close to the bottom of the income distribution vote Republican, given that Republican policies often favor the interests of wealthy business owners.").

legislation will be as democratic as the state's existing legislative process.

However, beyond this small-l "liberal" conception of democracy, there is a more communal conception under which optional legislation also succeeds. Political communities, it is often argued, ought to be able to organize themselves in accordance with their values, principles, and prior commitments.[160] One benefit of democratic systems is that, in theory, they enable this collective right to self-determination.[161] Our federal system was developed with an understanding that America was composed of overlapping political communities—in particular, the individual states and the nation as a whole—each entitled to determine their own existences within certain jurisdictional bounds set by mutual respect for the others. But, since the Founding, two additional political communities have joined our system, each with its own political ideology, culture, and history, and each deserving of respect as a community: the red states and the blue states. If that holds, then optional legislation is communally democratic in the sense that it allows for the *community of progressives* and the *community of conservatives* to determine their own existences to a greater degree. As Heather Gerken writes: "For all intents and purposes . . . there aren't fifty independent laboratories these days; there are two. One is red, one is blue, and they are composed of highly networked national interest groups running their battles through any state (or local) system where they have political leverage."[162]

We discuss state compacts below, but, along these lines, imagine that a number of blue states banded together under a compact to implement a favored progressive policy—a policy that they would never be able to pass at the federal level. On this communal conception of democracy, the compact would surely be deserving of respect in the sense that the *community of progressives* is coming together to realize its vision of justice, free from conservative obstruction on Capitol Hill. It is by cultivating and

160. *See* ANTONIO CASSESE, SELF-DETERMINATION OF THE PEOPLES: A LEGAL REAPPRAISAL (1995) (providing a comprehensive history of the law of self-determination); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 975–79 (2019) (presenting arguments for localism and its democratic virtues).

161. *See* Anna Stilz, *The Value of Self-Determination*, 2 OXFORD STUD. POL. PHIL. 99, 109–11 (2016) (arguing that collective self-determination enables community members to see themselves as coauthors of the institutions that govern their lives).

162. Gerken, *supra* note 8, at 1720.

enabling such political unions that optional legislation champions democratic ideals of communal self-control. To be sure, this would not resign America to permanent division. Through the laboratories of democracy enabled by optional legislation—and the policy successes or failures that they may reveal—we envision that the communities of progressives and conservatives might eventually come together into a more deeply shared political culture.

But perhaps they won't come together, at least not in the near- to-medium-term future. Is optional legislation then a vehicle of secessionism, either intentionally or not? The worry is that by allowing parties to realize their policies at the state level, without developing bipartisan consensus at the federal level, this may lead to wholly separate "peoples" who will ultimately seek independent statehood.[163] We disagree. If anything, optional legislation is a mechanism to reduce partisan rancor and divert and deter secessionist sensibilities. In part, we think that partisan discord emanates from a relatively small set of consequential issues. Optional legislation allows us to table those issues and isolate the accompanying enmity from the greater national policy conversation.

Optional legislation reveals how much of our thinking on federalism has become constrained by its Founding Era conception of the states. That is, current debates tend to conceive of the states as singular, isolated entities that stand opposed to the federal government.[164] This framing has led to an understanding of

163. Thanks to Linda Greene for raising this objection.

164. *See, e.g.*, U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000) (stating that the goal of federalism is to "preserve the regulatory authority of state and local institutions to legislate policy choices"); Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057, 1115 (2009) (explaining that a core "ideological principle[] of federalism" is that "states are entitled to some autonomous sphere in which to make policy free of interference from other sovereigns"); Michael S. Greve, *Federalism's Frontier*, 7 TEX. REV. L. & POL. 93, 96–100 (2002) (describing the tenet of federalism of "principles of state autonomy and equality," that both require a state's distinction from the federal government and other states).

That is not to say, however, that there is one singular dimension on which to understand the debates on federalism. Indeed, as Ernest Young has delineated, there are many such dimensions. Ernest A. Young, *The Rehnquist Court's*

federalism as having three principal benefits: empowering the states as a powerful check on federal power,[165] allowing states local control to more responsively govern and legislate for their residents,[166] and enhancing our politics by creating multiple fora for political contestation.[167] However, we contend that federalism is broader than the federal versus singular state conception, and that it ought to acknowledge the existence of *collections of states*. An appreciation for this additional layer of federalism will not only further the traditional aims of federalism, but also provide greater respect to these new political communities of red and blue states.

In a compelling article, Gerken challenged that we must "pa[y] more attention to the many forms state power can take."[168] Optional legislation does precisely that. It acknowl-

Two Federalisms, 83 TEX. L. REV. 1, 8–18 (2004) (identifying two different models of federalism doctrine: a "strong sovereignty" model often followed by the Rehnquist Court majority and a "weak autonomy" model sometimes advanced by the Court's dissenters). Our point here is that in analyzing federalism, the paradigm seems to understand the relevant entities as the federal government, on one hand, and singular states, on the other.

165. *See, e.g.*, Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1566 (2012) (referring to the claim that "one of the purposes of federalism is to check the national government"); Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 25–26 (2002) (discussing the commonly noted "benefits of decentralization" in relation to federalism, and in particular the "diffusion of power and protection of liberty"); Rex E. Lee, *Federalism, Separation of Powers, and the Legacy of* Garcia, 1996 BYU L. REV. 329, 334 (1996) ("The vertical division of governmental authority in the Constitution—federalism—similarly checks arbitrariness and overreaching by the federal government.").

166. *See, e.g.*, Cross, *supra* note 165, at 20–21 ("With decentralization, the citizens of 'each region create the type of social and political climate they prefer,' which differs in different localities. The nation is heterogeneous, and the preferences of different regions vary. A policy that is desirable in New York City may not be the preference in Wichita. Imposing a 'one size fits all' policy is not in the interest of the people, who should be allowed to choose their local preferences.").

167. *See, e.g.*, Gerken, *supra* note 165, at 1557; Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894 (2014) (discussing the discursive benefits of structural arrangements); *see also* Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–404 (1997) (discussing various possible benefits of diffusing power to the states).

168. Gerken, *supra* note 165, at 1551.

edges, as Jessica Bulman-Pozen explains, that states have become "'laboratories' of national partisan politics."[169] Additionally, it recognizes that collections of states are a source of power not otherwise located in the "federal" or traditionally understood "state" camps. Putting this together, optional legislation enhances state sovereignty vis-à-vis the federal government by giving states the opportunity to band together and pool resources, expertise, and political will. It also broadens the possibilities for laboratories of policy experimentation, expanding the spheres of local control afforded to the states. And it does this by breaking the mold of the adversarial relationship between the federal government and individual states. Instead, optional legislation—a joint venture between the federal government and collections of states—allows the federal government itself to enhance the rights of states to govern.

Optional legislation thus embodies the twin virtues of what Gerken envisions as the federalism of the future: (1) it conceives of states (now including *collections* of states) and the federal government as "cooperative"[170] or "braided"[171] governance regimes; and (2) it maintains that decentralization can favor progressive

169. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1126 (2014).

170. *See generally* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2d ed. 1972) (finding that the national government has not expanded at the expense of states); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (1966) (arguing that the national political process, particularly in Congress, provides strong safeguards for state and local interests); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344, 1344 (1983) (analyzing the merits of federal grants to states); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1692 (2001) (developing a vision of how federal courts should enforce cooperative federalism and applying this conception to the implementation of the Telecommunications Act of 1996); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 663 (2001) (highlighting how Congress favors cooperative federalism programs and has rejected the dual federalism model of regulation); Gerken, *supra* note 165, at 1557 ("States do not rule separate and apart from the [federal] system, and the power they wield is not their own. Instead, they serve as part of a complex amalgam of national, state, and local actors implementing federal policy."); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (theorizing the special case of "uncooperative" federalism, when states refuse to enact federal policy).

171. Cooter, *supra* note 10, at 728.

and conservative interests alike.[172] By embracing both intergovernmental cooperation *and* decentralization, it rejects the federalism of the New Deal, with its conception of the states and the federal government as competitive, zero-sum sovereigns,[173] as well as the federalism of the civil rights movement, with its assumption that decentralization impedes progressive politics.[174] In so doing, optional legislation provides a novel conceptual framework for American federalism and governance.

C. SCOPE

The question of scope primarily concerns which types of legislation would be appropriate candidates for optionality. Optional legislation would be especially relevant in regulatory areas where states could benefit from pooling resources and policy expertise, as in the context of welfare services like UBI and public healthcare. But it would not be relevant for certain policy areas, like immigration and foreign policy, which inherently cover the nation as a whole. Nor would it be relevant in the context of basic or fundamental rights. States can opt out of neither the Constitution nor the principle that each person has equal moral worth, and so optional legislation should never be available for issues such as civil rights. To seek any sort of compromise in this realm would be odious.[175]

Nonetheless, it is difficult to determine precisely which policies belong in this category, and it would undoubtedly be a point of contention. However, John Rawls's work on political pluralism provides some helpful structure. He considered the challenges of imposing a legitimate and stable system of law on a diverse group of citizens that hold "conflicting and even incommensurable religious, philosophical, and moral doctrines."[176] Rawls developed a conception of "reasonable" pluralism in his attempt to determine which sorts of policy questions and justifications are

172. Gerken, *supra* note 8, at 1718–21.

173. *Id.* at 1699.

174. *Id.* at 1718; *see also* Friedman, *supra* note 167, at 367 ("Repeated reactionary state conduct has had its effect on the American psyche, leaving some Americans—particularly elites—with the idea that problems are best solved at the national level and states are not to be trusted.").

175. *See, e.g.*, Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 151 (1989) ("[F]undamental liberties are not occasions for the experimentation that federalism invites.").

176. JOHN RAWLS, POLITICAL LIBERALISM 133 (1996).

appropriate for the public realm of such a heterogeneous society.[177] Rawls writes:

> Citizens are reasonable when, viewing one another as free and equal in a system of social cooperation over generations, they are prepared to offer one another fair terms of social cooperation (defined by principles and ideals) and they agree to act on those terms, even at the cost of their own interests in particular situations, provided that others also accept those terms.[178]

Thus, following Rawls, if people could in good faith disagree about whether the "fair terms of social cooperation" amongst "free and equal" citizens entail a particular policy, then that policy is likely an acceptable candidate for optional legislation. As support for the idea that political liberals ought to respect those who disagree on "reasonable" grounds, Rawls discusses what he calls "the burdens of judgment," that is, "the many obstacles to the correct (and conscientious) exercise of our powers of reason and judgment in the ordinary course of political life."[179] Examples of such "obstacles" include conflicting and complex empirical evidence, the unavoidability of judgment and interpretation, the divergence of views "on many if not most cases of significant complexity," and the presence of competing and sometimes contradictory normative considerations.[180] An appreciation of these "burdens" buttresses the notion that people can reasonably disagree over many liberal policies—say, about existence and amount of UBI or the scope of public healthcare insurance—and thus, that optional legislation within certain constraints is consistent with core liberal values.

A further question of scope concerns whether optional bills would be *opt-in* or *opt-out*. An opt-out program would be superior from the perspective of those actors who want as many states as possible to join the program. Behavioral economists have demonstrated that people are more likely to choose an alternative when it is opt-out rather than opt-in.[181] More importantly, the politics

177. *Id.* at 35–38.

178. *Id.* at xliv; *see also* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 6–7 (2001).

179. RAWLS, JUSTICE AS FAIRNESS, *supra* note 178, at 35.

180. *Id. at* 35–36; *see also* Shaun P. Young, *Rawlsian Reasonableness: A Problematic Presumption?*, 39 CAN. J. POL. SCI. 159, 161–63 (2006) (discussing Rawlsian "reasonableness" and enumerating the "burdens of judgment").

181. *See, e.g.*, Jon M. Jachimowicz, Shannon Duncan, Elke U. Weber & Eric J. Johnson, *When and Why Defaults Influence Decisions: A Meta-Analysis of Default Effects*, 3 BEHAV. PUB. POL'Y 159, 159–86 (2019).

of rejecting federal benefits is very perilous, even in red states.[182] It is for these reasons, though, that *opt-out* optional legislation is less likely to pass through Congress. Congresspeople opposed to the underlying policy would prefer a bill that their state could reject by doing nothing at all. Thus, rather than vote for the bill on a "live-and-let-live" or "laboratories-of-democracy" rationale, as discussed further below, or rather than abstaining from the vote, such Congresspeople may vote against the bill.

Proponents of optional bills would have to incorporate these concerns into their political strategy, understanding that opt-out bills are less likely to become law, but more likely to become broadly adopted if they make it through to the President's signature. These issues would be especially important for optional bills, like optional UBI or optional Medicare for All, which only a minority of states would take advantage of initially.

D. EXISTING MODELS

Optional legislation is a new but not entirely radical idea. There are approximate models of optional legislation already in place, which we seek to build upon as we develop our own system. Here we consider three: interstate compacts, conditional federal spending, and model codes.

First, we have interstate compacts. Interstate compacts are simply contracts between states.[183] They thus provide a mechanism for states to engage with other states to enter into mutually beneficial obligations. For example, interstate compacts are often used to create joint authorities or commissions to address issues that cross state borders, like environmental issues or those relating to cross-state metropolitan areas.[184] In order for the compact to bind the participating states, each state must

182. Sarah Kliff, *Obamacare's Survival Is Now Assured, but It Still Has One Big Problem*, N.Y. TIMES: THE UPSHOT (June 28, 2021), https://www.nytimes.com/2021/06/28/upshot/medicaid-expansion-democrats-obamacare.html [https://perma.cc/N528-2JP8].

183. Green v. Biddle, 21 U.S. (8 Wheat.) 1, 92 (1823) ("If we attend to the definition of a contract, which is the agreement of two or more parties to do or not to do certain acts, it must be obvious that the propositions offered and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract."); Wharton v. Wise, 153 U.S. 155, 171 (1894) (providing that the compact of 1785 between Virginia and Maryland remained operative as a contract after the adoption of the Constitution).

184. JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS 40–41 (2002).

pass legislation that enacts the compact.[185] In some cases, interstate compacts may require approval by Congress.[186] The text of the Constitution suggests that *any* such interstate compact requires congressional approval,[187] but the Supreme Court has narrowed this requirement to those compacts where there is a "formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[188] This might especially occur if Congress has authority over the subject matter of the compact.[189]

When approved by Congress, the compact then becomes an act of federal legislation, over which the federal courts have authority. Notably, when there is a dispute between states, as might arise from an interstate compact, the Supreme Court has original jurisdiction over the matter.[190]

The proposal of optional legislation is very similar to the construct of interstate compacts.[191] Both involve legislation that binds and obligates states. There are, however, some additional features that are key to the proposal of optional legislation. Foremost, optional legislation is federal legislation that sets the framework for an agreement—or compact—between states. In that way, it is similar to interstate compacts that require federal approval. But importantly, our proposal is federal legislation that invites participation from the states. Of course, some state authorities may be the impetus and drivers of such legislation. But the optional legislation is not intended to cement negotiated agreements between states; rather, it is intended to create the

185. *Id.* at 43.

186. MICHAEL L. BUENGER, JEFFREY B. LITWAK, RICHARD L. MASTERS & MICHAEL H. MCCABE, THE EVOLVING LAW AND USE OF INTERSTATE COMPACTS 67–86 (2d ed. 2016).

187. U.S. CONST., art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.").

188. Virginia. v. Tennessee, 148 U.S. 503, 519 (1893).

189. MICHAEL L. BUENGER ET AL., *supra* note 186, at 67–75.

190. U.S. CONST., art. III, § 2, cl. 1.

191. In a contemporaneous paper, Professor Jon Michaels and Emme Tyler make the case that interstate compacts could be used to achieve a "Blue New Deal," including progress on climate change, economic justice, and pandemic cooperation. Jon D. Michaels & Emme Tyler, *Just-Right Government* 27–31 (Feb. 9, 2022), https://ssrn.com/abstract=3894046.

framework for a compact that states can freely join (and leave). Further, optional legislation can avail itself of the standing institution of Congress, which is, of course, designed to debate and pass legislation. Without a comparable institution set up to negotiate state compacts, it is not surprising that they are employed so infrequently. By comparison to the many thousands of federal laws, each state belongs to an average of twenty-four state compacts.[192] Finally, an optional regime is likely to be more effectively run than an equivalent state compact, given the efficiencies provided by centralized administration.

Second, "conditional federal spending" provides states with access to certain federal funds on the condition that they have certain laws in place.[193] As Samuel Bagenstos explains,[194] this process allows for Congress to use the Spending Clause (and the power to "provide . . . for the general welfare of the United States") as a means of surpassing the limits of the Commerce Clause and the Tenth Amendment.[195] For instance, in light of the Twenty-First Amendment, which "delegated to the . . . states the power to prohibit commerce in, or the use of, alcoholic beverages," Congress does not have the authority to directly regulate the legal drinking age.[196] However, in *South Dakota v. Dole*, the Supreme Court upheld a federal statute that withheld a percentage of federal highway funds from states "in which the purchase or public possession . . . of any alcoholic beverage by a person

192. *Interstate Compacts*, THE COUNCIL OF STATE GOV'TS, https://www.ftc.gov/system/files/documents/public_events/1224893/slides_-_rick_masters_csg_ncic.pdf [https://perma.cc/W8EP-VTNH].

193. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1918–20 (1995) (discussing the unconstitutional conditions doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421–22 (1989) (identifying the basic components of an unconstitutional condition); MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 278 (2012) (explaining how actors at each level of government have an incentive to increase conditional federal spending).

194. Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J. L. & PUB. POL'Y 93, 93–95 (2014) (explaining why conditional federal spending has been a major target of those who seek to limit the scope of federal power).

195. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001) (holding that Congress lacked power under Section 5 of the Fourteenth Amendment to override state sovereign immunity in Title I of the Americans with Disabilities Act); United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's power under the Commerce Clause).

196. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 488 (1996); South Dakota v. Dole, 483 U.S. 203, 205 (1987).

who is less than twenty-one years of age is lawful."[197] Because every state has the "simple expedient" of declining the conditional funds (as Louisiana did for years by choosing not to increase its drinking age from eighteen), the Court ruled that such grants do not, in general, violate the state's legislative domain.[198] As discussed below, while the Court enumerated a number of restrictions on conditional funds, the limitations were extremely lenient.[199] For instance, the grants must be enacted in the pursuit of the "general welfare" consistent with the language of the Spending Clause,[200] and Congress must state any conditions "unambiguously."[201] The Court did observe, more broadly, that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[202]

The first time the Supreme Court held an exercise of "spending power" unconstitutional was in *National Federation of Independent Business v. Sebelius*.[203] The Roberts Court held that Obamacare's Medicaid expansion had passed the point into "compulsion."[204] Medicaid (unlike Medicare) is administered by the states. The original law expanded Medicaid coverage to cover people earning less than 138% of the federal poverty line ($17,420 for an individual as of 2021) and required states to provide a portion of the funding for the expanded coverage (10% of costs from 2020 onward).[205] What made the offer coercive, ac-

197. *Dole*, 483 U.S. at 205 (quoting 23 U.S.C. § 158 (Supp. III 1982)).

198. *Id.* at 210 (quoting Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143–44 (1947)); *see also* Baker, *supra* note 193, at 1929 (analyzing the holding in *Dole*).

199. Baker, *supra* note 193, at 1929–31.

200. *Dole*, 483 U.S. at 207 (citing Helvering v. Davis, 301 U.S. 619, 640–641 (1937), and United States v. Butler, 297 U.S. 1, 65 (1936)).

201. *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

202. *Id.* at 208 (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

203. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 574–87 (2012) (holding the Medicaid expansion unconstitutional as coercive); *id.* at 625 (Ginsburg, J., concurring in part) ("The Chief Justice therefore—for *the first time ever*—finds an exercise of Congress' spending power unconstitutionally coercive.").

204. *Steward Mach. Co.*, 301 U.S. at 590.

205. *Medicaid Financing: The Basics*, KAISER FAM. FOUND. (May 7, 2021), https://www.kff.org/medicaid/issue-brief/medicaid-financing-the-basics [https://perma.cc/DX7E-79SC]; *State and Federal Spending Under the ACA*, MEDICAID & CHIP PAYMENT ACCESS COMM'N, https://www.macpac.gov/

cording to the Court, was that the federal government threatened to revoke *all* of a state's Medicaid funding if it chose not to participate in the expansion.[206] The Court thus rendered this component of the bill optional for the states.[207] Ultimately, as indicated above, the expansion became wonderful proof of the idea that states, including red states, will eventually opt in to optional progressive legislation. From just a handful of states choosing to expand Medicaid by 2012, the list has grown to thirty-nine states, including Washington, D.C.[208] Oklahoma is the latest addition, with coverage extending to its citizens as of July 2021.[209] Further, some of the remaining states are facing intense internal pressure to join in, sometimes in the form of statewide referenda demanding such action from their Governors.[210]

Thus, conditional federal spending has many features of optional legislation. States can choose to join a federal program—

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subtopic/state-and-federal-spending-under-the-aca [https://perma.cc/U9VZ-JT9E].

206. *Sebelius*, 567 U.S. at 519–687. Prior to the expansion, "[o]n average States cover only those unemployed parents who make less than 37% of the federal poverty level, and only those employed parents who make less than 63% of the poverty line." *Id.* at 575.

207. A further component of Obamacare was always intended to be optional for the states. Chief among Obamacare's reforms was creating regulated health insurance markets, while preserving and strengthening Medicare, Medicaid, and the employer markets. A key feature of this reform was to create health insurance "exchanges" in each state. 42 U.S.C. § 18041(c)(1) (2006 ed., Supp. IV). The Act allowed each state to opt in, and create its own health insurance exchange, which could be subsidized or aided by the federal government and would allow the state to exercise control over features of the health insurance marketplace. *Id.* The Act also allowed states to opt out of creating such an exchange, in which case the exchange would be created and operated by the federal government (specifically, the Department of Health and Human Services). *Id.* This too had many of the features of optional legislation. It was federal legislation that allowed states to opt into a regime, with the benefit of federal expertise and aid. That said, states were given something of a false choice regarding Obamacare. Whether they opted in or out, there would be a health care exchange for its residents and Obamacare would govern how its residents interacted with the health insurance market.

208. *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (July 21, 2021), https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map [https://perma.cc/EMK9-DRLA]; Louise Norris, *A State-by-State Guide to Medicaid Expansion, Eligibility, Enrollment, and Benefits*, HEALTHINSURANCE.ORG (June 3, 2021), https://www.healthinsurance.org/medicaid [https://perma.cc/6HZ7-VUHG].

209. Norris, *supra* note 208.

210. Kliff, *supra* note 182.

or not. There are two important differences between conditional funding and optional legislation, however. First, and most importantly, those states that opt out are still paying for the program as a whole. So with the Medicaid expansion, those states that chose *not* to opt in were still contributing to the federal tax fund that paid for the expansion in states that *did* opt in. Their continued opposition to the expansion in *other* states is thus not entirely paternalistic or other-regarding. Second, conditional federal spending is just that: federal spending. Optional legislation allows for conditional federal programming writ large, with the federal government involved in the design and administration of the entire program. That is, rather than just the extra Medicaid funding being optional, it would be as if the *entire* Obamacare bill (or the entire Medicare for All bill) were optional.

A third legislative form that shares features with optional legislation is the model code. Model codes are not actual legislation in that they are not binding.[211] They are generally produced by nongovernmental organizations, but often have the input of government actors, including judges, legislators, and executives.[212] Two of the earliest and most famous examples are the Uniform Commercial Code (UCC) and the Model Penal Code (MPC). The UCC was jointly drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and the MPC was drafted by the American Law Institute. The drafting process for each was extensive, taking nearly a decade with constant revisions, and it included input from judges, government lawyers, private practitioners, and legal scholars and professors.[213] The result was extremely successful: the UCC was largely adopted in all fifty states and the principles underlying the MPC have informed most criminal codes in

211. *See, e.g.*, *Model Rules of Professional Conduct*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/model_rules_of_professional_conduct [https://perma.cc/HAW6-CJAB] ("[T]he Model Rules of Professional Conduct are not inherently binding but have come into effect only when states choose to adopt certain rules.").

212. *See, e.g.*, *Model Penal Code (MPC)*, CORNELL L. SCH., LEGAL INFO. INST., https://www.law.cornell.edu/wex/model_penal_code_(mpc) [https://perma.cc/D4M5-AEGD] ("The Model Penal Code (or MPC) is a model code assembled by the American Legal Institute that was first promulgated in 1962.").

213. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799–804 (1958); Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 320–25 (2007).

the United States.[214] But in each case, there was a choice by each state as to whether it should adopt the model legislation, reject it, or accept it in part.

There are important differences between model codes and legislation, and the proposal of optional legislation. Most importantly, optional legislation goes through the legislative process in Congress, whereas model legislation is proposed by nongovernmental entities.[215] Consequently, anyone can propose model legislation, and it might or might not get traction among state governments. Furthermore, much model legislation concerns only the internal affairs of states, such as with the Model Penal Code. In contrast, the proposal of optional legislation will often have its highest utility when there is a coordination component or a need for uniformity beyond a particular state's borders.

E. MOTIVATIONS

Why would American political actors and institutions *want* optional legislation? This Section considers the motivations of participating states as well as Congresspeople who are expected to vote for (or abstain from voting on) such bills. The latter discussion raises the issue of when eliminating the filibuster is appropriate.

1. Participating States

States will opt in for different reasons. For instance, a small state (or economically struggling state) that cannot afford UBI payments on its own may be incentivized to push for optional UBI legislation because it can then avail itself of the pooled funds. That motivation is clear enough.

But what of the large state (or economically prosperous state) that can afford payments for its qualifying residents? By opting for the legislation, the large/prosperous state is signing up to pay for its residents, but for others as well. Why would it agree to do that? There are at least four reasons.

First, the large/prosperous state may want to insure its benefits regime against any potential localized downturns or problems. For example, suppose a large state like California is hit with wildfires and pollution that temporarily harm its technological and agricultural industries. That may result in less tax

214. *See id.*

215. *See* Braucher, *supra* note 213.

revenue that year. The fact that other participant states may have surpluses in that year serves as a form of insurance for California. Widening the pool of individual participants can increase the survivability of the program. Perhaps even more importantly for insurance purposes, the large/prosperous state would be able to take advantage of the federal government's deficit spending capacity (assuming the optional bill did not specifically foreclose that possibility).[216] Unlike the federal government, most state governments are required by their constitution or other state law to balance their budgets.[217] While participating states would presumably have to cover the cost of deficit spending at some point, that year-to-year fiscal flexibility is enormously valuable when managing a large and expensive program.

Second, the large/prosperous state may be altruistic. Benefits programs are essentially created to help those in need. If a state can afford to help other states, then it might do so to further the essential purpose of the program beyond its borders. Such altruism may explain the support of existing national welfare programs by "donor" states, which receive less in federal spending than they send to the federal government in tax expenditures.[218] For instance, from federal fiscal year 2015 to 2019, New York gave $142.6 billion more to the federal government than it received back in federal spending.[219] Indeed, the top five states with the least favorable balances lean Democratic and thus tend to support such nationwide benefits programs: New York, New Jersey, Massachusetts, California, and Connecticut.[220]

Third, the large/prosperous state may want a more expansive program to increase the likelihood of wider adoption, perhaps out of nationalistic concern. As discussed, one of the principal benefits of optional legislation is to create a bigger laboratory

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216. Thanks to Matt Grossmann for helpful discussion on this point.

217. *NCSL Fiscal Brief: State Balanced Budget Provisions*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 2010), https://www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements-provisions-and.aspx [https://perma.cc/JB4H-AG57].

218. *Donor States 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/donor-states [https://perma.cc/Q3RQ-88Q9] (ranking largest donor states for programs such Medicaid).

219. Laura Schulz, *Giving or Getting? New York's Balance of Payments with the Federal Government, 2021 Report*, ROCKEFELLER INST. OF GOV'T 5, 22 (Jan. 2021), https://rockinst.org/wp-content/uploads/2021/01/2021-Balance-of-Payments-Report-web.pdf [https://perma.cc/2SJL-BNW8].

220. *Id.* at 5.

for certain legislative experiments. That can increase the likelihood of success of the program, and it can also encourage full-scale, national adoption of the program. In this way, optional legislation may be part of a broader legislative strategy.

Fourth, the large/prosperous state may wish to hedge against pathological behavior that would arise if it were the sole UBI state. For example, that may create an influx of people that would create resource shortages or cause the program to collapse. Instead, a large/prosperous state can pay a smaller amount to support systems in other states as a means of avoiding these pathologies.[221]

To be sure, there would remain the possibility of: (1) an influx of individuals who want to take advantage of optional social welfare programs; and (2) an outflow of individuals who want to avoid paying optional taxes. We aren't especially worried about this concern. Partially, that's because state tax and benefit rates have had very minimal impact on interstate moves historically.[222] Furthermore, there are several strategies that opt-in states may employ to mitigate an influx. First, states can use geography, by making their participation conditional on neighboring and nearby states' participation. For example, if California made its participation conditional on, say, Nevada, Arizona, and Oregon opting in, that might prevent a great deal of migration. Second, while it is more complicated legally, states may be able to impose residency requirements on optional benefits, such that people are subject to the benefits and burdens of optional bills only once they've resided in the state for, say, a year.[223] All that said, it's not at all clear that migration motivated by welfare

221. In his article *A Pure Theory of Local Expenditures*, Charles Tiebout set forth a model of governmental competition across local jurisdictions, which theoretically would lead to the optimal provision of social and public goods, as people pick up and move themselves into the local government system that best satisfies their preferences. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–24 (1956). The Tiebout model's assumptions are idealized, and there has been much scholarship devoted to understanding the practical applicability of the model. We think that one possibility in the context of interstate competition is for large or prosperous states to subsidize other states' policies in order to deter relocation of residents.

222. *See* Michael Mazerov, *State Taxes Have a Negligible Impact on Americans' Interstate Moves*, CTR. ON BUDGET & POL'Y PRIORITIES (May 21, 2014), https://www.cbpp.org/research/state-budget-and-tax/state-taxes-have-a-negligible-impact-on-americans-interstate-moves [https://perma.cc/2YYZ-EW8S] (collecting studies).

223. *See infra* pp. 157–59 (discussing the Privileges and Immunities Clause, and constitutional concerns about treating states' residents differently).

programs would be, on net, a fiscal negative for participant states. It may, of course, be that some people moving in will be net takers. But others may consider welfare programs to be simply good insurance; they may move to the state, start a business or be gainfully employed, contribute to the productivity and tax revenue of the state, and thus offset any welfare benefits they might ever draw. They might be net contributors. It will be a genuine empirical question as to whether, or to what degree, migration motivated by optional welfare bills—i.e., people voting with their feet, either to receive the optional benefits or avoid the optional taxes—will frustrate such programs.[224]

Finally, how large/prosperous states and small/struggling states will distribute optional resources between themselves is another important issue. To ensure a fair distribution, there are many different formulae available. Resources might be distributed on a per capita basis, in terms of utilization of resources, or on a more complex, multivariable formula. Indeed, that formula could be dynamic as well, allowing for evolving circumstances, as managed by a responsive federal agency. Regardless, the nature of the formula will depend on the subject matter of the legislation. There is no one-size-fits-all solution. We envision that negotiation among the states will produce an acceptable compromise, in the same manner that Congresspeople negotiate nationwide bills on behalf of their respective constituencies but with an eye to the national good.

2. Legislators

Beyond the states, one pressing question is why Congresspeople would adopt optional legislation. In other words, is op-

224. One further point is that our system does reward states for attracting more residents: relative growth in population is rewarded with further seats in the House, when there is reapportionment after the decennial census. Barry Edmonston, *Using U.S. Census Data to Study Population Composition*, 77 N.D. L. REV. 711, 712 (2001). Indeed, if there is enough migration to frustrate the implementation of some optional legislation, that detriment may be offset by gains of relative population growth that might give the state greater representation in the House (which can be used for decisions broader than the subject of the optional legislation). However, this correction does lag because it only occurs after the decennial census. But even a few seats in the House may have dramatic impact over the course of ten years. Thus, the calculus is multifactorial and may involve incommensurables, but there are plausible scenarios where net losses due to the optional legislation may be worth it for the gain in representation.

tional legislation a political and strategic improvement on nationwide bills, in terms of having a greater chance of passing through Congress? Specifically, one might wonder why "anti" legislators who disagree with the substance of optional legislation—that is, those who would not vote for the bill without optionality—would nevertheless be inclined to vote for it in the optional form or, perhaps, to abstain from the vote.[225] There are several possible reasons for their support.

First, from the perspective of the anti legislator, an optional bill is better than a nationwide bill. Now, if there is no possibility of nationwide legislation, even into the future, the anti legislator would prefer that outcome over an optional bill. But the anti legislator will very often be uncertain of that eventuality. In that case, they may be willing to accept the optional bill as a means of hedging against and, indeed, undercutting the motivation for more sweeping legislation. Thus, in certain instances, it may be rational for them to support the more limited optional form, given the nationwide alternative. Doing so "limits the damage," as it were. For individual legislators myopically focused on the next election and short-term wins and losses, such a long-term policy strategy might become attractive when enforced by organizations that are meant to take a broader view of the policy agenda, such as the national party and certain interest groups.

Second, optional legislation is an open mechanism, and is consistent with the policy goals of both parties. So, the anti legislator has an incentive to support optional legislation on proposals they oppose, in exchange for the opportunity to use optional legislation for proposals they support. For instance, conservatives may have an interest in passing optional bills related to, say, religious freedom or school choice that they would never otherwise be able to enact.[226] Further, just as progressive legislators might use optional bills to augment welfare programming in participating states, conservative or libertarian legislators might—in the exactly opposite direction—use such bills to

225. Only so many Senators could abstain, since the Senate has a quorum rule requiring the presence of fifty-one Senators. ELIZABETH RYBICKI, VOTING AND QUORUM PROCEDURES IN THE SENATE, CONG. RSCH. SERV., 96-452, at 1 (Mar. 26, 2020), https://crsreports.congress.gov/product/pdf/RL/96-452 [https://perma.cc/K9LX-LHY4].

226. *See, e.g.*, Mike McShane, *The School Choice Now Act and the Fate of Private Schools*, FORBES (July 23, 2020), https://www.forbes.com/sites/mikemcshane/2020/07/23/the-school-choice-now-act-and-the-fate-of-private-schools/?sh=2884fbd67278 [https://perma.cc/T3MZ-LL6E] (discussing the School Choice Now Act, a stalled Senate bill in the last Congress).

diminish welfare programming in nonparticipating states. Unable to overturn a given piece of progressive legislation, Republicans could pass a bill that provides states with the right to opt out of the program. It goes both ways. To be sure, if Republicans were unwilling to propose such an optional bill, that would be good evidence that their opposition to the program is more a matter of politics than good faith policy conviction, as discussed below.

Third, the anti legislator may represent a swing district or state, which is divided over the legislation in question. Depending on the nature of the division, voting for the optional bill may be optimal from an electoral perspective. It allows the Congressperson to say "yes, no, and maybe" at the same time.

Fourth, there are simple reasons rooted in federalism. We are a federalist country, and there's no reason why singular states should be the optimal federalist structure. The anti legislator, committed to the American ideals of divided power and states' rights, should support the ability of states to bind together to create a bigger laboratory and attempt the experiment. Indeed, we envision an Optional Legislation Caucus—filled with ardent federalists and representatives from swing districts and states, among others—which is committed to the optional form.

Fifth, the results of the optional legislation experiment may be favorable to the anti legislator. It may be that the experiment fails—and that states opt out of the legislation because it does not work. This would confirm the policy views of the anti legislator, and may help ensure that the substance of the optional legislation is not adopted on a nationwide scale. Indeed, the anti legislator can explain this dichotomous position: they disagree with the policy but support the federalist principle that participant states have the right to attempt it. Conversely, the result of the optional legislation experiment may be unfavorable to the anti legislator, but then that is an opportunity for them to revise their views. This may sound fanciful, but legislators have an interest in knowing what actually works. Optional legislation gives them that learning opportunity, without jeopardizing national policy.

This is not to say that there can be no rational opposition to optional legislation by the anti legislator. The anti legislator could believe that the optional legislation threatens substantial national interests. For example, if the optional legislation would require massive payments by the participant states, such that they would likely become insolvent, then that may be a rational

reason to oppose the legislation. In such cases, however, it becomes incumbent on the anti legislator to explain how the optional legislation makes that more likely—given that the federal government does not intervene in a host of potentially devastating decisions made by state governments that might threaten their internal well-being. The anti legislator could also contend that the purported separation between participant and nonparticipant states is in fact illusory. Because money is fungible, residents of nonparticipant states are in fact contributing to the program, because the existence of the program makes less resources available for other programs, which in turn must be supplemented by other resources. But here too optional legislation is not different in kind from state expenditures that may have the same downstream consequences. Thus, the anti legislator must explain how optional legislation is any worse.

The anti legislator (and their constituents) could also have a deep aversion to the substance of the optional legislation. For example, the anti legislator could believe that UBI constitutes a type of social welfare scheme that degrades the meaning and value of hard work.[227] That too may be a rational (though paternalistic) reason to oppose the optional legislation. Indeed, each of these bases for opposition provide rational reasons for the anti legislator to vote against the bill. But we would urge legislators—anti and pro—to take a broader view. As discussed, the toll of partisan warfare is great and growing. Optional legislation is a way to release some of the pressure, with little cost to both sides. But it requires legislators to loosen some of their obdurate policy views, in favor of tolerance and experimentation.

We now consider the legislator who supports the substance of the optional legislation, the "pro legislator." At first glance, the pro legislator would seemingly have all the reason to support the optional legislation. Given that the pro legislator supports the substance of the bill, and optional legislation makes it more likely that such a policy comes to fruition, that should provide sufficient reason. But there are countercurrents. It may be that the pro legislator does not want to subject the legislation to the mechanism of optionality and state funding because it risks policy failure. One unfavorable consequence of such failure is just the adverse inference on the substance of the optional legislation. Or perhaps the pro legislator wants immediate nationwide

227. *See* Jonathan D. Grossberg, *Something for Nothing: Universal Basic Income and the Value of Work Beyond Incentives*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 1, 41 (2019).

promulgation, rather than piecemeal, checkerboard, or gradual promulgation. Indeed, the pro legislator may worry that optional legislation will drain much-needed energy for more comprehensive reform. So, it is not guaranteed that pro legislators will necessarily support the optional legislation form.

Indeed, some of these reasons for the pro legislator to oppose optional legislation are sensible. For some proposals, federal funding and mandatory promulgation may be necessary for success. And, as we noted above, some subject matter—including fundamental rights—are simply inappropriate for optional legislation.[228] But still for others, pro legislators have to understand that they cannot have it all in an era when half the nation fervently disagrees. The optional form may be the best possible outcome and, indeed, the only outcome in which any bill passes.[229] Optional legislation thus represents at least a "Pareto improvement" from their perspective, in the sense that some individuals will be able to live under putatively superior legislation and none will live under worse legislation.[230] For these reasons, the pro legislator must embrace the spirit of compromise and opt in.

Beyond its ability to bridge the divide between anti and pro legislators, optional legislation may be useful in uniting what we call "some" and "more" legislators. Rather than disagreeing over the entire substance of a proposed bill, "some" and "more" legislators disagree over the degree to which the federal government ought to engage in the programming in question. The "some" legislator wants, say, two weeks of paid leave, while the "more" legislator wants, say, twelve weeks. This characterized much of the internal Democratic debate over President Biden's "Build Back Better" agenda. Senators Joe Manchin and Kyrsten Sinema

228. *See supra* Part II.C.

229. At the same time, where there is the possibility of nationwide or more robust promulgation, optional legislation may not be the optimal legislative strategy. One background assumption on which we propose optional legislation is that there is highly probable legislative gridlock in the near to medium term, such that optional legislation is an actual way forward on serious problems. But we do not take the view that optional legislation is normatively superior to regular federal legislation. We suspect that is likely a fact-sensitive, issue-by-issue inquiry.

230. *See* Samson Alva & Vikram Manjunath, *Strategy-proof Pareto-improvement*, 181 J. ECON. THEORY 121, 124 (2019) ("One allocation Pareto-improves another if each agent finds the first at least as desirable as the second."); Gerard Debreu, *Valuation Equilibrium and Pareto Optimum*, 40 PROC. NAT'L ACAD. SCI. U.S. 588, 588 (1959) (discussing pareto optimality).

were "some" legislators, and they were unable to reach an agreement with their "more" counterparts.[231] In this case, a hybrid optional bill may provide a political solution.[232] There would be a baseline of "some" nationwide programming that would apply to all (e.g., two weeks leave), but then "more" states could opt in to (and pay for) additional support (e.g., twelve weeks leave). Without such a compromise available, the Senate was able only to pass a dramatically pared down version of Biden's agenda in the form of the Inflation Reduction Act.[233]

3. An Exception to the Filibuster

But what if legislators simply don't budge? Here, we think optional legislation may have implications for one mainstay of federal legislative gridlock. Specifically, we think optional legislation provides a reasoned and justified exception to the filibuster.

Suppose some proffered optional legislation commands a majority of the House and fifty-five votes in the 100-member Senate. Because that is short of the filibuster threshold, the forty-five-member minority of the Senate could block the legislation. In such a case, we think that the fifty-five-member majority would have reason to change the Senate rules to allow for passage with a simple majority. Participation in optional legislation is left to the states, and the funding derives from the participant states themselves, not from the federal government. Thus, even if one generally believes in the function of the filibuster to protect the rights and interests of minority states, there is simply no reason to impose a supermajority requirement from the filibuster for the passage of optional legislation. States are amply protected by the terms and function of optional bills.

Indeed, there may be scenarios where breaking the filibuster is especially justified. Suppose anti legislators are *secretly*

231. *See* Richard Luscombe, *Joe Manchin and Kyrsten Sinema: The Centrists Blocking Biden's Agenda*, GUARDIAN (Oct. 3, 2021), https://www.theguardian.com/us-news/2021/oct/03/joe-manchin-kyrsten-sinema-democrats-biden [https://perma.cc/R6F2-R57A].

232. Thanks to Michael Sant'Ambrogio for helpful discussion on hybrid bills.

233. Michael D. Shear & Zolan Kanno-Youngs, *A Victory for Biden, and a Bet on America's Future*, N.Y. TIMES (Aug. 12, 2022), https://www.nytimes.com/2022/08/12/us/politics/biden-house-bill.html [https://perma.cc/G6AW-8WJC] ("[P]assage of Friday's bill may say less about Mr. Biden's ability to restore American bipartisanship than it does about the deep ideological breaches in his own party, which forced him to accept a much scaled-back version of his original legislative goals.").

pro legislators who are attempting to have their cake and eat it too. This is chiefly a possibility with respect to welfare programs. The secret pro legislator may recognize that their state benefits from a welfare program but wish to appear to oppose it for political reasons. If optional welfare legislation passes, the secret pro legislator would be forced to: (1) argue in favor of opting in, which would represent what they believe is good policy for their state but bad politics for themselves; or (2) hold their tongues as their state opts out and thereby loses much needed federal resources. Preferring the status quo where their state benefits from federal programs while they benefit from the politics of opposing such programs, the secret pro legislator may vote against the optional scheme, perhaps even *all* optional schemes as a matter of policy. The legislator would thus be acting unfaithfully with respect to the norms of democratic deliberation, and we have little reason to endorse that kind of decision-making. In this way, optional proposals may reveal the hypocrisy of secret pro legislators, perhaps even forcing them to admit their true policy preferences. But assuming that does not happen, a break of the filibuster would be plainly justifiable.

Now, as we have noted, optional legislation is not designed only for proposals that would command between fifty and sixty votes in the Senate were they presented as nationwide bills. There may be optional proposals that are much less popular as a matter of substantive policy, and which would garner the support of, say, eight states representing sixteen Senate votes. We think optional legislation can and should operate to aid these federalist experiments. But obdurate opposition by other Senators is not easily defeated in these cases. Here we can only urge legislators to embrace our federalist commitments.

III. CONSTITUTIONAL CONCERNS

There are four potential constitutional objections to the optional legislation regime. First, the Sixteenth Amendment in conjunction with Article I, Section 8, Clause 1 prohibits differential taxation of residents of participant states and residents of nonparticipant states. Second, the Eleventh Amendment prohibits suits against participant states, blocking enforcement of obligations critical to optional schemes. Third, the Privileges and Immunities Clause of Article IV, Section 2 prohibits differential treatment of residents by states, which may restrict certain core kinds of optional legislation. Fourth, the unconstitutional conditions doctrine may block certain types of optional legislation. We

consider each in turn, demonstrating that none threatens the constitutionality of such legislation.

A. UNIFORM TAXATION

The first constitutional challenge is principally to the funding mechanism of the optional legislation. The idea is that the Sixteenth Amendment, when read in combination with Article I,[234] requires that an income tax imposed by the federal government must be uniform across the states. Thus, this might negate the funding mechanism where the federal government collects taxes from residents of states participating in the optional legislation, without collecting taxes from residents of nonparticipating states.

As an initial matter, this would not prevent optional legislation *in toto*, rather it would simply threaten one funding mechanism. That is, it could be a condition of the optional legislation that states raise and remit these funds; and funding the optional legislation could occur through direct taxation by the participant states themselves. But using the federal taxing authority may make it more efficient and thus more likely that optional legislation is promulgated and accepted by states.

The Sixteenth Amendment reads: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[235]

Article I, Section 8, Clause 1 reads: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; *but all Duties, Imposts and Excises shall be uniform throughout the United States*[.]"[236]

The Court determined that income taxes were "indirect taxes" subject to the uniformity requirement in Article I, Section 8, Clause 1.[237] In *Knowlton v. Moore*,[238] the Court explained that a federal tax regime may be uniform even if it has differential

234. U.S. CONST. amend. XVI; U.S. CONST. art. I, § 8, cl. 1.

235. U.S. CONST. amend. XVI.

236. U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

237. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 18–19 (1916); Laurence Claus, *"Uniform Throughout the United States": Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 522 (2001).

238. 178 U.S. 41, 87 (1900).

effects on the residents of different states because of states' policy choices.[239] This was termed in *Knowlton* as "geographical uniformity," as it required only that taxation not be differentiated between residents of different states, where the subject of the tax was undifferentiated in those states.[240] But if the states had different policies and the tax imposed was relevantly associated with those policies, then differentiation was deemed constitutionally appropriate.[241] The Court further elucidated this point in *Florida v. Mellon*.[242] That case involved Florida's challenge to a federal inheritance law that provided 80% credit to any state inheritance taxes paid. Florida was aggrieved because that tended to eliminate the advantage of its prohibition on inheritance taxes.[243] The Court rejected the challenge on the basis that the injury to Florida was too speculative.[244] But the Court further stated:

> Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states, nor control the diverse conditions to be found in the various states, which necessarily work unlike results from the enforcement of the same tax. All that the Constitution ([a]rt. I, § 8, cl.1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be alike in all parts of the United States.[245]

Because the rule itself was facially the same, it was constitutional, even if it referenced state policies that might differ.

What emerges from this, then, is that a federal income tax funding mechanism would be feasible for optional legislation. The federal taxing authority could simply build in a tax or a credit by reference to the subject of the optional legislation, which would be assessed on residents of participant states.

B. SOVEREIGN IMMUNITY

The second argument is that the Eleventh Amendment prohibits suits against participant states. This would in turn block the primary means of enforcement of obligations that accompany the optional legislation.

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239. *Id.* at 107–08; Claus, *supra* note 237.
240. *Knowlton*, 178 U.S. at 107–08.
241. *Id.*
242. 273 U.S. 12 (1927).
243. *Id.* at 16–18.
244. *Id.* at 17–18.
245. *Id.* at 17.

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[246]

In *Seminole Tribe v. Florida*,[247] the Supreme Court held that Congress lacked the authority to subject states to suit through federal legislation, when Congress was legislating pursuant to its Commerce Clause powers.[248] Because optional legislation may be passed pursuant to Congress's Commerce Clause powers, this might prohibit suit against states to ensure that they fulfill their obligations.

This problem, however, is easily rectified in light of a fuller understanding of the Eleventh Amendment. Specifically, consistent with the Eleventh Amendment, a state may waive its sovereign immunity and consent to being sued in federal court.[249] Thus, so long as the optional legislation includes an explicit waiver of sovereign immunity concerning the subject matter, suits in federal court remain an appropriate enforcement mechanism of the legislation's obligations on the states.

C. PRIVILEGES AND IMMUNITIES

The third argument is that the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 prohibits differential treatment of residents in different states. This, in turn, would prohibit optional legislation's differential treatment of residents from participant and nonparticipant states.

Article IV, Section 2, Clause 1 states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[250]

The Privileges and Immunities Clause of Article IV was principally "intended 'to help fuse into one Nation a collection of independent, sovereign States.'"[251] The purpose was to "prevent discrimination against nonresidents by securing to nonresidents 'those privileges and immunities' common to citizens of the

246. U.S. CONST. amend. XI.

247. 517 U.S. 44 (1996).

248. *Id.* at 76.

249. *See, e.g.*, Clark v. Barnard, 108 U.S. 436, 447 (1883).

250. U.S. CONST. art. IV, § 2, cl. 1.

251. George T. Reynolds, *Constitutional Law – Constitutional Assessment of State and Municipal Residential Hiring Preference Laws*, 40 VILL. L. REV. 803, 806 (1995) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

United States 'by virtue of their being citizens.'"[252] But, as the Court explained in *Toomer v. Witsell*:

> [T]he privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.[253]

The following two-part test for whether state action violates the Privileges and Immunities Clause thus emerged:

The first part of the test, addressing the scope of the privileges and immunities protected, queries whether the conduct impacts nonresidents with respect to putative privileges and immunities that are "fundamental" to the livelihood of the nation.[254]

If satisfied, then the second part of the test sets forth that the state may "discriminate against nonresidents with respect to a fundamental privilege and immunity if it can show a substantial justification for its discriminatory action . . . ."[255] Specifically, the state may infringe such fundamental privilege or immunities if: "(i) [T]here is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[256]

Regarding the second part of the test, "the Supreme Court has interpreted the privileges and immunities clause to permit states to use residency-based distinctions when these serve some purpose other than to obtain an advantage for residents at the expense of nonresidents."[257] In accordance with this proposition,

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252. *Id.* (quoting Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869)).

253. 334 U.S. 385, 396 (1948).

254. Aaron Y. Tang, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103, 1139–40 (2011) (citing Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 386–90 (1978)).

255. *Id.* at 1140.

256. Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 284 (1985); *see also* Tang, *supra* note 254 (outlining the same test).

257. Larry Kramer, *The Myth of the "Unprovided-for" Case*, 75 VA. L. REV. 1045, 1066 (1989).

the Court has upheld benefits schemes based on residence.[258] This is especially the case when those benefits are easily portable, such that nonresidents could obtain them and leave the state.

The Court has rejected certain distinctions between new residents and long-term residents, especially with respect to the need for welfare benefits.[259] But in so doing, the Court noted that there may be situations where such durational requirements were necessary to establish the residents' bona fide state citizenship.[260] And the Court has reaffirmed the constitutional validity of tailored distinctions using residency requirements.[261]

Consequently, there is no hindrance to optional legislation allowing states to offer the benefit of its law—which may include literal benefits—to its residents, without providing the same to residents of other, nonparticipant states.

D. UNCONSTITUTIONAL CONDITIONS

Finally, there is the argument that, because the bill involves funding that may be diverted to certain states, the unconstitutional conditions doctrine may prohibit certain kinds of optional legislation. As Kathleen Sullivan explains: "Unconstitutional conditions problems arise . . . when government offers a benefit on condition that the recipient perform or forego an activity that a preferred constitutional right normally protects from government interference."[262] This means, following Adam Cox and Adam Samaha, that:

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258. *See, e.g.*, Martinez v. Bynum, 461 U.S. 321, 332–33 (1983) (upholding a requirement that a child's parents reside in and intend to remain in a school district before allowing the child access to tuition-free public schools); Sosna v. Iowa, 419 U.S. 393, 408–09 (1975) (upholding a durational residency requirement before allowing residents to divorce in state courts); Vlandis v. Kline, 412 U.S. 441, 453–54 (1973) ("[T]he state can establish such reasonable criteria for in-state [college tuition] status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.").

259. Saenz v. Roe, 526 U.S. 489, 511 (1999).

260. *Id.* at 505.

261. Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969) (invalidating a one-year waiting period for public assistance but recognizing permissibility of "residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession").

262. Sullivan, *supra* note 193, at 1421–22 (1989); *see also* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 6 (1993).

> unconstitutional conditions questions do *not* arise if government cannot offer the benefit to anyone without breaking the law, or if government must offer the benefit to everyone as a matter of law, or if the condition does not implicate a constitutional right, or, possibly, if the condition turns on immutable attributes of the recipient class, or, of course, if there is no condition at all.[263]

As a preliminary matter, because the optional legislation is funded by the participant states themselves, the unconstitutional conditions doctrine may not be triggered at all. That said, if the optional legislation has some contribution from the federal government, the question may arise, and so we consider the contours of what is allowed.

Again, in *South Dakota v. Dole*, the Court set forth a four-part test for the unconstitutional conditions doctrine:

> The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare. . . ." Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.[264]

Some have suggested an unstated fifth condition, that the conditional grant not be so great that it amounts to coercion.[265]

These conditions are easily satisfiable with respect to the most likely forms of optional legislation, including the examples above. First, the optional legislation will be passed for the general welfare. Second, when drafted properly, the legislation will be unambiguous in terms of what is being opted into, such that the state has free choice. Third, the optional legislation should be tightly constructed, such that the contribution of funds and receipt of benefits are closely related by participating states. Fourth, the optional legislation can be, and must be, crafted not to violate any other constitutional doctrines. Finally, because the federal government's contribution is minimal, if not nothing, it cannot amount to a coercive grant.

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263. Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 66 (2013) (internal citations omitted).

264. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

265. Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 30–31 (2001) (citing *Dole*, 483 U.S. at 211); *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 519–687.

To be sure, there are extreme versions of optional legislation that would fall afoul of *Dole*. Imagine that the federal government partners with some set of economically powerful states under the following agreement: the federal government will essentially completely recede, with this set of powerful states funding the previously federal functions. Other states are offered admission under the optional legislation, but with the caveat that they must accept a new constitution as detailed by the optional legislation. This would seem to violate the third requirement that the legislation be closely tied to the federal interest in the legislation. But it also would violate the restriction on interstate compacts—that is, that they not threaten the federal function.[266]

CONCLUSION

The nation is caught in at least a 100-year flood of partisanship. Partisan battles continue to trespass time-honored norms, with evermore strident and bellicose rhetoric (and even violence). One answer is to resign ourselves to, or even embrace, the no-holds-barred, winner-take-all political culture and see where it leads, whether that be peace or hellscape, victory for our side or defeat. However, we believe there is another path, which arises from a spirit of tolerance, and which takes advantage of our federal system. To this end, we proffer the solution of optional legislation—federal legislation which provides states with a choice. They can either opt in, on the condition that they provide the funding for the program, along with other participating states; or they can opt out, and thereby forego both the benefits and the burdens of the law.

We contend that the solution of optional legislation allows for a more resilient union. This is so for two general reasons. First, as a matter of politics, the parties will be able to govern at the federal level with some independence from each other, rendering their ideological competition less direct and urgent, and enabling proposals that would otherwise lapse in nascency due to our corrosive partisan culture. When legislation is optional, there is no winner and loser; in effect, one party is empowered to carry out a policy experiment that, in time, the other may come to accept as a success, or both may come to see as a failure. Second, as a matter of policy, by embracing the constitutional prin-

266. *See supra* notes 186–89 and accompanying text.

ciple of local control and the idea of states as "laboratories of democracy,"[267] optional legislation can generate more innovative and creative policymaking that is more responsive to an extraordinarily diverse people.

While the promise of optional legislation is, we think, momentous, its legal foundations are rather mundane, and carrying out such a proposal would require no change to our current constitutional order. As we have shown, most practicable instantiations of optional legislation are completely consistent with our constitutional jurisprudence, and they can be implemented readily by a willing Congress and participant states. In another sense, however, it is a radical departure from our current political order. Optional legislation requires that we rethink and reframe the relationship between the federal government and the states, with the states taking on more obligations and powers, in order to better tailor the government to the wishes of its citizens.

At the same time, we should observe that optional legislation is no panacea. Optional legislation is a way to ensure that reasonable policy differences—and the accumulation of such differences—do not undermine the integrity of the union. But it has little power over many fundamental issues and pathologies, whether because they are inherently nationwide concerns, as with immigration and foreign policy, or because they are not candidates for compromise, as with our collective reckoning on racism, misogyny, and other forms of bigotry. We contend, however, that optional legislation can help us to move beyond many of our deepest disagreements, so that we can begin together to reconstruct the foundations of our society.

267. *See* cases cited *supra* note 21.