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PERSPECTIVE

The state of American health coverage: the 2022 elections and the Affordable Care Act

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Abstract
The Affordable Care Act of 2010 (ACA) was the most significant policy breakthrough to expand health insurance coverage in the USA in 45 years. Culminating a decade-long effort by Republicans to repeal and undermine the ACA, the Trump administration launched a panoply of executive initiatives to sabotage the law. Benefitting from Democratic control of both the House and Senate during its first 2 years, the Biden administration through legislative and executive initiatives made substantial headway in reversing Trump's sabotage and further reinvigorating the ACA. The 2022 elections witnessed a shift in the partisan milieu. Republicans gained control of the House of Representatives; Democrats scored modest gains in state elections. Emphasising two pivotal features of American governance – federalism and the outsized role of the courts – this essay examines the implications of this new partisan context for Biden's efforts to bolster ACA durability prior to the 2024 presidential election.

Keywords: ACA; health reform; Biden

Preserving and expanding health insurance coverage for Americans has been a salient goal of the Biden administration. Efforts to reinvigorate and expand the Affordable Care Act of 2010 (ACA, or 'Obamacare') have assumed centre stage. Taking office in January 2021, the Biden administration promptly moved to reverse the systematic efforts of the Trump administration to sabotage the ACA (Thompson *et al.*, 2020; Thompson and Gusmano, 2022). It also successfully launched new legislative and executive initiatives to bolster the programme.

Biden's actions took place in a partisan context of unified government at the national level – the uncommon case where one party controls both houses of Congress and the presidency. But the Democratic edge in both congressional bodies was razor thin. In the House, Democrats outnumbered Republicans, 220 to 212 (with three vacancies) as of late 2022. In turn, the parties had equal numbers in the Senate with Vice President Harris serving as the tie breaker. The 50 states also loom large in shaping who gets what health care coverage in the USA. At this level, the Republican Party dominated, controlling both houses of the state legislature and the governor's office in 23 states.[1] Democrats exerted similar control in 14 states with 12 featuring divided government where no single party ran all three branches.

The 2022 election witnessed a return to divided government at the national level. Democrats retained control of the Senate by a margin of 51 to 49. But Republicans regained control of the House by a smaller than expected margin of 222 to 213. At the state level, the Republicans lost some ground. The number of states where Republicans controlled both the governor's office and legislature fell slightly to 21 while the states under unified Democratic control edged up to 17. In

[1]This figure excludes Nebraska where the state legislature is formally nonpartisan though dominated by Republicans.

part reflecting the forces of partisan polarisation, the number of divided governments dropped to 11 (Ballotpedia, 2023). Contests for state attorneys general, another office impacting the ACA, resulted in Republicans holding 27.

What implications does this new partisan backdrop hold for Biden's efforts to enhance the ACA's durability? 'Durability' connotes a political strength that allows a public programme to resist retrenchment, erosion, or termination. Construed broadly, the concept also characterises the degree to which a programme evinces accretion, growth, or enhanced effectiveness. From its passage in 2010, the ACA has faced existential challenges from Republican partisans. The challenges to its durability reached their apex during the Trump administration (Thompson *et al.*, 2020). The Biden administration's efforts to reinvigorate the ACA comprise the next phase of the ACA's evolution – one that deserves scholarly attention. To assess developments under Biden, we first place the ACA in the context of the US patchwork of health insurance coverage. Second, we identify key features of American governance that markedly shape the politics of the ACA – especially the forces of federalism and the outsized role of the courts. Third, we review the Biden administration's legislative and executive initiatives to bolster and expand the ACA during its first 2 years in office. Finally, we assay the emerging challenges to ACA durability over Biden's initial term in light of the 2022 election returns and other political factors.

1. The ACA's role in the patchwork of US health insurance coverage

The ACA is part of a patchwork of health insurance programmes which provide coverage to just over 90 per cent of the US population. Three vehicles provide the bulk of this coverage. Employer-based insurance plays the largest role with approximately 55 per cent of Americas obtaining health coverage in this way (Keisler-Starkey and Bunch, 2022). Employees generally share appreciably in the costs of this insurance through premiums, deductibles, and co-payments. For instance, a recent survey found that covered employees on average contributed 17 per cent of the premiums for single coverage and 28 per cent for family coverage (Kaiser Family Foundation, 2021). The federal government heavily subsidises this insurance by exempting employer contributions to health insurance from being counted as taxable income for employees (a 'tax expenditure').

Medicaid, the second major pillar of the American health insurance regime, is a means-tested programme covering some 85 million low-income people as of late 2022.[2] Deeply rooted in American federalism. Medicaid is by far the largest federal grant programme to the states. The grant ordinarily covers from 50 to about 75 per cent of state spending (the match rate) on the programme with less affluent states enjoying proportionately greater federal subsidies. While requiring states to provide certain health services and cover certain low-income cohorts (e.g. pregnant women), states have vast discretion to shape their Medicaid programmes and vary greatly in the benefits they provide. Another 7 million people enrol in a companion to Medicaid – the Children's Health Insurance Program (CHIP). CHIP provides federal grants to states to insure children in families with incomes above the eligibility threshold for Medicaid.

Medicare, the third major pillar, insures nearly 65 million Americans – nearly all individuals 65 and older as well as certain younger people with disabilities. Unlike Medicaid where the states provide partial funding, the federal government pays for Medicare, substantially relying on taxes on individual wages and salaries. Unlike Medicaid, where states play the lead role in implementation, the federal government relies on a network of private contractors including insurance companies, to deliver programme benefits. Combined, Medicare and Medicaid cover well over one-third of the US population.

[2]Data on Medicaid, Medicare, and CHIP enrolments come from the Centers for Medicare and Medicaid Services (2023*a*).

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Beyond these three major pillars, about 10 per cent of the populace individually purchases health insurance. Another sliver obtains health coverage from the military or Department of Veterans Affairs (Keisler-Starkey and Bunch, 2022).

The ACA impacted all sectors of the health insurance regime. But, rejecting reformers touting 'Medicare for all', it primarily targeted Medicaid and the individual insurance market as vehicles for expanding coverage. Supporters predicted that the ACA would provide health insurance to an additional 30 million Americans, and cause the uninsurance rate, which stood at over 16 per cent of the populace in 2010, to decline appreciably. While the law embraced a cornucopia of topics, three of its components were central. First, the ACA mandated that state Medicaid programmes, with certain exceptions, cover all non-elderly, non-disabled adults with incomes up to 138 per cent of the poverty line. States would receive federal subsidies (initially 100 per cent of costs declining to 90 per cent) to implement this provision. In 2012, the Supreme Court responded to a suit spearheaded by Republican state attorneys general that made the expansion voluntary for states.

Second, the ACA mandated state-specific insurance exchanges (or marketplaces) where individuals and small businesses could purchase coverage from participating private companies. States had the option of operating the exchanges or relying on the federal government to run them. People with incomes between 100 and 400 per cent of the poverty line received federal subsidies to buy exchange insurance. Within this cohort, those with incomes below 250 per cent of poverty would be exempt from certain deductibles and co-payments. To compensate insurance companies for this loss of patient revenues, the federal government promised to provide cost sharing reduction payments. The ACA also offered federal subsidies to insurance companies that disproportionately enrolled less healthy, more medically expensive individuals. These subsidies sought to encourage insurance companies to participate in the exchanges thereby fuelling more consumer choice and market competition. To motivate healthy people to obtain coverage, thereby promoting a 'balanced risk pool', the ACA also imposed a tax penalty on those without insurance (the 'individual mandate'). Trump and the Republican congress eliminated this financial penalty in 2017.

Third, the ACA sought to enhance the quality of health insurance. Among other things, it required insurers to cover ten essential health benefits (including mental health services). It forbade companies from rejecting applicants with preexisting conditions (guaranteed issue) and from charging them appreciably higher premiums than healthier enrolees (community rating). The ACA also prohibited insurers from imposing annual or lifetime spending caps on enrolees thereby reducing their risk of medical bankruptcy.

2. Governance context: federalism and the litigation state

Illuminating the politics shaping Biden's efforts to reinvigorate the ACA and the implications of the 2022 elections necessitates highlighting two distinguishing features of American governance – federalism and the outsized role of the courts. The ACA, as interpreted by the courts, left the 50 states with two key participation decisions (Beland *et al.*, 2016). First, state policymakers could decide whether they wished to operate the insurance exchanges or let the federal government do so within their boundaries. As of late 2022, 17 states (overwhelmingly Democratic) were fully implementing the exchanges. The participating states often had more robust exchange enrolments than states that ceded implementation to the federal government. Second, states could decide whether to participate in the ACA's Medicaid expansion. Prior to the 2022 election, 12 states led by Republican policymakers had declined to mandate coverage for those below 138 per cent of the poverty line. These 12 included four of the ten most populous states – Florida, Georgia, North Carolina, and Texas. State refusal to participate created a *Medicaid coverage gap* consisting of some 2.2 million low-income people in the 12 non-expansion states who did not qualify for ACA coverage under either Medicaid or the exchanges (Garfield *et al.*, 2021).

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A second key feature of ACA politics involves the outsized role of the courts (Morone, 2022) in combination with aggressive action by partisan cohorts of state attorneys general. Stressing the role of the courts in shaping who gets what from government, scholars have characterised the US as a 'litigation state' (Farnham, 2010; Merriman, 2019). Private parties and the states frequently go to court to challenge federal health laws and executive actions. Since its enactment in 2010, the ACA has faced more than 2000 legal challenges in federal and state courts contesting all or part of the law (Sobel *et al*., 2022). At the federal level, significant decisions come not only from the Supreme Court but from the appellate and district courts. The leverage of lower courts, which have jurisdiction in specified geographic areas, derives substantially from their ability and willingness to issue nation-wide injunctions. These injunctions often thwart federal initiatives across the entire country, at least temporarily, while presidential administrations appeal the reversals to the higher courts. Forum shopping also enhances court power to check federal government initiatives. Plaintiffs suing to block federal policies shop for courts whose judges have a track record of being sympathetic to their views. Forum shopping heightens the prospects that those seeking to thwart federal policy will prevail in the first round of court review at the district level.

The outsized importance of the courts also draws strength from the vigorous involvement of partisan coalitions of state attorneys general in challenging health policy initiatives (Nolette, 2015). Elected to office on a partisan basis in 43 states, these attorneys general often act independently of governors and state legislatures to sue in the federal courts. Reflecting the rising forces of partisan polarisation, state attorneys general have organised themselves into a Republican State Attorneys General Association and a Democratic counterpart. In addition to fund raising, these associations facilitate suits aimed at promoting their partisan agendas. In general, presidential administrations can count on staunch support from state attorneys general of their own party and aggressive opposition from those of the other. State attorneys general often work closely with private interest groups that share their ideological perspective in pursuing litigation.[3] In filing suits to undermine health legislation or presidential executive actions, state attorneys general benefit from a federal judicial doctrine that affords states special consideration in determining whether they have standing to sue (Thompson and Gusmano, 2022: 10).

Two episodes vividly illustrate the role of the courts and state attorneys general in ACA politics. Republican state attorneys general played the lead role in suit which led to a 2012 Supreme Court decision making the ACA's Medicaid expansion voluntary rather than mandatory for states (*NFIB et al. v. Sebelius et al*., 2012). More recently, partisan cohorts of state attorneys general battled each other in a legal case that posed an existential threat to the ACA. This case rose from a suit filed by 18 Republican state attorneys general, two Republican governors, and two Texas residents in a federal district court. The suit reasoned that, since Congress in 2017 had eliminated the financial penalty for failure to obtain health insurance, the remaining statutory mandate to purchase coverage was unconstitutional and invalidated the entire ACA. A federal district court judge in Texas sided with the Republican state officials as did the Fifth Circuit Court of Appeals. The Supreme Court (with six of nine members appointed by Republican presidents) then agreed to hear the case on appeal. With the Trump Justice Department siding with Republican state officials and refusing to defend the ACA, the law's defence fell primarily to a coalition of Democratic state attorneys general. Ultimately, this Democratic coalition prevailed over their Republican counterparts. In mid-June 2021, the Supreme Court in a seven to two decision upheld the ACA arguing that the Republican state officials and two Texas residents had not suffered the kind of 'fairly traceable' injury that gave them standing to sue (*California et al. v Texas et al*. 2021). This decision cleared the way for the Biden administration to pursue its legislative and executive initiatives to enhance the ACA.

[3]In cases brought exclusively by private parties against the ACA, state attorneys general have frequently filed supportive amicus briefs (Jost and Keith, 2120).

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3. Reinvigorating the ACA through legislative action

As a presidential candidate in 2020 Biden had pledged to reinvigorate the ACA rather than pursue the policy preferred by the progressive wing of the Democratic Party – Medicare for all. Victories in Congress enabled him to take a major stride towards honouring that pledge. When Biden took office, he inherited a temporary legislative legacy designed to ameliorate the COVID pandemic's consequences. In rare moments of bipartisanship, the House Democratic majority had joined with the Republican Senate majority and President Trump to approve legislation bolstering access to health care. Of particular relevance to the ACA, the Families First Coronavirus Response Act of March 2020 authorised a 6.2 percentage point increase in the federal Medicaid match rate to the states starting on 1 January 2020, and continuing until the end of the federally declared public health emergency. To receive this enhanced match, a state had to refrain from making Medicaid eligibility criteria more stringent or disenrolling current beneficiaries. These measures promised to kindle significant growth in Medicaid beneficiaries, since many who would no longer meet the income eligibility criteria for the programme would remain enrolled so long as the public health emergency persisted.

Eager to avoid any decline in Medicaid enrolments, the Biden administration extended the public health emergency during its first 2 years. In late December 2022, however, matters came to a head when Biden signed the Consolidated Appropriations Act (CAA). The law phased out the mandate for continuous Medicaid enrolment embedded in the 2020 Coronavirus Response Act as well as the enhanced federal subsidy to states. As discussed later in this article, the CAA threatened to precipitate a sharp decline in Medicaid enrolments and growth in the ranks of the uninsured. Coping with this challenge subsequently loomed large for the Biden administration.

When Biden took office, the prospects for another major measure to fight COVID and stimulate the economy had plummeted. The economy had fared better than many had predicted early in the pandemic calling into question the need for additional stimulus. These and other factors prompted congressional Republicans to oppose additional pandemic legislation. Their opposition did not, however, deter Biden from winning approval of the $1.9 trillion American Rescue Plan Act in March 2021. This law provided a spectrum of benefits including significant provisions enhancing the ACA. For 2021 and 2022, the new law appreciably boosted federal subsidies for those currently eligible for tax credits to purchase insurance on the exchanges, i.e. those with incomes between 100 and 400 per cent of poverty. For the first time it expanded eligibility for tax credits to those with incomes above 400 per cent. The subsidy for this more affluent cohort kicked in when premium costs for a benchmark exchange plan exceeded 8.5 per cent of an applicant's household income. An estimated 2.4 million people with incomes between 400 and 600 per cent of the federal poverty level stood to benefit from this expansion (Rae *et al.*, 2021).

Along with the marketplace provisions, the American Rescue Plan included special incentives for states to join the ACA's Medicaid expansion to mitigate the programme's coverage gap. The law increased the federal match rate by 5 percentage points, from 90 to 95 per cent, for any of the 12 hold-out states that opted to expand Medicaid.[4] The increased match would apply for 2 years before reverting to 90 per cent.

The passage of the American Rescue Plan represented the first act of Democratic efforts to enhance health coverage. The curtain went up on the second act in August 2021 when Democratic congressional leaders announced their support for Build Back Better legislation designed to expand the US safety net, including health care. The House of Representatives passed its version of the legislation in November 2021. Among other health care provisions, the bill extended the exchange subsidies for individuals featured in the American Rescue Plan from the end of 2022 through 2025. The bill also sought to circumvent the refusal of 12 states to

[4]These incentives also applied to two other states, Missouri and Oklahoma, where voters had bypassed their Republican-dominated state legislatures to approve Medicaid expansions via ballot initiatives.

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participate in the ACA's Medicaid expansion. The legislation stipulated that working-age adults with incomes below the federal poverty line and otherwise ineligible for Medicaid coverage in a non-expansion state could sign up for generously subsidised exchange insurance in the period from 2022 through 2025. Such insurance would feature no monthly premiums and minimal cost sharing by enrolees. To discourage states that had already expanded Medicaid from switching to the federally subsidised exchanges, Build Back Better increased the federal Medicaid match rate in expansion states from 90 to 93 per cent from 2023 through 2025.

Forwarded to the Senate for consideration, the House Build Back Better legislation quickly encountered difficulties. With Senate Republicans uniformly opposed to the measure, Democrats had to be equally united to secure its passage. But two Democratic senators, Joe Manchin of West Virginia, and Krysten Sinema of Arizona,[5] expressed reservations about the bill and by mid-July 2022 Build Back Better appeared dead. But, to the surprise of many observers, negotiations between Senate Majority Leader Charles Schumer and Senator Manchin led to a rebirth of the legislation, renamed the Inflation Reduction Act. The law, which Congress approved in August 2022, extended the American Rescue Plan subsidies for the purchase of insurance on the exchanges through 2025. It also broke new ground on other health policy fronts. For instance, it allowed Medicare to negotiate drug prices with pharmaceutical companies.

The Inflation Reduction Act did not, however, ameliorate the Medicaid coverage gap as the Build Back Better legislation approved by the House had done. The access to Medicaid of many low-income Americans continued to rest with the governors and state legislatures in the non-expansion states.

4. Bolstering the ACA through the administrative presidency

Major decisions concerning who gets what, when, and how from government programmes take place in the executive branch rather than Congress. The growing importance of administrative discretion in American governance has helped spur a greater focus on the 'administrative' or 'unilateral presidency' (e.g. Nathan, 1983; Howell, 2003; Skowronek *et al.*, 2021). Presidents have myriad tools to shape the direction of health programmes through executive action and in recent decades have aggressively deployed them. Biden exemplified this pattern in his efforts to reinvigorate the ACA.

Many of Biden's initiatives sought to reverse the extraordinary efforts of the Trump administration to sabotage the ACA through executive action (Thompson *et al.*, 2020). In addition to having the Justice Department side with Republican state attorneys general in their efforts to dismantle the programme in the federal courts, the Trump administration vigorously pursued other actions to undercut enrolments on the insurance exchanges and in Medicaid. Upon taking office, for instance, the Trump administration gutted funding for advertisements and outreach designed to boost ACA enrolments. It also issued a regulation that made it possible for Medicaid enrolment to be used as a reason to deny legal non-citizens the right to remain in the country. Additionally, it opened the door to the sale of cheaper individual insurance policies that did not meet the quality standards of the ACA (e.g. provide access to people with preexisting conditions at a reasonable price).

The Trump administration also aggressively deployed state waivers to undercut the ACA. Federal law permits presidential administrations to allow states to launch demonstrations that deviate from ordinary statutory requirements. Since the 1990s, the great majority of states have received Medicaid waivers which have generally sought to expand access to health care services. In contrast, many of the major waivers the Trump administration approved moved in the opposite direction. Of particular note, Trump officials signed off on 13 waivers authorising Medicaid to

[5]In December 2022, Senator Sinema left the Democratic Party to become an Independent. In doing so, she joined two other independents who are part of the 51-member Democratic coalition that controls the Senate.

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impose work requirements on programme beneficiaries – a step particularly likely to vitiate enrolment of the ACA's expansion cohort. The decline in enrolments precipitated by these requirements had less to do with whether enrolees were working or otherwise engaged in acceptable community service, than whether they complied with burdensome state reporting requirements. These requirements imposed substantial transaction costs on qualified current and potential beneficiaries leading many of them to be denied coverage (Thompson *et al.*, 2020).

The Trump administration also approved a waiver request from Georgia to exit from the ACA's federal insurance exchanges as of 2023. This made Georgia the only state without a single one-stop-shop marketplace for individuals seeking coverage. Instead, consumers would transition to a highly decentralised enrolment system reliant on private brokers and insurance companies to sign them up. Critics charged that the system opened the door to cheaper insurance plans that did not meet the ACA's quality standards. They claimed that the complexity and added transaction costs imposed on exchange applicants would cause more than 100,000 Georgians to lose coverage (Thompson and Gusmano, 2022).

Upon taking office, the Biden administration launched executive actions that substantially reversed these and other sabotage measures. In doing so, Biden often piggy backed on successful suits brought by private litigants and Democratic state attorneys general against the Trump administration. For instance, advocacy groups had joined with Medicaid enrolees to have lower federal courts block implementation of the work requirement waivers. So too, Democratic state attorneys general persuaded the courts to stymie Trump's efforts to penalise legal non-citizens for enrolling in Medicaid. They also fended off a Trump measure that threatened to increase access to health insurance that did not meet the ACA's quality standards.[6] In all these cases, the Trump Justice Department had appealed these adverse lower court decisions to the Supreme Court. In turn, the Biden Justice Department reversed course announcing that it would no longer appeal these rulings thereby negating Trump's sabotage initiatives (Thompson and Gusmano, 2022). In other cases, the Biden administration acted more unilaterally. For instance, it restored and expanded funding for advertising and outreach on the exchanges. It issued a regulation to reduce access to short-term health insurance coverage that did not meet the ACA's quality standards. The Biden administration also moved to rescind or modify several waivers that the Trump administration had granted states. In August 2022, for instance, it suspended implementation of the Georgia waiver described above that replaced the ACA exchanges with a decentralised private approach.

Efforts to overturn Trump-era waivers were not, however, invariably successful. Texas obtained last-minute approval of a waiver renewal from the Trump administration shortly before Biden took office. Biden officials believed, among other things, that the waiver undercut the state's incentive to join the ACA's Medicaid expansion and moved to rescind approval.[7] But Texas resisted. In addition to appealing the decision via federal administrative channels, the state's Republican attorney general successfully sued to block the recession in a federal district court. In April 2022, the Biden administration declined to appeal the adverse ruling concluding that 'it is not the best use of government's limited resources to continue to litigate the matter' (Mills-Gregg, 2022). A similar dynamic played out when the Biden administration rescinded a Georgia waiver that expanded the number of non-elderly adults eligible for Medicaid while imposing work requirements on them. Republican officials sued and a federal district court blocked the recession. Again, the Biden administration declined to appeal the ruling. In both cases, judges appointed by Republican presidents overturned the Biden initiatives.

[6]The Trump administration had issued a rule under the Employee Retirement and Income Security Act (ERISA) to skirt ACA quality standards. ERISA empowers the federal government to regulate key dimensions of the employer insurance sector.

[7]The Texas waiver allowed the state to use Medicaid to subsidise uncompensated care in hospitals rather than deal with a root cause of the problem – the great numbers of low-income people who lacked health insurance.

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On balance, however, the Biden administration enjoyed considerable success in reversing Trump's sabotage. In addition, the Biden administration launched other executive actions to strengthen Medicaid and the ACA. Three of these initiatives deserve particular note.

First, the Biden administration sought to expand enrolments on the insurance exchanges by reinterpreting the ACA's statutory provision which had produced the 'family glitch'. A core premise of the ACA is that those with access to employer insurance should not be eligible for subsidised exchange coverage. But this rule does not apply if the employee's share of the employer premium costs for individual coverage exceeds 9.5 per cent of the worker's income or if the employer fails to offer family coverage. In that case, the individual could decline employer insurance and sign up for subsidised exchange insurance (assuming that the person met the income criteria for these subsidies). The glitch stemmed from the fact that the 9.5 per cent trigger applied only to employer-sponsored *individual* rather than family coverage. For many lower-income workers the premium costs for family coverage greatly surpassed the 9.5 per cent criterion and were unaffordable. This left their spouses and children without employer coverage and unable to access subsidised exchange insurance. Republican congressional opposition notwithstanding, the Biden administration in 2022 issued a rule reversing an Obama-era administrative interpretation that had spawned the family glitch. Biden's new rule gave an employee the option of receiving subsidised exchange insurance if the premium cost of employer-sponsored *family coverage* exceeded approximately 9.5 per cent of the worker's income. The Biden White House boasted that the new rule was the 'most significant administrative action to implement the Affordable Care Act since the law was first put in place'. It estimated that the rule would increase insurance coverage by 200,000 and make it more affordable for 1 million Americans (Lotven, 2022). Women and children in lower-income working families would be the primary beneficiaries if the rule survives a likely court challenge.

Second, Biden extended the COVID-inspired public health emergency into 2023. Given the terms of the Coronavirus Response Act of 2020 (discussed previously), states could not impose more stringent Medicaid eligibility criteria or disenrol beneficiaries so long as the officially declared public health emergency continued. While several congressional Republicans argued that progress in curtailing COVID meant that the public health emergency no longer existed, Biden postponed a decision on when to terminate it until after the 2022 elections. He also took steps to avert a precipitous decline in Medicaid enrolments once the public health emergency ended. While the Trump administration had given states 6 months to complete the renewal process for enrolees, the Biden administration pledged to give 60 days advance notice of the health emergency's end and another 14 months to make eligibility redeterminations. The White House also moved to establish a special year-round open enrolment period on the insurance exchanges to transition those no longer eligible for Medicaid to this coverage. In addition, the Biden administration provided a steady stream of guidance encouraging states to adopt client-friendly renewal practices designed to boost take-up (i.e. assure that those eligible for benefits enrol).

Third, and relatedly, the Biden administration proposed a regulation in August 2022 which aimed to constrain state Medicaid programmes from adopting cumbersome enrolment procedures that reduced take-up rates.[8] Throughout Medicaid's history many states have imposed substantial administrative burdens on those seeking coverage. The proposed rule sought to reduce these burdens in myriad ways. For instance, it required states to fill in the renewal forms with information already in their administrative files. It prevented states from requiring in-person interviews to obtain Medicaid benefits (Early and Mills-Grigg, 2022).

On balance, Biden's legislative and executive initiatives bolstered the ACA during his first 2 years in office. They helped kindle a surge in exchange enrolments, reversing 4 years of decline

[8]Just prior to the pandemic, Medicaid take-up rates approximated 80 per cent of those who could qualify (Staiger *et al.*, 2022).

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under Trump. Sign-ups for exchange insurance in 2021 rose to over 12 million, a 5 per cent increase over the preceding year. Increases continued in 2022 with more than 14.5 million enrolling (Kaiser Family Foundation, 2023). Meanwhile, the Biden administration moved to prolong a legislative legacy of the Trump years. The Families First Coronavirus Response Act of 2020 had helped trigger a major Medicaid expansion. Enrolments in the programme soared by over 30 per cent increasing from 64 million in January 2020 to an all-time high of 85 million by late 2022 (Centers for Medicare and Medicaid Services, 2023*a*). Biden's refusal to terminate the public health emergency during his first 2 years contributed to this development.

5. Looking forward: persistent challenges to ACA durability

What are the political prospects for ACA durability in the second half of Biden's term? Election returns at both the federal and state levels provide part of the answer. So do major enduring challenges to the ACA regardless of the election. Four challenges loom particularly large: (1) the congressional weaponisation of the debt ceiling; (2) court rulings by a judiciary increasingly dominated by Republican appointees; (3) the persistence of the ACA's Medicaid coverage gap; and (4) the role of states as implementation agents for federal policy.

5.1. Congressional weaponisation of the debt ceiling

The Republican takeover of the House of Representatives afforded the opportunity for that party to chip away at funding for the ACA via the annual budget process. But any effort by House Republicans to undermine the ACA through this process seemed sure to encounter a roadblock in the Senate and a Biden veto. The enhanced exchange subsidies embedded in the Inflation Reduction Act extend through 2025, beyond the purview of the current Congress. Moreover, the ACA has ceased to be the salient polarising issue that it once was for Republicans. Adverse public response to Republican congressional efforts to repeal the law in 2017 contributed to their losing control of the House in the 2018 elections. Moreover, survey data suggest growing public support for the ACA (Thompson and Gusmano, 2022).

These circumstances did not, however, deter House Republicans from pursuing another fiscal strategy to downsize the federal government – the weaponisation of the debt ceiling. Unlike nearly all economically advanced democracies (Denmark being the exception), the USA periodically requires Congress and the president to increase the limit on what the federal government can borrow. By so doing they honour past budgetary commitments etched in law. They also assure that the government does not default on its obligation to pay those who have lent it money (e.g. by purchasing federal treasury instruments). Failure to increase the debt limit would have dire, possibly calamitous, consequences for the American and world economies; it would precipitate severe cuts in a vast array of government programmes. Historically, approval for increasing the debt limit has been relatively routine. Congress has increased the limit 78 times since 1960, including 20 times since 2001 (Burman and Gale, 2023). But as partisan polarisation has intensified the Republican Party has increasingly weaponised the debt ceiling against Democratic presidents when it controls the House of Representatives. In essence, Republican House leaders strive to hold the president hostage; they threaten to push the government over the default cliff unless they receive major budgetary and related policy concessions.

Having won control of the House in 2022, Republican leaders aggressively pursued this strategy. With government needing to raise the debt ceiling by mid-2023, the House staked out its initial bargaining position in April when it narrowly approved the Limit, Save, Grow Act, which raised the debt ceiling until 2024. The bill froze federal spending at fiscal 2022 levels for a decade. This would necessitate more than $3 trillion in cuts to federal domestic programmes. Of particular relevance to the ACA, the legislation also imposed work requirements on non-elderly, able-bodied Medicaid enrolees. This provision would void the Biden

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administration's accomplishments in eliminating nearly all these requirements (discussed earlier). Intense negotiations between House Speaker Kevin McCarthy and President Biden led to last-minute legislation that raised the debt ceiling in early June 2023. This legislation, which enacted a set of relatively modest budget cuts, did not impose work requirements or otherwise threaten the ACA.

5.2. The impact on judicial appointments

While overshadowed by Republican efforts to weaponise the debt limit, continued Democratic control of the Senate may ultimately prove significant for ACA durability. This stems from the fact that the Senate must approve presidential nominations to all levels of the federal judiciary. In this regard, the Trump presidency had been a 'watershed period' for tilting the courts in a more conservative direction. Thanks in large part to a Republican Senate's refusal to confirm many of President Obama's nominees during his last 2 years, Trump entered office with over 100 judicial vacancies and subsequently appointed over 230 judges (about a quarter of the total number of federal judges). As a result, three of the 13 courts of appeal shifted from having most of its judges appointed by Democratic presidents to having a majority named by their Republican counterparts. (This imbalance remained after Biden's first 2 years in office with Republican appointees comprising the majority on seven of the appellate courts.)[9] Most prominently, of course, Trump secured Senate approval for three Supreme Court appointments which provided Republicans with a six to three majority (Konisky and Nolette, 2022: 357). During his first 2 years in office, the Biden administration moved apace to rebalance the court ideologically through its own appointments. By the 2022 election, he had secured the appointment of 84 nominees, including one Supreme Court Justice. With Democrats maintaining control of the Senate, President Biden has the opportunity to rebalance the federal courts with more liberal judges at least at the district and appellate levels.

What does this judicial development portend for health policy in general and the ACA in particular? This question directly intersects with political science research which examines the degree to which judges behave as 'partisans in robes' once they assume office (Epstein *et al.*, 2013: 2–3).[10] In sum, are judges appointed by Republican presidents more likely to hand down decisions undermining the ACA or other federal health policies than those appointed by Democratic presidents? While we are aware of no research that definitively addresses this question, anecdotal evidence suggests a tendency in this direction (Thompson *et al.*, 2020: 187).

Court challenges to the ACA brought by private parties and Republican state attorneys general are sure to persist over the next 2 years. In response to a suit by private litigants, for instance, Texas District Court Judge Reed O'Conner in September 2022 vitiated the ACA's ability to determine the kinds of preventive care that private insurance must offer. (The case provides a vivid example of forum shopping by plaintiffs. O'Conner, a Republican appointee, had through prior decisions hostile to the ACA built a reputation as the go-to judge for those seeking to vitiate the programme. The Republican state attorneys general described earlier who sued to invalidate the entire ACA won their initial victory in O'Conner's court.)

The case arose from the ACA's mandate that group health plans and health insurance issuers cover certain preventive care without cost sharing. It fell to the federal bureaucracy to determine the types of preventive care covered. In late 2021, several private parties sued to challenge this ACA provision and Judge O'Conner sided with them on two counts. The first count targeted a federal 2019 decision specifying that drugs designed to keep people from developing HIV should be a required preventive service. Braidwood Management, a Christian for-profit business which provided health coverage to about 70 employees, took the lead in arguing that the mandate

[9]Democratic appointees represented a slight majority of federal district judges at this time.
[10]For a contrasting perspective, see Devins and Baum (2019).

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violated their religious beliefs because it 'facilitates and encourages homosexual behavior, drug use, and sexual activity outside of marriage between a man and woman' (U.S. District Court, 2022: 3). Second, the court sided with the plaintiffs in their claim that the federal Preventive Services Task Force, which the ACA had established to determine which care to cover, lacked the constitutional authority to do so.[11] This ruling threatened to invalidate the ACA's preventive coverage requirements in general thereby giving employers much greater discretion to shape these services. The federal government appealed O'Conner's decision to the Fifth Circuit Court of Appeals. The higher courts will likely determine the outcome of the case by the end of Biden's initial term.

5.3. State election returns and the coverage gap

State election returns also promise to leave their mark on the ACA. While the ACA has ceased to be the lightning rod for Republican hostility that it was in the 2010 decade, they continue to be less supportive of its goals than Democratic officials. As noted earlier, Democrats experienced a slight gain in the number of states they control. But Republicans continued to dominate both legislative bodies and the governor's office in 22 states, compared to 17 for the Democrats.

Within this overall context, the election returns in the 12 states that had created an ACA coverage gap by refusing to expand Medicaid deserve note. Do the 2022 elections along with other forces increase the prospects that the hold-out states will agree to the Medicaid expansion? Marginal progress has occurred. South Dakota voters expanded Medicaid, despite opposition from a Republican governor who won re-election. Twenty-six states in varying ways permit their residents to propose initiatives which voters can enact into law (National Conference of State Legislatures, 2022). Voters in seven of these states have, over the opposition of Republican legislators, governors, or both, approved Medicaid expansions (Hasselswerdt, 2021). Among the remaining non-expansion states, Florida, Mississippi, and Wyoming in varying degrees provide opportunity for such direct voter democracy. But efforts to place the Medicaid expansion on the ballot in these states have foundered. The experience of initiative states reinforces a political science finding that a substantial 'democratic deficit' frequently characterises state governance. This deficit occurs when the policy preferences of state policymakers run contrary to public opinion in that jurisdiction (Lax and Phillip, 2011). In addition to initiative-driven expansions, the Republican-led legislature in North Carolina joined the state's Democratic governor in endorsing a Medicaid expansion in 2023.

Table 1 shows the degree to which Republicans dominate state legislatures and the governor's office in the ten remaining non-expansion states. In all ten, Republicans control the state legislature by substantial margins. These margins range from 55 per cent (Texas) to 85 per cent (Wyoming) in the lower house and 61 per cent (Georgia, Wisconsin) to 93 per cent (again Wyoming) in the upper chamber. In eight of the ten states, Republicans control the governorship with those up for re-election winning by margins ranging from 53 per cent of the vote in Georgia to 79 per cent in Wyoming. By comparison, Democratic governors in Kansas and Wisconsin won their re-election bids by 49 and 51 per cent, respectively. In general, these partisan results do not bode well for future Medicaid expansions especially in populous Florida and Texas which make up a huge share of the ACA's coverage gap. Still, the 90 per cent federal subsidies to states participating in the expansion and the ebbing of the ACA as a polarising partisan issue may entice Republican policymakers in some hold-out states to follow North Carolina's lead. So too, states, such as Georgia, have pursued waivers which would allow then to enact partial expansions (e.g. cover non-elderly adults up to 100 per cent of poverty who meet certain work requirements). The

[11]The claim centred on the fact that the Preventive Services Task Force consisted of volunteer experts, rather than federal officials. Plaintiffs argued that this violated the appointments clause of the US constitution.

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Table 1. Partisan outcomes in Medicaid non-expansion states after 2022 election

State	% Republican lower house	% Republican upper house	% of vote for governor
Alabama	73	77	67 (R)
Florida	70	70	59 (R)
Georgia	57	61	53 (R)
Kansas	69	73	49 (D)
Mississippi	59	69	R – no election
South Carolina	71	65	57 (R)
Tennessee	76	82	74 (R)
Texas	55	58	56 (R)
Wisconsin	58	61	51 (D)
Wyoming	85	93	76 (R)

Source: https://ballotpedia.org (16 December 2022).

Biden administration has opposed these partial expansions and moved to rescind these Trump-approved waivers. But Georgia prevailed in the federal courts to overcome this opposition.

5.4. State election returns and policy implementation

The partisan composition of elected state officials also seems likely to shape important ACA implementation issues during Biden's initial term. The CAA of December 2023 terminates the continuous Medicaid enrolment provisions enacted in early 2020. This means that states will lose the enhanced federal subsidies for covering Medicaid enrolees. It also means that states face the staggering administrative task of dealing with the 'great unwinding' – the need to re-determine eligibility for the 85 million persons enrolled in the programme. These redetermination processes threaten to substantially increase the number of uninsured. Many enrolees will have incomes too high to qualify for Medicaid and fail to transition promptly to alternative coverage offered by the ACA's insurance exchanges or employers. Many others will continue to meet Medicaid eligibility criteria but lose coverage for failure to comply with the often-burdensome administrative requirements for renewal. Given these dynamics, the Kaiser Family Foundation projects that from 8 to 24 million could lose coverage by early 2024. In turn, the Department of Health and Human Services estimates that 45 per cent of disenrolments will be for procedural reasons, i.e. enrolee failure to provide required eligibility information (Burns *et al.*, 2023).

As noted earlier, the Biden administration has provided encouragement and assistance to the states to avoid a dramatic decline in Medicaid enrolments. Moreover, the CAA imposes certain process and data requirements on states. For instance, states must accept renewal applications online, over the phone, in person, or by mail. They must give enrolees at least 30 days to respond to requests for information. States must also regularly submit data related to disenrolments, call centre performance, and other factors. Should a state fall below performance norms, the federal government can penalise it financially or otherwise intervene to halt improper renewal practices.

While these statutory measures bolster the position of federal administrators to shape the unwinding, states and in some cases, counties hold the major implementation cards. Their level of commitment to preserving health coverage during the unwinding and their administrative capacity to further that goal will markedly shape health insurance outcomes. Many states face significant capacity deficits. They report they lack adequate numbers of well-trained staff to

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effectively process renewals in a timely way. Some indicate that they do not have the information systems and standard operating procedures that would allow them to make the renewal process less burdensome for enrolees (Brooks *et al.*, 2023).[12] Issues of state commitment to preserving Medicaid enrolments also loom large. The CAA phases out the enhanced federal subsidy for states by the end of 2023. Hence, state Medicaid costs per beneficiary will increase. Given budgetary concerns, some states may rapidly process renewals and thereby risk unwarranted disenrolments (e.g. false-negative eligibility errors, procedural disenrolments). This pattern may be especially evident in more conservative, Republican-led states which have historically tended to be less vigorous in pursuing high levels of Medicaid enrolment (e.g. Callaghan and Jacobs, 2017).

6. Conclusion

Since the ACA's inception in 2010, the partisan context at the federal and state levels has markedly shaped the severity of challenges to the programme's durability. Through legislative and executive initiatives, the Biden administration made substantial headway in reinvigorating the ACA during its first 2 years. Its initiatives helped end 4 years of enrolment declines on the ACA's insurance exchanges under President Trump. Sign-ups for exchange insurance rose from 11 million in 2020 to over 16 million in 2023 (Kaiser Family Foundation, 2023). Thanks in part to Biden's delay in terminating the COVID public health emergency, Medicaid enrolments rose dramatically to an all-time high of over 85 million in 2022. Republican takeover of the House of Representatives in the 2022 election made the partisan context for ACA durability less favourable. Through weaponisation of the debt ceiling, House Republicans sought to overturn Biden's success in curtailing Medicaid work requirements. But this effort failed and other major challenges to ACA durability seemed unlikely to take hold at least through 2024.

While compelled to deal with congressional challenges to the ACA, the Biden administration has continued to pursue executive initiatives to strengthen the programme. For instance, in April 2023 it issued a proposed regulation that would expand Medicaid, CHIP, and ACA coverage to some 580,000 deferred action for childhood arrival recipients. This cohort consists of individuals who are not legal citizens but were brought into the country at a young age by undocumented parents (Centers for Medicaid and Medicaid Services, 2023*b*).

Within this executive arena, the election results in the Senate preserved Biden's ability to reshape the partisan composition of the federal courts. Given the outsized importance of the courts in American governance, these appointments may over the longer term provide a more supportive environment for the ACA and other health policies. Over the next 2 years, however, the courts will provide a venue for those seeking to undercut the ACA. For instance, it remains unclear whether the Biden administration will on appeal overturn a lower court decision that crippled the ACA's capacity to determine the preventive services that large employers and insurance companies must provide without patient cost sharing. Republican states attorneys general or private litigants also seem likely to sue to prevent the Biden administration from implementing the federal rule to eliminate the 'family glitch'. Throughout its history, Republican state attorneys general and private litigants have striven to undermine the ACA. Politics pursued through the courts seems certain to persist over the next 2 years.

A key development in this regard may well be greater willingness of the courts to abandon their historic deference to federal executive agency initiatives promoted by its 1984 decision in *Chevron v. Natural Resources Defense Council*. The current Supreme Court has issued multiple rulings curbing administrative authority (Lemley 2022; Brown and Epstein, 2023). In *West Virginia v. EPA*, for instance, the Supreme Court ruled that agencies cannot act on anything

[12]States, for instance, can employ *ex parte* renewal processes whereby they use data already in their possession to make eligibility decisions rather than burden applicants with the need to provide it. But nearly half the states have done fewer than 25 per cent of renewals this way.

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the court considers to be a 'major question' without specific congressional approval. This decision significantly undermines the ability of the Environmental Protection Agency to take executive action to combat climate change. Furthermore, a statistical analysis of Supreme Court rulings suggests that the reversal of executive initiatives has a partisan tilt. The administrative presidencies of Democratic chief executives may well face more court resistance than those of Republicans (Brown and Epstein, 2023). If these patterns hold, the role of the courts in shaping and possibly undermining ACA durability may well loom larger than ever.

The 2022 elections yielded modest gains for Democrats at the state level though they continue to trail Republicans in the number of governments they control. Of special note, Republicans have unified control in eight of the ten states that have yet to join the ACA's Medicaid expansion. They hold majorities in both houses of the legislature in all ten states. While Republican resistance to expansion shows signs of abating in some states, significant progress is reducing the Medicaid coverage gap is unlikely over the next 2 years. Strong legislative and gubernatorial opposition to the expansion persists in the two states with the greatest potential to reduce the gap, Florida and Texas. The partisan election outcomes may also intertwine with state responses to the great unwinding precipitated by the CAA. Republican states may have less commitment and perhaps administrative capacity to stave off the loss of health coverage among Medicaid enrollees than their Democratic counterparts.

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