

Commonalities Surrounding Repeal Drives: Prohibition, Right-to-Work, and the Affordable Care Act

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Abstract

Three measures enacted by Congress since 1900 have drawn especially prominent repeal drives—Prohibition, Section 14b of the Taft-Hartley Act, and the Affordable Care Act. What can be learned from an investigation of the commonalities surrounding these drives—their causes, contexts, and effects? I look into the topics of political geography, Congress’s deliberative content and style, the U.S. system of vertical federalism, the U.S. system of elections, the role of crises, and the consequences of conflict. One line of takeaway is the following. In each of these three policy enterprises—Prohibition, 14b, and the ACA—we see a kind of conflict in which extreme intensity has joined with striking geographic differentiation in views. As a practical matter, the policymaking process in these cases has enrolled a multiplicity of actors, including emphatically the states as well as the public, and it has extended across time. All this activity has arguably constituted the policymaking process. In these instances, this is the way the country has been making its decisions—jaggedly and extendedly. A congressional statute can be just a first draft. For their part, the three repeal drives have served as components of policymaking, not responses to it. Thus also with “backlash.”

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Full-steam drives to repeal congressional enactments are rare. In this paper, I consider the causes, contexts, and effects surrounding three of them—those to repeal the Eighteenth Amendment (Prohibition), the 14b right-to-work clause of the Taft-Hartley Act, and the Affordable Care Act (the ACA, or Obamacare).

Watching the drive to repeal the ACA stimulated me to write this paper. What can we say about this remarkable exercise of intensity and tenacity? Have we seen anything like it before? Is there some point in looking? I decided to cast back in history for arguably comparable instances. Hence the earlier repeal drives. This is a paper about commonalities across instances, the idea being that insights of general illumination might derive from a comparative historical analysis. I address not the repeal drives themselves—there is little of that in the paper—but the political backgrounds of them. The political and constitutional contexts surrounding the drives are my topic.

The paper is inductive. It is loose and speculative. I plunged into the history to see what would come about. For the most part, I proceed in the paper by presenting commonalities across the three instances—a few that I believe are worth thinking about—and I leave it there. I invite readers to think about them. Topics that came to figure in the commonalities include: political geography, Congress's deliberative content and style, vertical federalism—that is, the coexistence of the national government with those in the states—the American system of elections, the role of crises, and the consequences of conflict. For one key source, I spent a good deal of time reading congressional hearings and debates—on Prohibition in 1914, 1917, 1918, and 1919; on the Wagner Act in 1935; on the Taft-Hartley Act in 1947 and 1949; on the ACA in

2009 and 2010.¹ The paper is entirely about institutions and processes. I do not intend any partiality to the various policy causes or to the moral dramas that attended them.

But first, a refresher on the three repeal drives and the congressional decisions that anteceded them. All three drives have linked to especially far-reaching regulatory designs that Congress has voted since 1900. The histories are complex. The Eighteenth Amendment banning the production, transport, and sale of intoxicating liquors was debated in the House in 1914, approved by Congress in 1917, ratified by the states in 1919, supplemented by an enforcement measure, the Volstead Act, in 1919, and formally repealed in 1933. The plan was to be jointly enforced by the national and state governments. Congress enacted the Taft-Hartley Act in 1947. Repeal of Taft-Hartley began as an enterprise targeting the entire act in a failing effort in 1949, but the drive soon settled into a thus far always losing campaign against the act's 14b clause, which guarantees the states the authority to enact right-to-work laws. But to address Taft-Hartley requires also an inspection of the earlier regulatory measure against which it was itself a reaction—the National Labor Relations Act of 1935 (that is, the Wagner Act). I will conduct that inspection here. Enactment of the ACA in 2010 brought a repeal drive through 2017 ending in a showdown failure at that time.

My guess is that most political scientists after a few minutes of thought would endorse these choices of repeal drives. One justification is as follows. In each of the three cases, one of the two major parties called for repeal in one or more of its platforms. The Democrats targeted the Eighteenth Amendment in 1932, the Democrats the Taft-Hartley Act in whole or in part nine times between 1948 and 1980, and the Republicans the ACA in 2012 and 2016. This resort to

¹ Generally speaking, I capitalize the term “Prohibition” when it refers to the well-known formal enactments of the national government—the Eighteenth Amendment and its accompanying Volstead Act. But I leave the term in lowercase in its more general usage as in programs in the states or in the dry cause as it evolved in history aside from these congressional enactments.

platforms is not an everyday occurrence. Roughly two dozen repeal calls regarding other measures have appeared in major-party platforms since 1900 (see Appendix A), but most of these have been forgotten, and none have figured in drives as prominent and explosive as the ones taken up here.

The politics surrounding these drives has differed a good deal in its partisan texture and its rhythms. The Eighteenth Amendment had a nonpartisan birth, but the Democrats weighed in at its death in 1932 and 1933. The Republicans generated the Taft-Hartley Act, but most House Democrats (notably, the bulk of the party’s southerners) voted to pass it. The politics of the ACA has been resolutely partisan—Democrats generated the measure; every Republican opposed it.

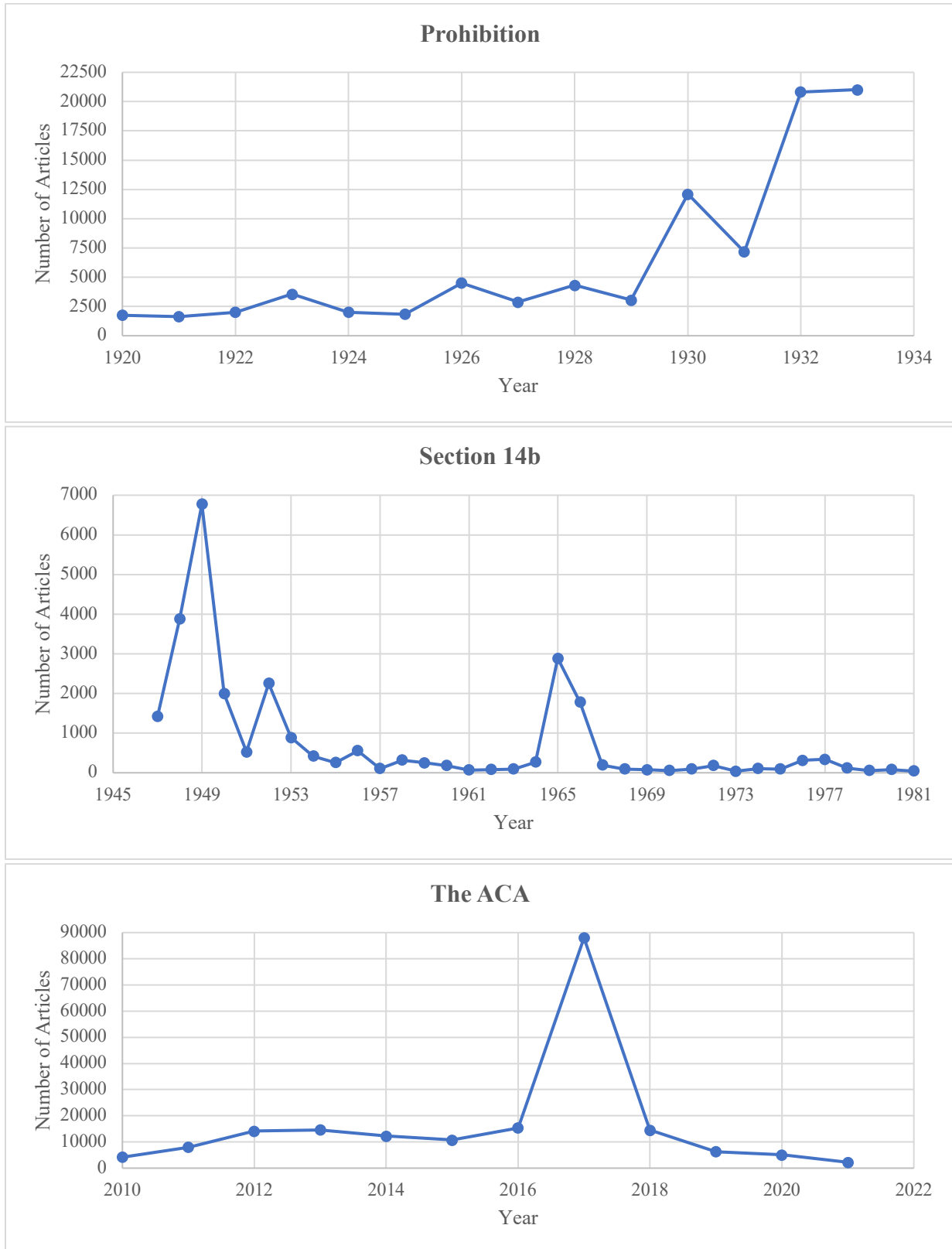
As for rhythm, sentiment to repeal the Eighteenth Amendment grew gradually during the 1920s, then soared in the early 1930s. After 1949, the drawn-out campaign to repeal 14b featured a congressional showdown in 1965. The Republicans’ anti-ACA drive proceeded at a steady temperature until 2017, peaked in prominence then, but fell away after the drive’s Capitol Hill failure. Still, the ACA story may not be finished yet given Donald Trump’s stated aims.²

See Figure 1 for the time-lines of the three repeal histories, based on ProQuest counts of relevant mentions of the term “repeal” in media articles.³

² David Millward, “Trump revives pledge to abolish Obamacare,” [The Telegraph](#), November 27, 2023; Megan Messerly, “Trump embraced a conservative vision for Medicare. States want to try it again,” [Politico](#), February 20, 2024.

³ In the case of Prohibition, that count means mentions of “repeal” in conjunction with one or more of the terms “Volstead Act,” “prohibition,” “18th Amendment,” or “Eighteenth Amendment.” In the case of the Taft-Hartley Act, “repeal” in conjunction with one or more of the terms “Taft-Hartley,” “14b,” or “14(b).” In the case of the ACA, “repeal” in conjunction with one or more of the terms “Obamacare” or “Affordable Care Act.” Thanks to Ethan Yan for these calculations and graphics. With Prohibition there is an ambiguity. Joint enforcement by the federal and state governments was the reform’s official design. Accordingly, many of the states soon enacted their own dry enforcement laws (or already had them) to supplement the Volstead Act. But then in the middle and late 1920s, the states increasingly moved to repeal their dry laws. Thus, in such cases it was state, not federal enactments, that were being repealed and possibly drawing media interest. Hence, there are some likely contributions to the “repeal” mentions reported here. But this does not cause much of a data misunderstanding. By repealing their own laws, the states were delegitimizing the national dry cause and, in effect, preparing the way for the Twenty-first Amendment that repealed the Eighteenth in 1933.

Figure 1: Number of Articles with *repeal* and Terms Related to Prohibition, Section 14b, and the ACA



I organize the paper into a series of five observations about commonalities. The second of these observations is especially long and is divided into three parts. I preface each observation with a brief bolded statement providing the gist of what follows. The first observation deals with conditions of conflict, the following four with processes.

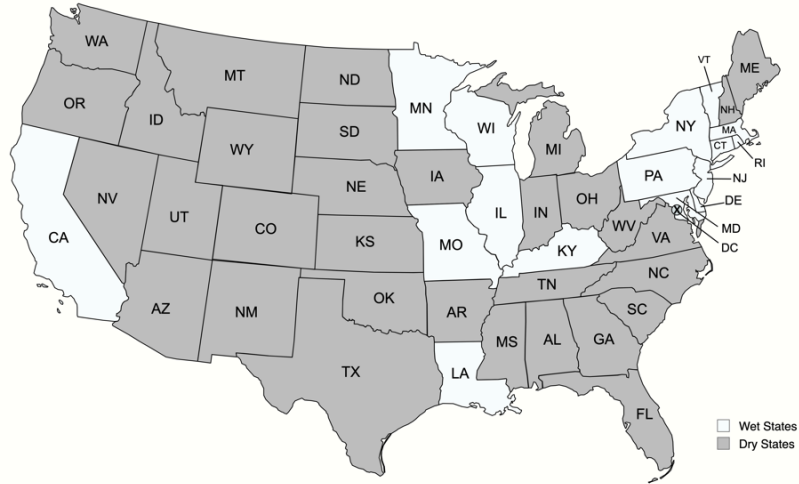
1. All three cases have featured severe, high-publicity conflict that broke along geographic lines.

Geography plus intensity can invite a signal pattern of politics in a federal system where the lower constitutional units enjoy leeway as centers of authority and voice. Coming to mind quickly are such centers as, say, Texas in the U.S. system, or Alberta and Quebec in Canada.⁴ Interacting with the relevant constitutional structures, the size and heterogeneity of a country can add on as commotion magnifiers. The United States seems a decent match to these ideas.

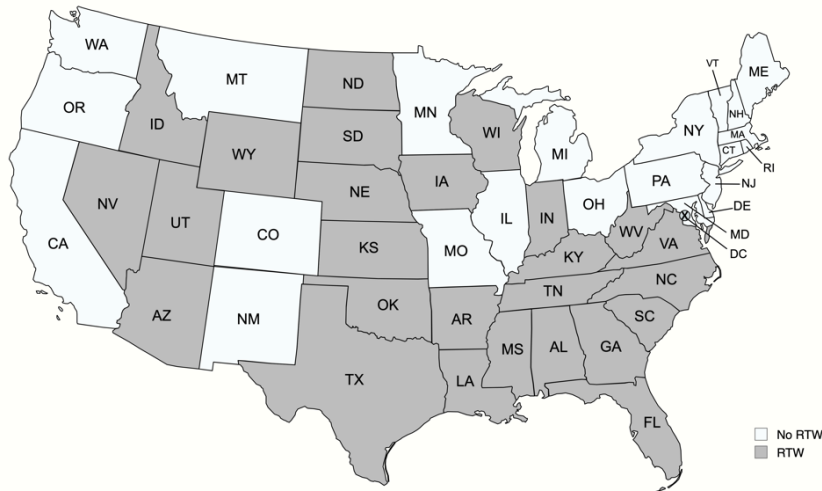
⁴ See, for example, Ian Austen, “Alberta Law Deepens Schism Over Sovereignty in Canada,” New York Times, December 26, 2022, p. A8.

Figure 2: State Positions on Questions of Prohibition, Right-to-Work (RTW), and the ACA

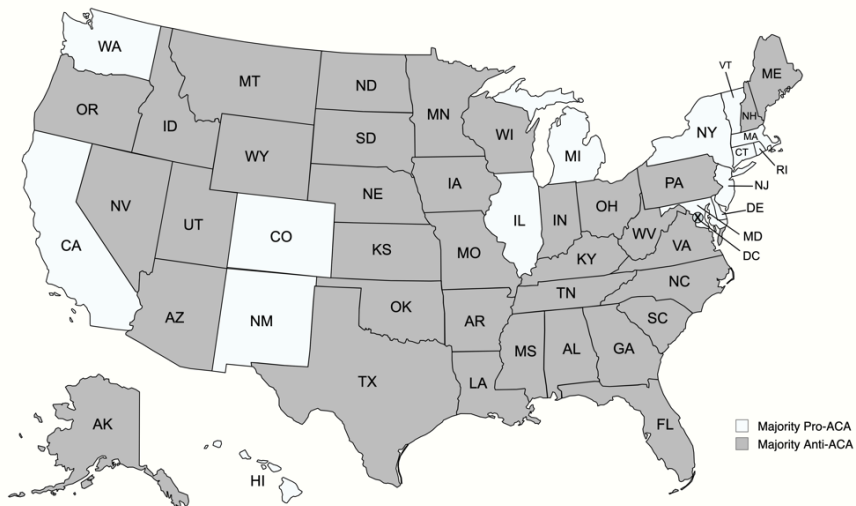
Dry States vs. Wet States



RTW States vs. Non-RTW States



Anti-ACA States vs. Pro-ACA States



Conflicts over Prohibition, right-to-work, and the ACA have divided this country geographically, and, beyond that, they have divided it in a similar configuration. See the maps in Figure 2.⁵ Each of the three policy controversies is recorded here in binary fashion. Colored in gray for Prohibition are the thirty-three states that had enacted their own dry (that is, prohibition) statutes (they were free to do that) before the necessary pivotal state ratified the Eighteenth Amendment bringing it into effect in January 1919. This is a plausible indicator of enthusiasm for the dry cause at that time.⁶ Colored in gray for right-to-work is a measure whose values draw from an expanse of time – the twenty-six states that had right-to-work laws on their statute books as of 2023 (the bulk of them acted much earlier). Colored in gray for the ACA are the thirty-five states where majorities of the public responded against the ACA in opinion surveys that asked for up-or-down judgments just after the enactment in 2010-2011. New York and Utah supplied the extremes of these judgments at 40.5 percent and 65.0 percent unfavorable, respectively.⁷

There is intricacy in these maps. Certain entries in the Prohibition map, for example, likely owe to the views of German Americans in the Midwest who did not favor drinking curbs and to the presence of liquor industries in Kentucky, Wisconsin, and Missouri. New Orleans was notoriously wide-open. But there is commonality across the maps. In American life, it comes as no surprise when Massachusetts, New York, Illinois, and California align on one side of things and Alabama, the Dakotas, Texas, and Utah on the other. Why might that be? For reasons of culture or whatever it is that generates the consistency across the maps, an urban-versus-rural

⁵ The maps were created with mapchart.net.

⁶ Anti-Saloon League of America, “Wet and Dry Map of the United States by State, January 1919,” printed in the 1919 Anti-Saloon League Year Book.

⁷ Thanks to Elizabeth Rigby for access to this measure, which is explained in Rigby, “State Resistance to ‘ObamaCare,’” The Forum 10:2 (2012), Article 5, at page 5. State-specific values are estimates relying on 16,417 individual responses opting for generally favorable or unfavorable toward the ACA across fifteen Kaiser Family Foundation tracking polls fielded monthly from April 2010 through June 2011. See also Mollyann Brodie, Claudia Deane, and Sarah Cho, “Regional Variations in Public Opinion on the Affordable Care Act,” Journal of Health Politics, Policy and Law 36:6 (December 2011), 1097-1103.

dimension peers out from each of them.⁸ In each case, to report relevant calculations, the rural percentage of a state's population in a preceding national Census (those of 1910, 1940, and 2000) correlates at a .01 level of significance with the policy expression exhibited in a map.⁹ In the case of right-to-work, one multivariate cross-state analysis offers a grainier account. Through 1991 (the study necessarily misses a few later adoptions), presence of state right-to-work laws is said to have owed appreciably to three variables: percent African American population (generally high in the South), percent of small as opposed to large businesses, and conservative "citizen ideology" as measured in surveys.¹⁰

These patterns permit an implication. In circumstances like these analyzed here, which have entailed conflict that is both intense and geographically inflected, it can be especially troublesome to try to impose uniform policy designs, or ones nearly that, onto the entire U.S. national population. This idea is hardly a surprise. The dissonance between the North and the South on slavery and race is a key theme in U.S. national history all the way back. But I leave aside the North-versus-South story here. It has exhibited its own pattern of geography, it has drawn on constitutional rights as a major consideration, it has not engendered repeal drives (the politics has worked differently), and a vast scholarship has addressed it.

In addition, the patterns on view here invite certain questions. In the three cases at hand, involving conflicts that were both intense and geography-inflected, what went on in the congressional deliberations? What connections were drawn? In particular, what kind of

⁸ For recent reflections on the rural side of this differentiation, see Katherine J. Cramer, [The Politics of Resentment: Rural Resentment in Wisconsin and the Rise of Scott Walker](#) (Chicago: University of Chicago Press, 2016); Nicholas Jacobs and B. Kal Munis, "Place-Based Resentment in Contemporary U. S. Elections: The Individual Sources of America's Urban-Rural Divide," [Political Research Quarterly](#) 76:3 (2023), 1102-1118.

⁹ In the cases of Prohibition and right-to-work, the correlation is with the binary policy measure. In the case of the ACA, it is with the full graduated state-by-state information available in the opinion dataset.

¹⁰ David Jacobs and Marc Dixon, "The Politics of Labor-Management Relations: Detecting the Conditions that Affect Changes in Right-to-Work Laws," [Social Problems](#) 53:1 (February 2006), 118-137. The study has no variable for "rural."

attention did Congress give to decentralization, as opposed to centralized standardization, as a possible way of handling policy? Relatedly, given the powers and resources of the states, how deft was Congress in addressing the ins and outs of vertical federalism in its deliberations? I mean “address” in the specific sense of congressional hearings and debates, the forums where proposals are presented, explained, tested, and defended before the public.¹¹ An observation accordingly follows.

2. Generally speaking, Congress’s addressing of decentralization and vertical federalism in these cases has been sparse and ragged.

Many warrants exist for making policies that are nationally uniform: election mandates, nation-centered democracy, science, moral imperatives, destiny (history is with us), efficiency, clarity, crisis, constitutional rights (as with the Reconstruction amendments), constitutional grants of authority (as with the Commerce Clause), negative externalities caused by state governments jostling against each other, not to mention common sense.

But locating policymaking at lower levels of government can have advantages, too. They range from the theoretical to the practical. A list would include the following. Democracy—in the Tocquevillian sense that public participation and choice at lower levels can define and energize a society.¹² Information—in the Hayekian sense that central decision making can lack the nuance needed to address local circumstances. It can be “irrational when applied to particular places,” as Martha Derthick has argued.¹³ Experimentation—the “states as

¹¹ I try to use the term “debates” to refer strictly to floor discussions in the Congressional Record. I use the term “deliberations” to encompass the contents of both the floor discussions and the committee hearings.

¹² “Public spiritedness” is the associated term invoked in Michael W. McConnell, “Federalism: Evaluating the Founders’ Design,” University of Chicago Law Review 54 (1987), 1484-1532, at 1510.

¹³ Martha Derthick, Keeping the Compound Republic: Essays on American Federalism (Washington, D.C.: Brookings, 2001), p. 52. See also Roger D. Congleton, “Federalism and Pandemic Policies: Variety as the Spice of Life,” Public Choice 195 (2023), 73-100, at 26.

laboratories” idea associated with Louis Brandeis.¹⁴ Maximizing the satisfaction of people’s policy tastes—the idea that one-size-fits-all policymaking can work out worse in satisfying an overall schedule of individual views than does an allowed variation in local policies. In a way, this idea is simple but it has theory behind it.¹⁵ Cooperation and compliance—the difficulty that courts, lower governing bodies, or the public itself may idle, block, or balk in reaction to national policy decisions.¹⁶ Conflict reduction or avoidance—a premise sewn into this country’s states’ rights origins, and basic to the governing of geographically cleaved countries like Canada and Belgium.

I will take up one by one the enactments that spurred the three repeal drives. In the debates and hearings, how were questions of decentralization and vertical federalism addressed? As a side-point, what do we see in the way of attention to cleavages—as in urban versus rural?

Prohibition. In the Prohibition debates, it is easy to see urban-versus-rural dissonance. At one extreme, certain pro-dry members spoke contemptuously of “the slums of the great cities,” “some semicivilized foreign colony in New York City,” the “gamblers, hoodlums, and harlots” in an anti-dry parade in Chicago, and the foreign-born population of Detroit failing to “bow to American ideals.” A Kentuckian spoke favorably of “rural communities in the central, southern, and western part of our country, with the population makeup almost entirely of

¹⁴ Warren E. Oates, Fiscal Federalism (New York: Harcourt Grace Jovanovich, 1972), p. 12; Congleton, “Federalism and Pandemic Policies,” 89-90; Jeffrey S. Sutton, “What Should Be National and What Should Be Local in American Judicial Review,” The Supreme Court Review (2023), 191-218, at 208. See also Frances Lee, “Federalism, the Pandemic Response, and the Laboratories of Democracy,” 2023 manuscript.

¹⁵ Oates, Fiscal Federalism, pp. 11, 13; McConnell, “Federalism: Evaluating the Founders’ Design,” 1493-94; John O. McGinnis and Ilya Somin, “Federalism vs. States’ Rights: A Defense of Judicial Review in a Federal System,” Northwestern University Law Review 99:1 (2004), 89-130, at 106-107. The freedom of people to switch residences across states in search of more agreeable contexts—like as a result possibly clustering with like—could play a role in the logic and practice here, although the question becomes complicated.

¹⁶ In the case of publics: “The implicit rationale for decentralization goes something like this: If a government can perform closest to the people it is meant to serve, the people will get more out of government and, in turn, will be more willing to accept that government’s authority.” Stacey White, “Government Decentralization in the 21st Century: A Literature Review: A Report of the CSIS Program on Crises, Conflict, and Cooperation” (Center for Strategic and International Studies, 2011).

Americans.” On the other side, an anti-dry member pointed to “the little jack rabbit, coyote and sage-brush states of the far West.”¹⁷

As for decentralization or vertical federalism, it cannot be said that the argumentation offered by the anti-dry side was sparse or ragged. It was robust. Almost all the boxes were checked. Under threat was self-government or states’ rights, although the states’ new initiative and referendum processes of the Progressive era brought little mention as exercises of democracy.¹⁸ Varying state conditions, an ingredient of the “information” idea, drew interest.¹⁹ Long historical experience with the dry laws of the states drew attention (the wets said they failed; the dries said they worked), occasionally employing the term “experiment.”²⁰ Conflict avoidance made an appearance. Enactment of the Eighteenth Amendment “would light the fires of a controversy which would probably rage for a generation.” It would plunge the country into a “vortex of internal strife.”²¹

But the centerpiece of the anti-dry case was compliance. Could Prohibition be enforced? Some three dozen members of Congress said no. “To enforce it in the cities of the country would end in failure.” “How will you discover the manufacture and sale of these beverages?” “I have seen in Western states whole towns wide open in the face of the state constitution.” Local

¹⁷ I will reference the Congressional debates by specifying the year, session (where needed), chamber (H or S), and page. Specification of sessions is suitable for the 1910s, when they stretched across years and can be confusing. The quotations in this paragraph are respectively at Cong Rec 1917 (1st sess), at H558, 1917 (2nd sess), at H461, 1919 (1st sess), at H2467, H2483-84, H2501, 1914 (3rd sess), at H558. See also statements at 1914 (3rd sess) at H551, 1917 (1st sess), at H5643, 1917 (2nd sess), at H443, 1919 (1st sess), at H2497-98, H2467, H2497-98.

¹⁸ A sample of statements: Cong Rec 1914 (3rd sess), at H508, H512, H599. On initiative and referendum: Cong Rec 1914 (3rd sess), at H508, 1917 (2nd sess), at S5651.

¹⁹ Some instances: Cong Reg 1914 (3rd sess), at H499, H511, H540, H560, H580, 1917 (1st sess), at S5586.

²⁰ Examples: Cong Rec 1914 (3rd sess), at H512, H514, H534, H581, 1917 (1st sess), at 5643.

²¹ Quotations at Cong Rec 1914 (3rd sess), at H507, 1917 (2nd sess), at H441. See also 1914 (3rd sess), at H512, H530, 1917 (2nd sess), at H428, H446.

juries wouldn't convict.²² Nine senators or House members noted that the Fourteenth or the Fifteenth Amendment or both had proven unenforceable. Why expect better of the Eighteenth?²³

Certain arguments tending toward the abstract did not seem available to the members. In several hundred pages of debate on Prohibition, I did not come across a clean statement of the principle of maximizing the satisfaction of individual preferences. Also, what is the logic of experimentation? Notwithstanding a good deal of testimony about experiences in Kansas, Maine, and elsewhere, no one seems to have addressed the question: How can the experience or experimentation of any state be extrapolated in theoretical or practical terms to a case for policy uniformity across a large, heterogeneous continent? That is a parts-versus-whole question.

On to the dry side. Leaving aside the specifics of problems and remedies, the crux of any policy debate, what warrants did the members express for Prohibition action? There are recurring themes.²⁴ Nation-centered democracy kept appearing: "Shall the people rule?" "This is a national demand." "All power is inherent in the people." "Over six million American citizens have petitioned on this subject." A pro-dry scroll 150 feet long was stretched across the congressional chamber.²⁵ Also, Prohibition was a moral imperative: "Alcohol is a liquid poison." "This terrible evil in our land." "It creates moral leprosy." "Of the same importance as slavery in that other day."²⁶ There were touches of teleology or destiny: "Its day has come." "The truth

²² Quotations at Cong Rec 1914 (3rd sess), at H508, H531, 1917 (2nd sess), at H447. On the juries: 1914 (3rd sess), at H509.

²³ For example: Cong Rec 1914 (3rd sess), at H532, H546, 1917 (1st sess), at S5586, 1917 (2nd sess), at H453.

²⁴ I came across just a few references to negative externalities owing to independently acting states—such as a dry state acting alone could not keep alcohol from intruding into its territory. Cong Rec 1914 (3rd sess), at H498, H504, H513, 1917 (2nd sess), at H443.

²⁵ Quotations at Cong Rec 1917 (1st sess), at S5587, 1914 (3rd sess), at H518, H568, H504. Scroll at 1914 (3rd sess), H602.

²⁶ Quotations at Cong Rec 1917 (1st sess), at S5548, 1914 (3rd sess), at H504, H594, H503.

about alcohol is rapidly bringing men and nations out from under the alcoholic amnesia of history.”²⁷

But on most facets of decentralization or vertical federalism, the dries offered silence broken by occasional flourishes of loose argument. On states’ rights, there was what seems like casuistry: “This proposition is simply to give the states an opportunity to say whether the federal government should be granted power over this particular subject matter.... This is not an invasion of state rights”—a logic hard to sell in New York.²⁸ Senator Robert La Follette (R-WI), the era’s icon of Progressivism, although “very certain” that an enactment like this would “fail of enforcement,” voted for the Eighteenth Amendment anyway (technically, to send it to the states) based on his “convictions in support of democracy.”²⁹ There were confident assurances on shared authority: “If power is given both to the nation and to the states to enforce the prohibition, either independently or concurrently, there can be no conflict.” “No conflict can arise between the federal and state acts.”³⁰ Congressman Edwin Webb (D-NC), a floor manager for the Amendment in 1917, saw no problems ahead: “It is all right. I am not afraid to trust the states about that. I never saw one that went counter to the U.S. Constitution, or whose law officers failed to enforce the law.”³¹

Right-to-work laws. Right-to-work laws are a different kind of story. Some background is in order. The Wagner Act of 1935, a capstone victory for the labor union cause, did not cover agricultural workers, railroad workers, or public-sector employees (these omissions might be kept in mind), and it did not bar state right-to-work laws.³² Before the Republicans passed the

²⁷ Quotations at Cong Rec 1917 (1st sess), at S5639, 1914 (3rd sess), at H604.

²⁸ Cong Rec 1914 (3rd sess), at H592. See also 1914 (3rd sess), at H513, H529, H569.

²⁹ Cong Rec 1917 (1st sess), at S5586.

³⁰ Cong Rec 1914 (3rd sess), at H592, 1919 (1st sess), at H2434. See also 1914 (3rd sess), at H562.

³¹ Cong Rec 1917 (2nd sess), at H425.

³² On agricultural workers: Katherine Rader, “Delineating Agriculture and Industry: Reexamining the Exclusion of Agricultural Workers from the New Deal,” Studies in American Political Development 37 (2023), 146-163.

Taft-Hartley Act in the Eightieth Congress in 1947, the states of Florida, Arkansas, Arizona, Nebraska, and South Dakota had already voted for right-to-work in public referendums.³³

Through its 14b clause in 1947, the Taft-Hartley Act in effect firmed up an already existent state leeway into a formal congressional guarantee.

The clause's wording goes: "Nothing in this act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or territory in which such execution or application is prohibited by state or territorial law."

Following their election victory in 1948, the Democrats tried to repeal Taft-Hartley, and, beyond that, reaching past the Wagner Act, to enact a substitute measure that would ban state right-to-work laws. The latter achievement would have been a first. They failed on all counts. A hindrance to these aims was that majorities of both senators and House members in the new Congress in 1949, even though the Democratic Party now enjoyed sizable majorities, had voted for Taft-Hartley in 1947 and they stayed put.³⁴ And so, Taft-Hartley along with its 14b clause remained in place.

In the relevant hearings and debates in 1935 as well as 1947 and 1949, geography and business size figured in various ways. For example: "There is a difference in the degree of industrialization."³⁵ Heavy-handed national regulation was said to be a bad fit for small towns and rural areas: "Industry in South Dakota with a few exceptions has not gone much beyond the stage where the employer calls his men by their first names."³⁶ In 1949, most of the senators

³³ Harry Millis and Emily Clark Brown, From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations (Chicago: University of Chicago Press, 1950), pp. 326-27; Gilbert J. Gall, The Politics of Right to Work: The Labor Federations as Special Interests, 1943-1979 (New York: Greenwood, 1988), pp. 22, 27.

³⁴ Cong Rec 1949, at H5516-17, S7400.

³⁵ Cong Rec 1949, at S8439.

³⁶ Testimony by a business representative from that state, Senate Committee on Labor and Public Welfare, 1935, at 786. See also same hearings at 350; Cong Rec 1947, at H3571-73.

from New England, whose mills had been drifting to the South where unions were weak (a long-standing problem), backed a national standardization of law regarding the unions' membership security, but they lost.³⁷ On the question of business size, the deliberations brought complaints that smaller firms suffered special harm from strikes and other union activities.³⁸ Senator Robert Taft (R-OH) in 1947: "Larger employers can well look after themselves, but throughout the United States there are hundreds of thousands of smaller companies, smaller businessmen, who, under existing statutes, have come gradually to be at the mercy of labor-union leaders."³⁹ A business testifier in 1947: "But in the case of the average smaller employer, a strike is a quick way of inviting the unions, the bankers, the sheriff, or one's competitor to take the remains. Either of the four is willing to step in."⁴⁰ In fact, there is evidence that smaller businesses have been special fans of right-to-work laws.⁴¹

How did the members of Congress justify acting at all in 1935, 1947, and 1949? Events underlay certain warrants. In 1935, the industry codes of the National Industrial Recovery Act of 1933 were running out and needed replacement. Also, in light of the nationwide strikes of 1934, rife with violence, it is no surprise that Senator Robert Wagner (D-NY), stage-managing the new legislation, made a pitch "to promote industrial peace."⁴² In 1947, the Republicans dwelt on the

³⁷ Cong Rec 1949, at S8698-99, S8709.

³⁸ Senate Committee on Labor and Public Welfare, 1935, at 301, 508, 626, 786; Senate Committee on Education and Labor, 1947, at 892-93, 927; Cong Rec 1947 at S3834.

³⁹ Cong Rec 1947, at S3834.

⁴⁰ Senate Committee on Labor and Public Welfare, 1947, at 893.

⁴¹ Gall, The Politics of Right to Work, pp. 35, 71-72; Jacobs and Dixon, "The Politics of Labor-Management Relations"; William Canak and Berkeley Miller, "Gumbo Politics: Unions, Business, and Louisiana Right-to-Work Legislation," Industrial and Labor Relations Review 43 (January 1990), 258-271 at 259-262 (a small business edge in especially the early years); Fred Witney, "The Indiana Right-to-Work Law," Industrial and Labor Relations Review 11:4 (July 1958), 506-517, at 511-12; Glenn W. Miller and Stephen B. Ware, "Organized labor in the political process: A case study of the right-to-work campaign in Ohio," Labor History 4:1 (1963), 51-67, at 55.

⁴² Cong Rec 1935, at S7573. On the strikes: J. Joseph Huthmacher, Senator Robert F. Wagner and the Rise of Urban Liberalism (New York: Atheneum, 1968), pp. 166, 190.

postwar strike surge of 1945-46.⁴³ In 1949, the Democrats dwelt on the party's election verdict of 1948 as a mandate to repeal Taft-Hartley.⁴⁴

On matters intrinsic to decentralization or vertical federalism, I did not find a great deal in these deliberations to report. In the committee hearings, several business representatives made the local-conditions case, as did Senator George ("Molly") Malone (R-NV) in an extended floor speech: When we try to "settle every dispute in the country, hundreds or thousands of miles away, we are placing upon the National Labor Relations Board a duty which it is impossible to fulfill." "It is like averaging the length of a lot of pairs of pants; the result does not fit anybody."⁴⁵ Otherwise, no one on either side seems to have considered the values of experimentation, close-to-the-ground democracy, maximal catering to voter tastes, or conflict avoidance.⁴⁶ These ideas did not come up.

Specifically on right-to-work and the 14b clause, the deliberations are sparse. In the Congressional Record, they appear on parts of a few pages and comprise not more than one or two percent of the Taft-Hartley wordage in 1947 and 1949.⁴⁷ Other considerations drew more

⁴³ Cong Rec 1947, at H3412, H3516, H3424, H3529, H3530, H3531, H3534, H3538, H3554, H3617, H3625, S3834, S4135.

⁴⁴ Cong Rec 1949, at H5056, H5064, H5083, H5133, H5134, H5141, H5147, H5148, H5161, H5165, H5170, H5272, H5276, H5335, H5339-40, H5341, H5348, H5364, H5365, S7231.

⁴⁵ The Malone speech: Cong Rec 1949, at S8435-39, quotations at S8436, S8438. The business testimony: Senate Committee on Education and Labor 1935, at S268, S627; Senate Committee on Labor and Public Welfare, 1947, at S213, S342, S641.

⁴⁶ As for compliance, in the realm of labor-management relations, the law is, generally speaking, carried out without difficulty. There is not much of a Volstead Act-type problem.

⁴⁷ Leaving aside cursory mentions, the complete record is available at: Senate Committee on Labor and Public Welfare, 1947 at 726-78 (an exchange between Rep. Francis Case (R-SD) and Sen. Wayne Morse (R-OR)); Cong Rec 1947, at H3453 (Sen. Claude Pepper (D-FL)), H3559-62 (Rep. Case and others), S4362 (Sen. Pepper again), S4876-79 (Sens. Malone (R-NV) and Taft), S7632-33 (Sens. Alben Barkley (D-KY) and Taft), S6456 (Sen. Morse), S6519-20 (Sens. Pepper, Taft, and Barkley), Cong Rec 1949 at H5059-61 (Reps. Howard Smith (D-VA) and Augustine Kelley (D-PA), H4150 (Rep. Smith again), H5156-57 (Rep. John Wood (D-GA)), H5157 (Rep. Dewey Short (R-MO)), H5166 (Rep. Adam Clayton Powell (D-NY)), H5540 (Rep. Brooks Hays (D-AR)), H5085 (Rep. James J. Delaney (D-NY)), H5150 (Rep. Wint Smith (R-KS)), S7400 (Sen. Taft), S7419-20 (Sens. Pepper and Taft), S7425 (Sens. Hubert Humphrey (D-MN) and Taft), S7243-4 (Sen. Elbert Thomas (D-UT)), S7493 (Sen. Paul Douglas (D-IL)), S7625 (Sens. Russell Long (D-LA) and Humphrey), S7719 (Sen. Spessard Holland (D-FL)), S8693-94 (Sens. Raymond Baldwin (R-CT) and Taft), S8698-99 (Sen. Henry Cabot Lodge, the grandson (R-MA)), S8427 (Sen. Holland).

attention. When they said anything at all, how did the backers of 14b support it? They noted that state leeway on the matter was the status quo, that many states had already enacted right-to-work laws or other union constraints. These facts, stated without adornment or elaboration, were their message. It strewed through the deliberations. The implication was: Why interfere with this state authority?⁴⁸ Enough said. As an add-on, they did occasionally argue that the leeway already resting in the states could be cemented against any tampering, by courts or others, that might later come along by writing it into the specific 14b guarantee.⁴⁹ As an analog to the 14b clause, state control of private insurance systems, formally guaranteed by congressional statute, was occasionally pointed to.⁵⁰ That was about it.

Required are national standards, the pro-union opponents of 14b argued. The Commerce Clause cries out for them. Surrender to a hodgepodge of state laws brings inconsistency and confusion. “The industrial strength of this nation flows over state lines.... When local diversity of control constitutes a burden on that interstate flow and effort, it must give way to central control.” Conflicting rules can cause troubles for both unions and employers. Employers in union-weak states can enjoy an unfair competitive edge. This package was the chief pitch of the opposition side.⁵¹ But it faced an embarrassment. The Wagner Act had operated for a dozen years without enjoying the requisite national standardization.⁵²

There were silences on both sides. At stake, everyone knew, whatever else, was the economic and political power of the labor unions. A few liberal senators pressed the value of

⁴⁸ Senate Committee on Labor and Public Welfare, 1947, at S698-99, S806-07; Cong Rec 1947, at H3559, H3562, S4878; Cong Rec 1949, at H5059, H5066, H5150, H5156-57, H5511, H5512, S7419-20, S8215, S8427, S8578, S8945, S8695.

⁴⁹ Senate Committee on Labor and Public Welfare, 1947, at 727; Cong Rec 1947, at H3559, S6519.

⁵⁰ Senate Committee on Labor and Public Welfare, 1947, at S727; Cong Rec 1947, at H3562.

⁵¹ Cong Rec 1947, at S6520, S6532, S6546; Cong Rec 1949, at H5061, H5166, H5085, S7243, S7419-20, S7493, S7625, quotation at Cong Rec 1947, H3453.

⁵² As Senator Taft pointed out: Cong Rec 1949, at S7420.

strong unions. Senator Wayne Morse (R-OR): “Unfair to the legitimate rights of labor.” Senator Paul Douglas (D-IL): “In the decade from 1937 to 1947, the period in which the Wagner Act was in effect, great progress was made.” Senator Hubert Humphrey (D-MN): “The truth is that those who sermonize on the sacred ‘right to work’ really are thinking of the sacred right to starve.”⁵³ But there was little takeup. Humming in the background was a national Gallup poll of January 1947 cited in the deliberations. Asked to evaluate union security agreements, 8 percent of respondents chose “closed shop” (join a union to get a job), 18 percent “union shop” (join a union and pay dues to hold a job), 66 percent “open shop” (neither of the above).⁵⁴ Senator Morse conceded that the “closed shop” if put to a national referendum would lose.⁵⁵ The unions’ membership security formulas were political poison.

Given the subsequent economic and political role of the 14b clause, and the persisting controversy regarding it, it is hard to read these deliberations of 1947 and 1949 without reflecting that the treatment of 14b was rather cursory. Aside from bouquets to state authority, the Republicans said virtually nothing to justify the 14b clause. There was little discussion of the place of labor unions in the economy or the society. On the Democratic side, there were occasional eloquent interjections. But the anti-14b case was sparse and its arguments seemed incomplete or vulnerable. Exactly why did the Commerce Clause need new application? What was the justification for imposing union membership security rules onto a national public that, on various evidence hard to rebut, was deeply hostile to them?

⁵³ Quotations at Cong Rec 1947, at S6456; Cong Rec 1949, at S7491, S7625.

⁵⁴ And 8% “no opinion.” Senate Committee on Labor and Public Welfare 1947, at S806-07; Cong Rec 1947, at H3358.

⁵⁵ Senate Committee on Labor and Public Welfare, 1947, at S728.

Generally speaking, the enactment of 14b just flew past. It flew past The New York Times, too, whose coverage of it at the congressional decision days of 1947 was sparse to nonexistent.⁵⁶

The Affordable Care Act. Why enact universal health insurance in 2009? Two warrants kept infusing the deliberations. Destiny was one. Present was “the call of history,” “the right side of history.” After “waiting for 100 years,” a “hope,” “aspiration,” “vision,” “challenge,” “dream,” “promise,” or “goal” was finally to be met.⁵⁷ There would be a “culmination.”⁵⁸ I counted some sixty references to earlier promises or efforts, including thirty to Theodore Roosevelt – the original promiser in 1912. Does any other enactment mindset in U.S. history match this one? Urgency was another warrant. It wasn’t just a matter of problems; there are always problems; it was immediacy and urgency. Across the country, troubles were said to be rising to a boil – health insurance premiums “spiraling out of control,” “eating into family budgets faster and faster.”⁵⁹ Senator Dianne Feinstein (D-CA) testified: “So over just the past two years, California has lost insurance for two million people, bringing the total of people up to eight million who have no insurance whatsoever.”⁶⁰ There were dozens of such claims, which rang of credibility. An analogy is the focus on soaring strike activity in the Taft-Hartley debates of 1947.

Scarce, however, in the ACA debates, was any action warrant based on the 2008 election. In hundreds of pages, I found just three sightings of an election mandate on health policy: “health care reform,” “make it possible for every American to afford a healthy life,” and

⁵⁶ See coverage by William S. White: “House Due to Vote on Labor Curbs Today,” April 27, 1947; “Vote on Labor Bill Up in Senate Today,” May 2, 1947; “Opposition Is Weak,” June 7, 1947.

⁵⁷ Quotations at Cong Rec 2009, at H12857, S12564, H12432, H12851, H12836, H12613, S12851; 2010, at H1881, H1894, H11856.

⁵⁸ Cong Rec 2009, at H12605.

⁵⁹ Cong Rec 2009, at H12839, S11575.

⁶⁰ Cong Rec 2010, at S1953.

“improving health care for all Americans.”⁶¹ There is nothing here specifically about the ACA as it evolved. This reticence may owe partly to the fact that Barack Obama in his 2008 nomination drive had attacked, not supported, the idea of an “individual mandate,” a key component of the ACA. The Obama team “had polled a mandate and thought it was a loser.”⁶²

In the hearings and debates, health-care reform at the state level received abundant attention. At least eighteen states drew comments for success, failure, or shying away from action. A Senate committee conducted a special panel on Massachusetts, California, Vermont, and Utah.⁶³ In general in the deliberations, easily the leader in recognition was Massachusetts with its fresh Romneycare program (an individual mandate, 97% insurance coverage).⁶⁴ Second in level of notice was Utah (market reforms, low costs, a new market exchange).⁶⁵ Progress was reported in Minnesota (92% coverage, 90% enrollment in nonprofit HMOs), Maine (guaranteed issue, a ban on cancellations), and Texas (costs down through tort reform).⁶⁶ TennCare in Tennessee had failed.⁶⁷ Single-payer efforts drew testimony.⁶⁸ The language of models, experiments, and laboratories appeared, although innocent of any discussion about extrapolating from state to nation. Differences in local “conditions” appeared as an argument against national

⁶¹ House Energy and Commerce Committee, Subcommittee on Health, 2009, Series 111-54, at 293 (Rep. Henry Waxman (D-CA)); Cong Rec 2009, at 13165 (Sen. Harry Reid (D-NV)); Cong Rec 2009, at 13733 (Sen. Mary Landrieu (D-LA)).

⁶² Steven Brill, America’s Bitter Pill: Money, Politics, Backroom Deals, and the Fight to Fix Our Broken Healthcare System (New York: Random House, 2015), pp. 45-47, 61, 118, 247, quotation at 47.

⁶³ Senate Committee on Health, Education, Labor and Pensions, 1917, at 5.

⁶⁴ For example: House Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions, 2009, Series 111-16, at H100, H139; House Committee on Commerce, Subcommittee on Health, 2009, Series 111-54, at H95-96; Cong Rec 2009, at S13451.

⁶⁵ For example: House Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions, 2009, Series 111-16, at H128, H139; Cong Rec 2009, at H12606, S11820, S13014.

⁶⁶ On Minnesota: Cong Rec 2009, at H12885, S11034, S11931. On Maine: House Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions, 2009, Series 111-16, at H93-94. On Texas: House Committee on Commerce, Subcommittee on Health, 2009, Series 111-11, at H14-15; Cong Rec 2009, at S1944-45.

⁶⁷ Cong Rec 2009, at H12264, H12877.

⁶⁸ House Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions, 2009, Series 111-15, at H98.

standardization, yet, except in one particular, the case was ill-developed and vague on alleged hurdles.⁶⁹ I did not come across a substantial, coherent argument. The exception was rural versus urban contexts. Repeatedly, the ACA design was seen as a threat to hospitals and other health services in rural areas. Republicans from Maine, New Hampshire, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Wyoming, Montana, Arizona, and Alaska voiced this alarm, as did two Democrats from Virginia.⁷⁰ There is a lot of rural in this list, although not much South.

Otherwise in the deliberations, the logics that might apply to decentralization or vertical federalism drew little attention. There was silence on both sides. As always, the idea of maximizing the satisfaction of individual views made no appearance. Thus also the pluses or minuses of decentralized democracy. In the hundreds of pages of debate, I came across no references by either side to conflict avoidance as a public good net of all else. Portents from the 1990s did not figure. In 1996, Haynes Johnson and David S. Broder entitled their account of the Clintons' unsuccessful health-care drive, The System: The American Way of Politics at the Breaking Point.⁷¹ The countermobilization to the drive grew fierce. At a climactic moment, the

⁶⁹ The conditions case: House Committee on Education and Labor, Subcommittee on Health, Education, Labor and Pensions, 2009, Series 111-16, at H61; House Small Business Committee, 2009, at H25; Senate Committee on Health, Education, Labor and Pensions, 2009, at S6; Cong Rec 2009, Series 111-011, at S11820, H12606, S13014, S13602.

⁷⁰ On Maine: Cong Rec 2009, at S12494, S12496, S13443-44. On New Hampshire: Cong Rec 2010, S1827. On South Dakota: Cong Rec 2009, at S12492. On Nebraska: Cong Rec 2009, at S13002; Cong Rec 2010, at S1827. On Kansas: Cong Rec 2009, at S13003, S13620; Cong Rec 2010, at S1789, S2004. On Oklahoma: Cong Rec 2009, at S12657. On Texas: Cong Rec 2009, at S12535, S12856, S12976, S13403, S13657; Cong Rec 2010, at S1822, S1826. On Wyoming: Cong Rec 2009, at S12537, S12568, S12979, S13288, S13346; Cong Rec 2010, at S1827. On Montana: Cong Rec 2009, at H12226. On Arizona: Cong Rec 2009, at S12657. On Alaska: Cong Rec 2009, at S12722. On Virginia: Cong Rec 2009, at H12847; Cong Rec 2010, at S1954-55. Republicans from Oklahoma and Kentucky pointed to the special vulnerability of their rural health-care systems without mentioning the ACA: Senate Finance Committee 2009, at S8, S22. Was there truth in this alarm? It has been alleged. The case seems to be at the hypothesis stage. See Hayden Dublois, "Medicaid Expansion Won't Stop Rural Hospital Closures," www.wsj.com/articles/medicaid-expansion-wont-save-rural-hospitals, April 28, 2023; Chad E. Mathis, "Why Obamacare Fails and What We Can Do Instead," www.realclearpolicy.com/articles/2023/12/21/why_obamacare, December 21, 2023.

⁷¹ Boston: Little Brown, 1996.

Clinton White House launched pro-reform bus caravans to proceed in a buzz of publicity across the country. “Every one of the caravan routes—which set out from Portland, Dallas, Independence, and Boston—became an expedition into enemy territory.... The longer they traveled, the greater the signs of opposition they encountered.”⁷²

As for compliance or cooperation, the ACA would enjoy smooth sailing once it was enacted. That was the assumption in the deliberations. Neither the pro nor the anti side saw otherwise. Once empowered to do so, the states would set up their own insurance exchanges (the plans for which received fleeting attention in the deliberations).⁷³ That confidence was shared by the Obama administration and by Democratic congressional aides. Medicaid expansion, the second major thrust of the measure, would proceed smoothly.⁷⁴ Nowhere in the debates did I come across any alertness that the courts or the states might balk at these performances. Dr. Raymond Scheppath, Executive Director of the National Governors Association, testifying in the ACA hearings at an early stage, did voice caution. On the exchanges: “The bottom line is, given the rigidity of the administrative rules here, I question at this time whether a substantial number of states would actually opt into the system.” On Medicaid expansion: “My sense is that [the governors] would question the necessity of increasing the eligibility of childless adults and parents over 100% of poverty [an aim of Medicaid expansion].”⁷⁵ But Dr. Scheppath was ignored. None of the states’ governors testified in the hearings.

⁷² Johnson and Broder, *The System*, p. 463. See also Abigail Trafford, “What Went Wrong: How Wonks and Pols—and You—Fumbled Universal Health Care,” *Washington Post*, August 21, 1994.

⁷³ Sen. Ron Wyden (D-OR), spoke occasionally on the state exchanges; otherwise, there was virtually nothing. Cong Rec 2009, at S13853; Cong Rec 2010, at S1969.

⁷⁴ For the Obama administration on the exchanges, see David K. Jones, *Exchange Politics: Opposing Obamacare in Battleground States* (New York: Oxford University Press, 2017), p. 7. For the congressional aides on both the exchanges and Medicaid expansion, see Eileen Burgin, “Congress, Policy Sustainability, and the Affordable Care Act: Democratic Policy Makers Overlooked Implementation, Post-Enactment Politics, and Policy Feedback Effects,” *Congress and the Presidency* 45:3 (2018), 279-314, at 297.

⁷⁵ House Energy and Commerce Committee, Subcommittee on Health, 2009, Series 111-54, at 446-47, quotation at 446; Senate Finance Committee, 2009, at 75.

Research can bring interesting surprises. What are we to do when health insurance confronts vertical federalism? I came upon a piece by Nicholas Bagley that offers a two-track model, separating the fiscal side from the regulatory side.⁷⁶ On the one hand, the American states are in no position to fund expensive programs. Barring that option are their annual balanced-budget constraints as well as Congress's ERISA preemption that walls off employee-benefits plans from state interference. Testimony in the ACA deliberations notes this state fiscal incapacity.⁷⁷ Thus, in Bagley's argument, as a practical matter, gushers of funding from Washington, D.C., are called for. On the other hand, the case for tight regulation of the states is less compelling. In Bagley's argument: "If federalism means anything, it is that national judgment should not supersede state judgment, absent a good reason for federal intervention.... Yes, federal money might be squandered in a state that adopts stupid insurance rules.... But that's an issue between the state and its voters."⁷⁸ "Roughly, the states should retain control over regulation while passing to the federal government responsibility for money.... The country can easily accommodate a patchwork of state insurance laws. Indeed, it already does."⁷⁹ I did not see this two-track idea anywhere in the ACA deliberations. Canada's way of handling health insurance, although I found the subject difficult to drill into, seems to smack of the two-track plan. Ample funding from Ottawa joins with, on the regulatory side, chronic catering to

⁷⁶ Nicholas Bagley, "Federalism and the End of Obamacare," *The Yale Law Journal Forum* 127 (2017-2018), 1-26.

⁷⁷ House Education and Labor Committee, Subcommittee on Health, Education, Labor and Pensions, 2009, Serial 111-16, at 11, 94; House Education and Labor Committee, Subcommittee on Health, Education, Labor and Pensions, 2009, Serial 118-15, at 98; Senate Finance Committee, March 25, 2009, at 7; Senate Finance Committee, May 5, 2009, at 75; Senate Committee on Health, Education, Labor and Pensions, April 25, 2009, at 44; Cong Rec 2009, at H12190, H12264, H12877.

⁷⁸ Bagley, "Federalism and the End of Obamacare," 18.

⁷⁹ *Ibid.*, 4, 6.

Quebec.⁸⁰ So far as I could tell, Canada's experience with vertical federalism did not come up at any place in the ACA deliberations.

Alcohol prohibition, regulation of labor-management relations, health-insurance reform. All these policy enterprises were good bets to invite political reaction, but it is hard to read the congressional deliberations on them without reflecting that Congress itself, by the way it handled them, issued special invitations to reaction. The story is complicated for right-to-work, and more will be said. But in all three cases, repeal drives sooner or later kicked into place. In all three cases, conflict of a geography-inflected flavor ensued.

But next I make a detour. In all three cases, geography as a shaper and explainer of conflict had to compete with, or interact with, an additional feature of the American policymaking environment.

3. National crises—the management of them, the policy opportunities afforded by them, and the downswings from them—have been key contributors to these repeal stories.

Prominently in the United States, where, owing to the mechanics of separation of powers it is hard to move the government to act, crises have rivaled elections as spurs to policy change.⁸¹ The rhythm is familiar. A crisis occurs. “Policy windows” open. There is a logic of remedies. In some such instances, policies designed to be crisis remedies, such as the Agricultural Adjustment Act of 1933, far outlast their crises. But there is also a logic of opportunity. Momentary fears or excitements, or temporary congressional majorities heaved up by crises, may help along policy initiatives that are not politically feasible in normal times. Bonus options thus

⁸⁰ Daniel Béland and André Lecours, “Sub-state nationalism and the welfare state: Québec and Canadian federalism,” *Nations and Nationalism* 12:1 (2006), 77-96, at 86-89; Daniel Béland and André Lecours, *Nationalism and Social Policy: The Politics of Territorial Solidarity* (New York: Oxford University Press, 2008), p. 86 and more generally ch.2 passim.

⁸¹ See, for example, David R. Mayhew, “Wars and American Politics,” *Perspectives on Politics* 3:3 (September 2005), 473-493.

accrue to those in power. But then a crisis ends, the tide recedes, political disequilibrium gives way to a new equilibrium, and reaction or regret comes to flourish. This dynamic figured significantly in all three of the enterprises analyzed in this paper, with altogether five crisis nodes contributing to the stories.

In this country and elsewhere, liquor prohibition owed its success to World War I.⁸² Before that, the American drive had been vigorous but had stalled. Now, a long-sought policy goal morphed into a crisis remedy. A spirit of sacrifice and abstemiousness was called for. Grain, a source of alcohol, became a precious wartime food commodity. The Anti-Saloon League and its allies pounced. “The prohibitionists draped their political pressure tactics in patriotic bunting. The war made it easy for dries to portray the predominantly German American brewers as subversives, if not traitors.” No congressional hearings were held. The Eighteenth Amendment sailed through Congress easily, and the states took only thirteen months to ratify it.⁸³

Hence national Prohibition. Yet, a half-generation later, the Great Depression brought another crisis node. Support for the national dry regime had eroded in the 1920s, but now it collapsed. The causal story on this is a bit cloudy but it is multiply subscribed to and seems compelling. “The growing malaise of the Great Depression introduced new political and social as well as economic circumstances, greatly accelerating the revolt against prohibition....”⁸⁴

Available now was a new “window for policy change.... In addition to concerns over increases in crime and infringements on states’ rights, in the midst of economic depression, a persuasive

⁸² On the U.S. and other countries, Mark Lawrence Schrad, “Constitutional Blemishes: American Alcohol Prohibition and Repeal as Policy Punctuation,” *Policy Studies Journal* 35:3 (2007), 437-463, at 445-46.

⁸³ Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920* (Chapel Hill: University of North Carolina Press, 1995), ch. 8, quotation at p. 240; David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution, 1776-1995* (Lawrence: University Press of Kansas, 1996), pp. 218-226; Schrad, “Constitutional Blemishes,” at 448-50. I found little mention of German Americans in the *Congressional Record* debates. That theme seems to have resonated more generally in the society.

⁸⁴ David E. Kyvig, *Repeal: Repealing National Prohibition* (Kent, OH: Kent State University Press, 2000), ch. 7, quotation at p. 116.

economic argument was put forth—that a resurrected, legal liquor industry would provide a respectable source of government tax revenues and produce badly needed jobs nationwide.”⁸⁵

The 1932 election played a role: “As the liquor issue was one of the few issues that clearly divided the two parties, the results were interpreted as a popular mandate for repeal....”⁸⁶ Once Congress recommended formal repeal in February 1933, it took the states only nine months to ratify the Twenty-first Amendment – faster than they had ratified the Eighteenth Amendment.

In labor-management-relations policy, there were two crisis nodes. The Great Depression brought fortune to the labor unions as the Democrats won the White House and swelled their congressional ranks. The party swept to victory in 1932 yet rose even higher in the unusual midterm of 1934. The party in 1935, having gained in both chambers, held 322 House seats and 69 Senate seats. First-term urban Democrats abounded. One consequence was: “In the wake of the November elections labor strength was greater than ever.”⁸⁷ “Wagner and his allies could be more confident in forcing their labor bill to a vote in 1935 even in the face of presidential reluctance to endorse it.”⁸⁸ They did that. The Wagner Act of 1935 established the unions’ right to organize. The bill passed with scant floor debate and little opposition.

Was there a crisis in 1945-46? Well, the voters seemed to believe so. Economic woes afflicted the country as wartime gave way to peacetime – inflation, wrangling over price controls, food and housing shortages, a cascade of militant nationwide strikes. “In fact, 1946 turned out to be the most strike-ridden year in American history.” The year’s election season overlapped with a nationwide meat shortage. In a flash November victory, the Republicans

⁸⁵ Schrad, “Constitutional Blemishes,” p. 451. See also David S. Jacks, Krishna Pendakur, and Hitoshi Shigeoka, “Urban mortality and the repeal of federal prohibition,” *Explorations in Economic History* 89 (2023), 1-40, at 4.

⁸⁶ Schrad, “Constitutional Blemishes,” p. 453.

⁸⁷ Alonzo L. Hamby, *For the Survival of Democracy: Franklin Roosevelt and the World Crisis of the 1930s* (New York: Free Press, 2004), p. 283.

⁸⁸ Theda Skocpol and Kenneth Finegold, “Explaining New Deal Labor Policy,” *American Political Science Review* 64:4 (December 1990), 1297-1304, at 1300.

gained fifty-five House seats and twelve Senate seats to win control of the incoming Eightieth Congress. There, in 1947, in the Taft-Hartley Act, they overhauled labor-management relations to their taste (including 14b) and maneuvered it past a White House veto.⁸⁹ Thus, labor-management relations, like Prohibition, experienced action connected to one crisis node, but then reaction connected to another.

Rahm Emanuel, Chief of Staff of the incoming Obama administration in 2009, a scary and memorable crisis juncture due to the banking collapse of 2008, mused: “You never want a serious crisis to go to waste. And what I mean by that is an opportunity to do things that you could not do before.” In such circumstances, spasms of creativity and drive may seize a leadership class.⁹⁰ But also, as in 1935 and 1947, leeway in congressional seats can be a help. In the 2008 election campaign, Obama and the Democrats enjoyed at least decent prospects through the summer, but then came the financial meltdown in September, which was bad news for the White House party (the Republicans) and also exposed the presidential candidates to spotlight scrutiny of how they would handle the crisis. As can be seen in tracking polls, Obama then soared from probably a slight favorite to his seven-point November victory.⁹¹ The Democrats, already in control of Congress, gained twenty-one House seats and eight Senate seats. How did Obama’s late-season surge correlate with the party’s results at the congressional level? There is

⁸⁹ Michael Barone, Our Country: The Shaping of America from Roosevelt to Reagan (New York: Free Press, 1990), 184-88, quotation at 186; James Richard Boylan, “Reconversion in Politics: The New Deal Coalition and the Election of the Eightieth Congress,” Ph.D. dissertation, Columbia University, 1971, passim.

⁹⁰ On the theoretical chin-scratching induced in the U.S. and abroad by the financial crisis of 2008, see Henry Farrell and John Quiggin, “Consensus, Dissensus, and Economic Ideas: Economic Crisis and the Rise and Fall of Keynesianism,” International Studies Quarterly 61 (2017), 169-283.

⁹¹ Robert S. Erikson, “The American Voter and the Economy, 2008,” PS: Political Science and Politics 42:3 (July 2009), 467-471; James E. Campbell, “The Exceptional Election of 2008: Performance, Values, and Crisis,” Presidential Studies Quarterly 40:2 (June 2010), 225-246, at 234; Suzanna Linn, Jonathan Moody, and Stephanie Asper, “Explaining the Horse Race of 2008,” PS: Political Science and Politics 42:3 (July 2009), 459-465, at 460. For testimony by the candidates’ managers on how the 2008 campaign looked and evolved after its September breakpoint, see Institute of Politics, Campaign for President: The Managers Look at 2008 (New York: Rowman & Littlefield, 2009), at pp. 190-210.

no easy way to tell. But, absent it, it seems most unlikely that the party would have had enough Senate slack—that is, sixty votes—to craft the Affordable Care Act in the form that they did. At the margin, a needed Minnesota seat accrued to the Democrats in mid-2009 by way of a 0.01% victory edge only after a laborious seven-month overtime vote recount.⁹² On the question of health-care reform, we do not know what would have happened absent the 2008 financial crisis and its election echoes.

Note that there was no crisis node in 2016, at least none outside the conduct of the election itself. No immediate crisis in the economy, the society, or foreign affairs endowed the Republicans with extra slack for policy action as they took over the government in 2017.

4. In these three cases, the states have played a key constitutional role in supplying voice, force, shape, and duration to the cabining of congressional decisions.

In a recent work, Susan Rose-Ackerman points up the uniqueness of U.S. national policymaking as contrasted with that in the British, French, and German systems. Tight, centralized party leaderships in league with government bureaucracies are the European story. The parliaments taken alone lean toward being passive. The American Congress, given its constitutional standing and its processes of deliberation and decision, is more powerful, more busy, and more transparent than the parliaments, thus in some ways rendering the U.S. system more democratic. On Capitol Hill, anyone can get a spoon in, and the media are on patrol.⁹³

This American design has met a long test of time. Yet difficulties arise. Congressional processes can be ragged. The images are familiar: the 535 cooks, party games, position-taking, dashes to 218 or 51 or 60 votes, blitzes while opportunity allows. Partly in consequence, the

⁹² Edward B. Foley, “The Lake Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election,” *Election Law Journal* 10:2 (2011), 129-164.

⁹³ Susan Rose-Ackerman, *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany, and France* (New Haven, CT: Yale University Press, 2021). See also Charles E. Lindblom, *The Intelligence of Democracy* (New York: Free Press, 1965).

contents of the deliberations or the enactments themselves may be ragged or ill-thought-out. “Legislation typically involves compromises that generate vague language and inconsistent provisions.”⁹⁴ Concerns for administrability may take a back seat.⁹⁵ So may concerns for constitutionality, as in the case of the ACA: “Twenty-two hearings tied to health care legislation were held in each chamber of Congress..., although none meaningfully considered the constitutionality of the ACA.”⁹⁶ Grasps of a measure’s post-enactment future may be cloudy, as also instanced in the ACA: “Key staff, by and large, neither contemplated nor recognized the significance of the ACA’s post-enactment years.”⁹⁷

Such raggedness is not always the case. For an instance in this paper, it is hard to beat Senator Wagner’s skill in maneuvering the Wagner Act into law, not to mention that act’s design of taming industrial conflict by shunting it into government-monitored elections in the workplace—an exercise of engineering ingenuity.⁹⁸

Even so, raggedness does occur. Yet there are curbs on it. At the level of lateral federalism—that is, Congress, the executive branch, and the courts—the system offers a kind of encasement around such congressional difficulties. Think of a statute as a first draft. A statute emerges, and then institutions elsewhere go to work cleaning it up—clarifying it, polishing it, fleshing it out, cabining it. In this task, Rose-Ackerman emphasizes the role of bureaucratic rule-making, which the United States has pioneered as a post-enactment device—notably in the

⁹⁴ Rose-Ackerman, *Democracy and Executive Power*, p. 8.

⁹⁵ On administrability, see Martha Derthick, *Agency Under Stress: The Social Security Administration in American Government* (Washington, D.C.: Brookings, 1990), ch. 9.

⁹⁶ Neal Devins, “Party Polarization and Judicial Review: Lessons from the Affordable Care Act,” *Northwestern University Law Review* 106:4 (2012), 1821-1848, quotation at 1831.

⁹⁷ Burgin, “Congress, Policy Sustainability, and the Affordable Care Act,” 293.

⁹⁸ For anyone trying to understand the genesis of the Wagner Act, at least insofar as evidence for that genesis appears in the public record, I recommend an inspection of the senator’s performance in the 1935 committee hearings. Hardly anything else needs to be consulted. In the three cases under examination here, I found one rival to Wagner in mastery of what was going on – Senator Taft in handling labor-management relations.

operations of the Administrative Procedure Act, a congressional creation. Also, the courts are on watch. U.S. policymaking, approached in this comprehensive sense, consists of far more than the enactment of statutes: It draws in multiple players and can go on for quite a while.

Bring in the states—vertical federalism—and we see an expansion of this constitutional encasement across space and time. The states also react to congressional statutes, also supply follow-up players as well as elongated discussion and disputation. Yet two points are worth making. First, Congress’s neglect—see the earlier discussion in this paper—can be a special spur to state reaction. Neal Devins has written, “There is no federalism constituency in Congress that pushes lawmakers to take [vertical] federalism into account when enacting legislation.”⁹⁹ This is a peculiar absence. Vertical federalism does not enjoy much of a niche in the position-taking repertoires of the members of Congress. Second, vertical federalism juxtaposes the whole of the country to parts of the country. Thus is supplied a readymade vehicle for expressing differences between the country’s center and its periphery, and across its periphery. This formal structure contrasts with horizontal federalism, where the presidency, the federal courts, and Congress taken as a whole serve the same nationwide constituency. Bring in the states, and the resulting geography-related differences in policy tastes can be deep. In the three cases in this paper, they have been. This second point is obvious, but I will embroider on it later.

But first, a rollout of historical experience—the records of the three policy enterprises under study here as they entailed—or sometimes did not entail—interaction between the national government and the states.

Taken in the round as a policy enterprise, the prohibition cause went on for 115 years. The states began voting dry in the 1850s. Dry or wet victories took place all over the country, in

⁹⁹ Devins, “Party Polarization and Judicial Review,” at 1821.

some cases states going dry and then backing off, in a mix of spirited legislative and referendum processes lasting until World War I.¹⁰⁰ Then came the national triumph. Of key interest here is the span of 1918 through 1933. The wartime enthusiasm carried on for a while. In a spirit of concurrence, nearly every state enacted its own enforcement law, a little Volstead Act.¹⁰¹ Even so, “That the federal government had any role at all proved an excellent excuse for states to abdicate their law enforcement responsibilities.”¹⁰² Soon, a response of “leave it to the feds” became the norm.¹⁰³ State money for enforcement never appeared, fell off, or went away. “In 1926 the state legislatures allocated eight times more to implement the fish and game laws than to enforce prohibition.”¹⁰⁴ But the feds were wanting: “While the states’ enforcement of prohibition varied from lackadaisical to nonexistent, the national government’s efforts ranged from inefficient to corrupt.” Enforcement had success in rural areas, but a poor record in cities like New Orleans, Memphis, St. Louis, Detroit, Chicago, Cleveland, and New York, where politicians ran for office opposing it and juries would not convict.¹⁰⁵

During the 1920s, the states took the lead in dialing back as support for prohibition waned, which it did. The New York legislature, a pioneer performer, passed its own little Volstead Act in 1921 (yet appropriated no money for it), then broke precedent by repealing that

¹⁰⁰ Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity*, pp. 20-25, 123-124, 211, 236; David R. Kyvig, *Explicit and Authentic Acts*, pp. 218-226; Michael P. Olson and James M. Snyder, Jr., “Dyadic Representation in the American North and South: The Case of Prohibition,” *Journal of Politics* 83:3 (2021), 1030-1046, at 1033.

¹⁰¹ Hamm, *Shaping the Eighteenth Amendment*, p. 255; Andrew Sinclair, *Prohibition: The Era of Success* (Boston: Little, Brown, 1962), p. 193; Kyvig, *Repeal*, p. 23. Only Maryland failed to enact a concurrent statute.

¹⁰² Hamm, *Shaping the Eighteenth Amendment*, p. 267.

¹⁰³ My phrase.

¹⁰⁴ Hamm, *Shaping the Eighteenth Amendment*, p. 266; Sinclair, *Prohibition*, p. 193.

¹⁰⁵ On rural versus urban: Sinclair, *Prohibition*, p. 195; Kyvig, *Repeal*, p. 24; *Wickersham Report on Prohibition*, 1931. On St. Louis and Richmond: *Wickersham Report*. On New Orleans, Minneapolis, St. Paul, and other big cities: Kyvig, *Repeal*, p. 24. On Memphis: Patrick O’Daniel, *Crusaders, Gangsters, and Whiskey: Prohibition in Memphis* (Jackson: University Press of Mississippi, 2018). On Chicago: Scott Schaeffer, “The Legislative Rise and Populist Fall of the 18th Amendment: Chicago and the Failure of Prohibition,” *Journal of Law and Politics* 26:3 (Spring 2011), 385-424.

act in 1923, and the state's voters added a wet victory in a referendum in 1926.¹⁰⁶ Any state, by legislative or referendum action, could slacken or repeal its own laws, thus setting a tone or example, or could formally petition the national government to back away, and many states followed one such course or another. Following New York's example, Nevada, Missouri, and Wisconsin repealed their dry laws in the late 1920s. The wet side won referendums in Massachusetts, Illinois, and Rhode Island in 1930. Ten states piled on in referendums in 1932. From there, it was easy sailing to the state conventions ratifying the Twenty-first Amendment in 1933.¹⁰⁷ Six states nonetheless kept their dry laws. Mississippi was the last to repeal, in 1966.¹⁰⁸ In brief, alcohol prohibition amounted to an over-century-long enterprise that the national government, thanks to war, launched a brief, shaky intrusion into, then backed away from.

The story of right-to-work is more involved. It begins with the Wagner Act. Congress enacted that measure at a time of high crisis, catering to a constituency—the unions—favored temporarily by the extraordinary Democratic congressional majorities of the time. Also, it should be noted that Congress addressed the country's economic geography as it then existed. In the Senate hearings, of the thirty-eight business leaders who testified, 87% named a connection with firms in the Northeast or the Rust Belt.¹⁰⁹ That was the country's industrial base at the time.

But much was to happen during the next decade. World War II brought “a great wartime expansion of industry into the South and Southwest,” creating a larger and more diverse

¹⁰⁶ On New York: Sinclair, Prohibition, p. 193; Hamm, Shaping the Eighteenth Amendment, pp. 266-27; Wickersham Report.

¹⁰⁷ Hamm, Shaping the Eighteenth Amendment, pp. 266-27; Sinclair, Prohibition, pp. 196; Wickersham Report; Kyvig, Repeal, pp. 68, 116, 163.

¹⁰⁸ Camilo Garcia-Jimeno, “The Political Economy of Moral Conflict: An Empirical Study of Learning and Law Enforcement under Prohibition,” Econometrica 84:2 (March 2016), 511-570; Pamela E. Pennock and K. Austin Kerr, “In the Shadow of Prohibition: Domestic Alcohol Policy since 1933,” Business History 47:3 (July 2005), 383-400. The last six dry states were Alabama, Kansas, Mississippi, North Carolina, North Dakota, and Oklahoma.

¹⁰⁹ Senate Committee on Education and Labor, National Labor Relations Board, Part 3, 1935.

industrial map. Think Arizona and California.¹¹⁰ Also, union membership skyrocketed nationwide thanks to the Wagner Act and the war.¹¹¹ In sync with this growth, labor union strikes and other activities, beginning with the Michigan sit-down strikes in 1937 and later becoming a signature of the war years, stirred an immense backlash in public opinion.¹¹² Finally, or relatedly, in a trademark onset of political homeostasis, the New Deal impulse and the congressional leeway that accompanied it petered out in the late 1930s.

Against this background, the states swung into action. Five of them, bearing the spirit of 1935, enacted “Baby Wagner Acts” in 1937. But then the thrust shifted. Starting in 1938, roughly half the states, year after year, by way of legislative or referendum processes, took steps to restrain unions. Targeted were picketing, boycotts, sitdown strikes, union dues plans, internal union processes, alleged intimidation, and other practices, culminating in the right-to-work campaigns of the mid-1940s. By the fall of 1947, “Closed shops, and usually all other types of union-security agreements, were banned by constitutional amendment or statute in thirteen states, all of them predominantly agrarian, nonindustrialized states....” Eight other states constrained such agreements.¹¹³ Congress, in passing the Taft-Hartley Act in 1947, was stepping into a fast-moving stream. Then, shielded by the new 14b clause, anti-union interests kept pressing. The Supreme Court upheld Arizona’s right-to-work law in 1949.¹¹⁴ Since 1947, the

¹¹⁰ Millis and Brown, From the Wagner Act to Taft-Hartley, p. 322; Elizabeth Tandy Shermer, “Counter-Organizing the Sunbelt: Right-to-Work Campaigns and Anti-Union Conservatism, 1943-1958,” Pacific Historical Review 78:1 (2009), 81-118.

¹¹¹ Orley Ashenfelter and John H. Pencavel, “American Trade Union Growth, 1900-1960,” Quarterly Journal of Economics 83:3 (August 1969), 434-48, Figure 1 at 435; Gerald Mayer, “Union Membership in the United States,” CRS Report for Congress, August 31, 2004, Figure 1 at CRS-11.

¹¹² On strikes: Joseph P Goldberg and Bernard Yabroff, “Analysis of Strikes, 1927-49,” Monthly Labor Review 72:1 (1951), 1-7, Chart 1 at 3. On public opinion: Eric Schickler and Devin Caughey, “Public Opinion, Organized Labor, and the Limits of New Deal Liberalism, 1936-1945,” Studies in American Political Development 25:2 (October 2011), 162-189, at 167-179.

¹¹³ Excellent on this history is Millis and Brown, From the Wagner Act to Taft-Hartley, pp. 316-330, quotation at pp. 329-30. See also Gall, The Politics of Right to Work, pp. 18-27.

¹¹⁴ AFL v. American Sash & Door Co., 335 U.S. 538 (1949).

drive for right-to-work laws has gone on for three-quarters of a century. In state after state, through a mix of state legislative and referendum decisions, many choices have been made. As with prohibition, some states have opted in, then reneged.¹¹⁵ Labor interests have racked up decisive referendum wins in certain states with historically strong unions—for example, Ohio in 1958, California in 1958, and Missouri in 2018.¹¹⁶ But the list of right-to-work states has kept growing, reaching a total of twenty-six as of 2023, and the jousting does not seem to be over.¹¹⁷

For the ACA, the story told here begins in 2009-2010. Most of us remember, perhaps flaggingly, the aftermath of the measure’s enactment. There were expectations: “The vast majority of states were expected to embrace the chance to craft their own exchanges [today called marketplaces], nor did the reliance on Medicaid appear problematic since all states were expected to expand it given the alternative of losing all of their federal Medicaid funding.”¹¹⁸ In fact, only fourteen states plus the District of Columbia signed on to run their own exchanges. The rest opted out—some likely in a spirit of “leave it to the feds” echoing the 1920s, but many in a spirit of nullification that seemed to echo back to the 1820s.¹¹⁹ As with right-to-work in

¹¹⁵ On the history and its lists of choices: Gall, The Politics of Right to Work; Canak and Miller, “Gumbo Politics,” 258-271; Gilbert J. Gall, “Right-to-Work Referendum Voting: Observations on the Aggregate Historical Statistics,” Labor Law Journal 39:12 (December 1988), 805-812; David T. Elwood and Glenn Fine, “The Impact of Right-to-Work Laws on Union Organizing,” Journal of Political Economy 95:2 (1987), 250-273; Jacobs and Dixon, “The Politics of Labor-Management Relations,” 118-137; Vladimir Kogan, “Do Anti-Union Policies Increase Inequality? Evidence from State Adoption of RTW Laws,” State Politics and Policy Quarterly 17:2 (June 2017), 180-200; Sudheer Chava, Andra Danis, and Alex Hsu, “The Economic Impact of RTW Laws: Evidence from Collective Bargaining Agreements and Corporate Policies,” Journal of Financial Economics 137 (2020), 451-469.

¹¹⁶ On Ohio: Marc Dixon, “Movements, Countermovements and Policy Adoption: The Case of Right-to-Work Activism,” Social Forces 87:1 (September 2008), 473-500. On Missouri: Scott Neuman, “Missouri Blocks Right-to-Work Law,” National Public Radio, August 8, 2018.

¹¹⁷ This total of 26 excludes Michigan, which recently signed on and then reneged. It includes Wisconsin, whose sign-on may be shaky.

¹¹⁸ Jonathan Oberlander and R. Kent Weaver, “Unraveling from Within? The Affordable Care Act and and Self-Undermining Policy Feedbacks,” The Forum 13:1 (2015), 37-62, at 46. On expectations, see also Jones, Exchange Politics, pp. 4-7; Burgin, “Congress, Policy Sustainability, and the Affordable Care Act,” at 297.

¹¹⁹ Brill, America’s Bitter Pill, p. 266. In general: David K. Jones, Katharine W. B. Bradley, and Jonathan Oberlander, “Pascal’s Wager: Health Insurance Exchanges, Obamacare, and the Republican Dilemma,” Journal of Health Politics, Policy and Law 39:1 (February 2014), 97-137; Daniel Béland, Philip Rocco, and Alex Waddan, Obamacare Wars: Federalism, State Politics, and the Affordable Care Act (Lawrence: University Press of Kansas,

1949, the Supreme Court backed up the states' authority. The Court ruled in 2012 that the ACA's mandate for Medicaid expansion was unacceptably coercive—"a gun to the head"—and, as of 2015, twenty-two states had passed up participating.¹²⁰ Quickly after the ACA's passage, voters in Missouri, Oklahoma, and Arizona amended their state constitutions to bar any "individual mandate."¹²¹ Officials in twenty-six states filed lawsuits arguing that the measure was unconstitutional.¹²² Once the ACA was in place, a number of hostile state governments took steps to impede the "navigators" sent by national officials to ease people into the exchanges, which were now, by default in those states, federally operated.¹²³

Yet, like a river cutting new channels, or as comparably seen in the policy paths of prohibition and labor-management relations, the ACA in its state manifestations has kept evolving. Medicaid expansion has increasingly caught on. The mega-states Florida and Texas remain holdouts, but many more states have signed on, thanks to thirsty state budgets and the public's desire for benefits.¹²⁴ Referendum victories in Idaho, Nebraska, Utah, and Maine are a recent story.¹²⁵ But a new, surprising, secondary policy regime has kicked into place. In many states, the conflict over Medicaid expansion spurred new enthusiasm for "work requirements" as conditions for benefits, and that drive has spread its force into even the non-expansion states,

2016), ch. 3; Abbe R. Gluck and Nicole Huberfeld, "What Is Federalism in Healthcare for?" *Stanford Law Review* 70:6 (June 2018), 1689-1804, at 1759-1772; Elizabeth Rigby, "State Resistance to "ObamaCare," 2-5.

¹²⁰ Shanna Rose, "Opting In, Opting Out: The Politics of State Medicaid Expansion," *The Forum* 13:1 (2015), 63-82. See also Beland, Rocco, and Waddan, *Obamacare Wars*, ch. 4.

¹²¹ Rogan Kersh, "Health Reform: The Politics of Implementation," *Journal of Health Politics, Policy and Law* 36:3 (June 2011), 613-623, at 621. On Missouri, see also Beland, Rocco, and Waddan, *Obamacare Wars*, pp. 88-89.

¹²² Beland, Rocco, and Waddan, *Obamacare Wars*, p. 57.

¹²³ Beland, Rocco, and Waddan, *Obamacare Wars*, p. 77; Burgin, "Congress, Policy Sustainability, and the Affordable Care Act," at 288.

¹²⁴ Rose, "Opting In, Opting Out," pp. 66-69; Gluck and Huberfeld, "What Is Federalism in Healthcare for?" at 1733-1757; Stacey McMorrow, Linda J. Brumberg, and John Holahan, "Ten Years Later: Reflections on Critics' Worst-Case Scenarios for the Affordable Care Act," *Journal of Health Politics, Policy and Law* 45:4 (August 2020), 465-483; "Medicaid coverage gap," https://en.wikipedia.org/wiki/Medicaid_coverage_gap; Megan Messerly, "'The politics have changed': South warms to expanded health benefits," *Politico*, January 31, 2024.

¹²⁵ Beland, Rocco, and Waddan, "The Affordable Care Act in the States," at 652.

threatening to make participation there even tougher than before. Work requirements became a cause. In general, the work-requirements question seems to have resolved lately into a kind of waivers warfare in which, thus far, Republican presidents (Trump) say yes to states asking to waive the ACA's national standards, and Democratic presidents (Biden) say no, a pattern that may continue. Congress is cut out of the process.¹²⁶ A geography-related chasm in policy tastes remains in place. It has appeared elsewhere. Much as Missouri, Oklahoma, and Arizona rushed to ban the individual mandate around 2010, the states of Vermont and New Jersey and the District of Columbia, after a Republican Congress repealed the ACA individual mandate in 2017, rushed to enact their own, so to speak, "baby individual mandates."¹²⁷

What does all this state action denote? A summary reflection is as follows. Across this paper's three enterprises, given, notably although not only, their juxtaposition of intensity to an inflection of geography, it has been hard for Congress to make a big policy move and make it stick. The states have joined in (or were in already). As a practical matter, the policymaking process in these cases has enrolled a multiplicity of constitutional actors, including the states as well as the public and it has extended across time. All that activity has arguably constituted the policymaking process. In these instances, this is the way the country has been making its decisions—jaggedly and extendedly. For their part, given this way of construing things, the

¹²⁶ Frank J. Thompson, Michael K. Gusmano, and Shugo Shinohara, "Trump and the Affordable Care Act: Congressional Repeal Efforts, Executive Federalism, and Program Durability," *Publius* 48:3 (Summer 2018), 396-424; Richard C. Fording and Dana Patton, "The Affordable Care Act and the Diffusion Feedback: The Case of Medicaid Work Requirements," *Russell Sage Journal of the Social Sciences* 6:2 (July 2020), 131-153; Madeline Guth and MaryBeth Musumeci, "On Overview of Medicaid Work Requirements: What Happened under the Trump and Biden Administrations?" *KFF*, May 3, 2022.

¹²⁷ My phrase. Thomas L. Gais and Michael K. Gusmano, "Putting the Pieces Together: American States and the End of the ACA's Shared Responsibility Payment," *Journal of Health Politics, Policy and Law* 45:3 (June 2020), 439-454, at 441-42. Massachusetts had an individual mandate on its books that predated the ACA. On repealing the ACA mandate in 2017: Austin Bussing, Will Patton, Jason M. Roberts, and Sarah A. Treul, "The Electoral Consequences of Roll Call Voting: Health Care and the 2018 Election," *Political Behavior* 44 (2022), 157-177; Eric M. Patashnik and Jonathan Oberlander, "After Defeat: Conservative Postenactment Opposition to the ACA in Historical-Institutional Perspective," *Journal of Health Politics, Policy and Law* 43:4 (August 2018), 651-682, at 673-74.

three repeal drives have served as components of policymaking, not responses to it. Thus also with “backlash.”

It is important to see the role of the states. In these three policy enterprises, decisions by the state legislatures or electorates have figured repeatedly. I have found the referendum processes especially interesting. Those processes go way back. They are not just creations of the Progressive era. Popular votes to amend state constitutions date back more than two centuries and are used frequently. Roughly half the states make the holding of referendums relatively easy, and all but Delaware allow occasional direct voter choice in some fashion.¹²⁸ Direct voter democracy is widely available. Missouri strikes again, for example, has been a story for this paper – decisive no votes on prohibition in 1918, right-to-work in 1978, the individual mandate in 2012, and right-to-work again in 2018.¹²⁹ Madisonian as the American system may be at the national level, it has a Swiss referendum flavor at the bottom.

Finally, what happens when vertical federalism meets party polarization? Across national election systems, G. Bingham Powell, Jr., has written, “distance between median voter and government” varies with degree of party polarization.¹³⁰ The measure is of ideological positioning—that of the national median voter as opposed to that of the elected national government. The greater the party polarization, the greater the ideological distance. It is true that, regardless of polarization levels, victorious parties may move to overshoot the median voter

¹²⁸ William B. Fisch, “Constitutional Referendum in the United States of America,” American Journal of Comparative Law 54 (2006), 485-504; John G. Matsusaka, Let the People Rule (Princeton, NJ: Princeton University Press, 2020), ch. 6; Sutton, “What Should be National,” pp. 209-210.

¹²⁹ On 1918: Ira M. Wasserman, “Prohibition and Ethnocultural Conflict: The Missouri Prohibition Referendum of 1918,” Social Science Quarterly 70:4 (December 1989), 886-901. On 1978: Gall, The Politics of Right to Work, p. 202. On 2012: Béland, Rocco, and Waddan, Obamacare Wars, pp. 88-89. On 2018: Neuman, “Missouri Blocks Right-to-Work Law.”

¹³⁰ G. Bingham Powell, Jr., “Representation in Context: Election Laws and Ideological Congruence Between Citizens and Governments,” Perspectives on Politics 11:1 (March 2013), 9-21, quotation at 16.

once in office—it is a familiar idea¹³¹ – thus among other things pleasing their activists. But a context of polarization seems to bolster the overshoot option. The “bias bonus,” so to speak, goes up.¹³² Such a majority-party legislative bias, increasing or not, may be leaving traces in certain recent controversies in the states. In Kansas on abortion restrictions, a result was: Republican state legislature yes, referendum voters no.¹³³ In California on affirmative action, a result was: Democratic state legislature yes, referendum voters no.¹³⁴ These have been quite striking dissonances. Of relevance here is: In the current condition of polarization, what can happen when one party controls Congress and the other party controls a selection of state legislatures? To be sure, other institutions can figure, too. But this juxtaposition seems to invite a double whammy of bias bonuses, spoking out in opposite directions and inviting tension nationwide as policy is made. This looks like one story of our polarized era under recent presidents.

5. Enactments have consequences.

In recent times, concerns about “implementation” and “sustainability” have led the scholarship on the impacts ensuing from congressional enactments. That is no surprise. For the three enterprises here, the reports might go as follows. On Prohibition, vexed implementation was followed by collapse. For labor-management relations, the central thrust of the Wagner Act has been a ringing success. Besides its workplace mechanisms, the act has offered a comfort zone for the political parties, a legitimizing flexibility: the staggered appointments to the

¹³¹ For an empirical analysis rich in suggestion on why this might happen, see Joseph Bafumi and Michael C. Herron, “Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress,” *American Political Science Review* 104:3 (August 2010), 519-542. Also of relevance is the logic of voter midterm “balancing” as presented in Morris Fiorina, *Divided Government* (Longman Classics, 2nd ed., 2019).

¹³² My phrase.

¹³³ Katie Bernard and Lisa Gutierrez, “‘No’ Prevails: Kansas votes to protect abortion rights in state constitution,” *Kansas City Star*, August 5, 2022.

¹³⁴ Thomas Peele, “California voters rejecting Proposition 16 to restore affirmative action,” *EdSource*, November 3, 2020.

National Labor Relations Board have allowed one party to edge the Board's rulings one way, the other party, once the wheel turns, the other way.¹³⁵ But the right-to-work regimes in the states have proven sustainable, too. Rather as the Reformation and Counter-Reformation ended up splitting Europe in half, right-to-work politics has brought a split territorial settlement that we are accustomed to living with, although its boundaries change. The ACA, shorn of certain of its provisions and still evolving as discussed above, has proven sustainable. It could not be repealed in 2017. Beyond that, the 2018 midterm ratified the failure of repeal. In one telling detail, Republican House members who had voted against repeal (there were 20) fared statistically better in the midterm, net of all else, than did the Republican incumbents who had voted in favor of it.¹³⁶ Medicaid expansion and a package of constraints on insurance companies emerged from 2018 as likely entrenched.¹³⁷

But concern for implementation should not end the story. It makes for too narrow a story. Did the Stamp Act of 1765 “work”? Statutes can bring impacts in many areas. In this paper's cases, for example, Prohibition brought its celebrity gangsters, corruption, bootlegging, a dynamic new liquor industry sprawling down the Appalachians, and so on.¹³⁸ The Wagner Act, by enabling the unions, also enabled indirectly the extraordinary strike activity that ensued. In 1945, when asked in a national survey “who you feel might be harmful to the future of the

¹³⁵ Terry M. Moe, “Control and Feedback in Economic Regulation: The Case of the NLRB,” American Political Science Review 79:4 (December 1985), 1094-1116.

¹³⁶ Bussing, Patton, Roberts, and Treul, “The Electoral Consequences of Roll Call Voting,” 157-177.

¹³⁷ Eric M. Patashnik and Jonathan Oberlander, “After Defeat: Conservative Postenactment Opposition to the ACA in Historical-Institutional Perspective,” Journal of Health Politics, Policy and Law 43:4 (August 2018), 651-682; Mark A. Peterson, “The ACA a Decade In: Resilience, Impact, and Vulnerabilities,” Journal of Health Politics, Policy and Law 45:4 (August 2020), 595-608; Sayeh Nikpay, India Pungarcher, and Austin Frakt, “An Economic Perspective on the Affordable Care Act: Expectations and Reality,” Journal of Health Politics, Policy and Law 45:5 (October 2020), 889-904; Benjamin D. Sommers, “Health Insurance Coverage: What Comes After the ACA?” Health Affairs 39:3 (March 2020), 1-19.

¹³⁸ Schaeffer, “The Legislative Rise”; Sinclair, Prohibition, ch. 11; Lisa McGirr, The War on Alcohol: Prohibition and the Rise of the American State (New York: W. W. Norton, 2016), ch. 2.

country unless they are curbed,” respondents overwhelmingly chose John L. Lewis, the president of the United Mine Workers. No one else ran a close second.¹³⁹

I close with comments on the parties. One way or another, congressional enactments can impinge on the parties. Both of today’s parties were born as reactions to enactments—the Democrats to Alexander Hamilton’s economic program, which took form as congressional enactments; the Republicans to the Kansas-Nebraska Act. No such births have occurred for quite a while. But there are leadership teams and factions. Reactions to this paper’s statutes have sparked or been closely associated with some of these. Al Smith rose to power in New York and in the national Democratic party symbolizing the anti-dry cause.¹⁴⁰ Barry Goldwater cut his teeth on right-to-work politics in Arizona in the 1940s.¹⁴¹ In the case of the ACA, there is the Tea Party.¹⁴² Why did the “conservative coalition” emerge in the late 1930s? Was the public’s icy reaction to the strikes, as recently documented by Eric Schickler and Devin Caughey, a larger factor than we have thought?¹⁴³

There are the fortunes of the parties. Does right-to-work make a difference? One rigorous recent work suggests that it does: “We find that right-to-work laws reduce Democratic Presidential vote shares by 3.5 percentage points. We find similar effects in Senate, House and Gubernatorial races, as well as on state legislative control.”¹⁴⁴ Figuring as a mechanism is whether unions can be strong enough, as through levying and using dues, to exercise influence in

¹³⁹ Schickler and Caughey, “Public Opinion, Organized Labor,” 176.

¹⁴⁰ Christopher M. Finan, Alfred E. Smith: The Happy Warrior (New York: Hill and Wang, 2002), chs. 7, 8, 10, 11.

¹⁴¹ Robert Alan Goldberg, Barry Goldwater (New Haven, CT.: Yale University Press, 1995), pp. 69-71.

¹⁴² Jones, Exchange Politics, chs. 1-5; Brill, America’s Bitter Pill, pp. 147-149; John B. Judis and Ruy Teixeira, Where Have All the Democrats Gone? The Soul of the Party in the Age of Extremes (New York: Henry Holt, 2023), p. 100.

¹⁴³ Schickler and Caughey, “Public Opinion, Organized Labor,” at 167-179.

¹⁴⁴ James Feigenbaum, Alexander Hertel-Fernandez, and Vanessa Williamson, “From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws,” National Bureau of Economic Research, Working Paper 24259, January 2018, quotation in the Abstract. The analysis hinges on changes in voting patterns in counties along the borders dividing pairs of states, as one state votes to adopt right-to-work and its paired state does not change.

election. Public policy effects one way or another may ensue from election victories.¹⁴⁵ This is a familiar logic. But this reported Republican bonus (or is union dues leeway a Democratic bonus?) is remarkably large. How many elections are decided by less than 3.5 percent? Small wonder that 14b rose to the top ranks as a repeal target.

Did the Democrats pay a price for their ACA victory? Well, they did. After passage, the 2010 midterm ratified the measure's hostile polls. Democratic House members who had cast roll call votes against the ACA (there were 39) fared significantly better in the 2010 midterm, controlling for other factors, than did those Democrats who had voted in favor of it. Only in districts over 72% for Obama in 2008 (read: the cities) did a pro-ACA roll call vote prove an electoral plus rather than a minus.¹⁴⁶ The midterm was a disaster. After it, "Democrats held fewer elected offices nationwide than at any time since the 1920s."¹⁴⁷ "Backlash to the ACA cost the Democrats legislative seats and likely majority status in the House for eight years."¹⁴⁸ The Republicans got to draw the legislative maps for the decade. Collateral damage to the Democratic Party included four new right-to-work states—West Virginia, Kentucky, Indiana, and Wisconsin—as well as a disempowerment of the public employees' unions in Wisconsin.¹⁴⁹ Aside from discomfort with the ACA itself, the conflict exploding around its passage likely

¹⁴⁵ Additional useful sources on this matter: Elwood and Fine, "The Impact of Right-to-Work Laws," at 268-271; Ozkan Eren and Serken Ozbeklik, "What Do Right-to-Work Laws Do? Evidence from a Synthetic Control Method Analysis," Journal of Policy Analysis and Management 3:1 (Winter 2016), 173-94; Daniel DiSalvo, Patrick Flavin, and Michael Hartney, "State Labor Laws and Government Responsiveness to Public Opinion," Political Research Quarterly 76:3 (2023), 1475-1485, at 1475-1477.

¹⁴⁶ David W. Brady, Morris P. Fiorina, and Arjun S. Wilkins, "The 2010 Elections: Why Did Political Science Forecasts Go Awry?" PS: Political Science and Politics 44:2 (April 2011), 247-250. The analytic leverage here resembles that for, as mentioned earlier, the 2018 midterm.

¹⁴⁷ Timothy Stoltzfus Jost and Katie Smith, "ACA Litigation: Politics Pursued through Other Means," Journal of Health Politics, Policy and Law 45:4 (August 2020), 485-499, at 486.

¹⁴⁸ Eric M. Patashnik, Countermobilization: Policy Feedback and Backlash in a Polarized Age (Chicago: University of Chicago Press, 2023), p. 93.

¹⁴⁹ Jason Stein and Patrick Marley, More Than They Bargained For: Scott Walker, Unions and the Fight for Wisconsin (Madison: University of Wisconsin Press, 2013).

contributed to the situation. Voters do not relish conflict on Capitol Hill.¹⁵⁰ Possibly the experience poisoned the well for a while against large policy enterprises. For whatever cluster of reasons, the public’s temperature on “trust in Congress,” “confidence in Congress,” and “favorable toward Congress” plummeted during Obama’s first term and has stayed low.¹⁵¹

A final note.

A stubborn libertarianism seems to lurk in American culture: Don’t tell me I can’t drink alcohol, get a job without joining a union, or arrange my own health insurance. The Prohibition era cannot be illuminated by survey data, but since then the individual mandate hasn’t polled well, and the principle of right-to-work has.¹⁵² An instance today might be: Don’t tell me I can’t have an abortion.¹⁵³

¹⁵⁰ Laurel Harbridge and Neil Malhotra, “Electoral Incentives and Partisan Conflict in Congress: Evidence from Survey Experiments,” *American Journal of Political Science* 55:3 (2011), 494-510; John R. Hibbing and Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes toward American Political Institutions* (New York: Cambridge University Press, 1995); Robert H. Durr, John B. Gilmour, and Christina Wolbrecht, “Explaining Congressional Approval,” *American Journal of Political Science* 41:1 (January 1997), 175-207.

¹⁵¹ Pew Research Center, “How Americans view Congress, the President, state and local political leaders,” September 19, 2023, p. 2; Gallup New Service, Gallup Poll Social Series, Governance: “Q11, Trust in Branches of Federal Government, The Legislative Branch,” p. 11; Gallup, “Confidence in Institutions,” 2023, <https://news.gallup.com/poll/1597/confidence-institutions.aspx>, pp. 14-16.

¹⁵² On the individual mandate: Béland, Rocco, and Waddan, *Obamacare Wars*, p. 66; Gallup, “Healthcare System,” 2023, <https://news.gallup.com/poll/4708/healthcare-system.aspx>, citing a question from February 2012 on the individual mandate where 72% of respondents saw it as unconstitutional, 20% as constitutional. On right-to-work: Jeffrey M. Jones, Gallup, “Americans Approve of Unions but Support ‘Right to Work’: Union approval at 53% while 71% favor right-to-work,” August 28, 2014.

¹⁵³ On abortion politics and vertical federalism: Martin K. Mayer, John C. Morris, Joseph A. Alstrup, R. Bruce Anderson, and Robert C. Kenter, “*Dobbs*, American Federalism, and State Abortion Policymaking: Restrictive Policies Alongside Expansion of Reproductive Rights,” *Publius* 53:3 (2023), 378-404; Sutton, “What Should Be National,” 209.

Appendix A – National party platform calls since 1900 to “repeal” congressional acts¹⁵⁴

Democrats

1908 tariff on wood pulp, etc.
1932 18th Amendment
1948 Taft-Hartley Act
1952 Taft-Hartley Act
1956 Taft-Hartley Act
1960 14b of Taft-Hartley Act
1964 14b of Taft-Hartley Act
1968 14b of Taft-Hartley Act
1972 tax preferences of 1975-1976
1972 14b of Taft-Hartley Act
1976 14b of Taft-Hartley Act
1980 14b of Taft-Hartley Act
2012 Defense of Marriage Act
2016 Commerce in Arms Act (guns)
2020 gun manufacturers’ shield

Republicans

1936 Reciprocal Trade Act
1940 Thomas (silver) amendment of 1933
1940 Silver Purchase Act of 1934
1964 wheat certificate tax
1980 Windfall Profits Tax
1988 Windfall Profits Tax
1988 Transfer Rule tax provision
1996 Goals 2000 program
1996 School-to-Work Act of 1994
2000 death tax (i.e., inheritance tax)
2008 Alternative Minimum Tax
2012 Davis-Bacon Act
2012 Alternative Minimum Tax
2012 Affordable Care Act
2012 McCain-Feingold Act (campaign finance)
2012 Dodd-Frank Act
2016 Davis-Bacon Act
2016 Foreign Tax Compliance Act
2016 Affordable Care Act
2016 McCarran-Ferguson Act of 1945

¹⁵⁴ These entries clock uses of the specific term “repeal.” Close runner-ups would be the term “remove” in the instances of wartime federal excise taxes (R-1964) and provisions of the Gun Control Act of 1968 (R-1980); and “It must go” for the Davis-Bacon Act (R-1992).