OBAMACARE FOR HOMEOWNERS INSURANCE: FIXING AMERICA'S BROKEN INSURANCE MARKETS IN A TIME OF CLIMATE CHANGE

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Over the last decade, homeowners insurance markets nationwide have experienced unprecedented instability due to climate change. These disruptions, which are likely to accelerate in the coming years, risk destabilizing real estate markets, triggering financial instability, and undermining the nation's resilience to climate change. Despite these massive stakes, federal and state reforms to date have largely failed to result in more accessible and affordable homeowners insurance coverage that promotes climate change resilience. This Article offers a new way forward, arguing that today's troubled homeowners insurance markets resemble the broken state health insurance markets that pre-dated the 2010 passage of the Affordable Care Act (ACA), also known as Obamacare. For that reason, Obamacare offers a compelling initial template for reforming homeowners insurance markets in a time of climate change. This template begins with the principle that the federal government should play a major role in regulating homeowners insurance markets due to their national importance. However, rather than completely displacing existing state insurance regulation, federal reform should embrace a cooperative federalism model patterned on the ACA. This model would rely on federal law to establish key rules for selling, underwriting, pricing, and subsidizing homeowners insurance, while allowing states to implement and customize these rules to their local markets. Substantively, it would require homeowners insurers to offer coverage that meets comprehensive federal minimum standards and to avoid discrimination that does not plausibly promote social goals like climate change resilience. At the same time, Obamacare-based reform to homeowners insurance markets would dispense with heavy-handed state

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regulation of insurers' rates, instead relying on managed competition among private insurers via state-run insurance exchanges. It would also rely on progressive subsidies to ensure that coverage remained affordable for low-income purchasers. While these reforms would of course need to be adapted to the homeowner insurance setting, Obamacare ultimately offers a powerful and underappreciated model for ensuring that homeowners insurance markets equitably promote climate change resilience in the decades to come.

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Introduction

Over the last decade, homeowners insurance markets nationwide have experienced unprecedented instability and disruption due to climate change.[1] More severe weather events—such as wildfires, floods, and wind storms—are causing widespread property damage and triggering larger insurance claims.[2] Just as importantly, climate change is disrupting historical patterns of extreme weather, complicating insurers' ability to accurately predict losses.[3] In response, insurers are non-renewing policies, raising premiums, and reducing coverage for homeowners across the country.[4] Some insurers are even exiting state insurance markets altogether.[5] These trends are hardly transient, as most experts agree that disruptions in homeowners insurance markets will only become more severe in the coming years as the effects of

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[1] *See, e.g.*, Mark Nevitt & Michael Pappas, *Climate Risk, Insurance Retreat, And State Response*, 58 GA. L. REV. 1603, 1604 (2024). This trend is most pronounced in states prone to high-profile natural disasters, such as Florida, Louisiana, and California. However, it is also increasingly evident in states that have historically been less exposed to natural disaster risk, like North Carolina, Iowa, and Colorado. *See* Christopher Flavelle, *As Insurers Around the U.S. Bleed Cash from Climate Shocks, Homeowners Lose*, N.Y. TIMES, May 13, 2024. *See generally* CAROLYN KOUSKY, UNDERSTANDING DISASTER INSURANCE: NEW TOOLS FOR A MORE RESILIENT FUTURE (2022); Carl Smith, *Some Models to Keep Insurance Companies from Pulling Out of States,* GOVERNING (June 4, 2024) (quoting Dave Jones, former California Insurance Commissioner, as stating "The insurance crisis is the price we're paying for the failure to address climate change."); Christopher C. French, America on Fire: Climate Change, Wildfires & Insuring Natural Catastrophes, 54 U.C. Davis L. Rev. 817, 821 (2020); Kenneth S. Klein, Ashes to Ashes: A Way Home for Climate Change Survivors, 63 Ariz. L. Rev. 679, 681 (2021).

[2] DANIEL FARBER & CINNAMON CARLARNE, CLIMATE CHANGE LAW 1 (CONCEPTS AND INSIGHTS) (1st ed. 2017).

[3] *See* Madison Condon, *Climate Services: The Business of Physical Risk*, 55 Ariz. St. L.J. 147, 157 (2023); Amarnath Suggu, *Impact of Climate Change on Insurance*, THE ACTUARY (Aug. 2023), https://www.theactuarymagazine.org/impact-of-climate-change-on-insurance; Joint Economic Committee, Climate Risks Are Already Destabilizing Insurance Markets and Threatening Americans' Financial Security: Democrats (11/7/23); Frances C. Moore, "Learning, Catastrophic Risk and Ambiguity in the Climate Change Era" NBER Working Paper No. w32684.

[4] *See* FIO, INSURANCE SUPERVISION AND REGULATION OF CLIMATE-RELATED RISKS (2023).

[5] See Breck Dumas, California insurance crisis: List of carriers that have fled or reduced coverage in the state, January 13, 2025. https://www.fox9.com/news/california-insurance-crisis-list-carriers-have-fled-reduced-coverage-state

climate change accelerate.[6]

As homeowners insurance markets come under increasingly severe stress, they also become a major source of systemic risk.[7] Broken homeowners insurance markets can devastate real estate markets, as homes that cannot be insured also cannot be sold to purchasers who require a mortgage.[8] Widespread instability in local real estate markets can, in turn, upend financial markets.[9] Low income communities are particularly vulnerable to these consequences, as they have limited financial resources on which to draw in the wake of catastrophic losses.[10] Perhaps most importantly, malfunctioning homeowners insurance markets can undermine adaptation to climate change.[11] For example, distortionary government policies that keep premiums artificially low ultimately subsidize building in the areas most imperiled by climate risk.[12]

These potential costs of broken homeowners insurance markets are put into even sharper relief when considered in light of the potential benefits of

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[6] WORLD METEOROLOGICAL ORGANIZATION, STATE OF GLOBAL CLIMATE 2023 REPORT (2024).

[7] *See* Daniel Schwarcz & Steven Schwarcz, *Regulating Systemic Risk in Insurance*, 81 U. CHI. L. REV. 1569, 1570 (2014). Remarks by Assistant Secretary for Financial Institutions Graham Steele at Event Hosted by the Brookings Institution's Assessing Insurance Regulation and Supervision of Climate-Related Financial Risk, June 28, 2023, at https://home.treasury.gov/news/press-releases/jy1583.

[8] Mortgage lenders universally require that a borrower maintain homeowners insurance as a condition of their loan. This requirement protects their collateral from physical loss or damage. Insurers are much better situated than lenders to evaluate and manage this risk *See* Zac Taylor & Sarah Knuth, *The Insurance Crisis is a Housing Crisis*, CLIMATE AND COMMUNITY PROJECT, April 18, 2024; KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION (7th ed. 2020).

[9] *See* KATHLEEN ENGEL & PAT MCCOY, THE SUBPRIME VIRUS (2016); ERIK GERDING, LAW, BUBBLES, AND FINANCIAL REGULATION (THE ECONOMICS OF LEGAL RELATIONSHIPS) (2016). *See* Jordan Haedtler & Tracey Lewis, *The Home Insurance Crisis Is a Threat to Financial Stability*, CLIMATE AND COMMUNITY PROJECT (May 16, 2024). Indeed, the Financial Stability Oversight Counsel (FSOC) has identified the lack of affordable homeowners insurance as a primary mechanism by which climate change may threaten financial stability. *See* FSOC, REPORT ON CLIMATE-RELATED FINANCIAL RISK (2021).

[10] *See* REBECCA ELLIOTT, UNDERWATER LOSS, FLOOD INSURANCE, AND THE MORAL ECONOMY OF CLIMATE CHANGE IN THE UNITED STATES (2021).

[11] Adaptation to climate change risk can take the form of resistance (e.g. sea walls), resilience (e.g. raised homes), and retreat (e.g. leave the highest risk areas). See Mark Nevitt, The Legal Crisis Within the Climate Crisis, 76 Stan. L. Rev. 1051, 1057-59 (2024) Properly priced insurance can theoretically promote all three forms of adaptation.

[12] Kenneth Abraham & Daniel Schwarcz, *The Limits of Regulation by Insurance,* 98 IND. L.J. 215 (2022). Omri Ben-Shahar & Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 STAN. L. REV. 571, 611–16 (2016); Alexander Lemann, *Assumption of Flood Risk*, 51 ARIZ. ST. L.J. 163 (2019).

well-functioning homeowners insurance markets.[13] Properly priced, well-regulated, and transparent homeowners insurance markets offer a compelling vehicle for promoting resilience to climate change in the coming decades.[14] Such insurance could encourage Americans to build and live in areas comparatively less exposed to climate risk, while prompting individuals and communities to invest in effective risk-mitigation measures like preserving defensible space against wildfires, building hail-resistant roofs, and elevating flood-prone homes.[15]

Despite these massive stakes, federal and state policymakers have largely failed in recent years to effectively reform homeowners insurance markets. Adhering to the long-standing principle that states should regulate insurance markets,[16] national policymakers have primarily prodded states to adopt limited reforms, like collecting more granular data[17] or better accounting for climate risk in solvency regulation.[18] Federal actors have supplemented these efforts with incremental reforms to the dysfunctional National Flood Insurance Program ("NFIP").[19] Meanwhile, a small handful of front-line states have experimented with more expansive reforms–such as modifying insurance rate regulation,[20] limiting judicial remedies for coverage denials,[21]

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[13] See Klein, supra note 1, 683-84.

[14] See Christina Ross, Evan Mills & Sean B. Hecht, *Limiting Liability in the Greenhouse: Insurance Risk-Management Strategies in the Context of Global Climate Change*, 26 STAN. ENV'T L.J. 251, 252 (2007). For discussion of how other types of insurance, such as Directors' and Officers' Insurance, can address climate change, see Amelia Miazad, *D&O Insurers As Climate Governance Monitors*, BU Law Rev. (forthcoming 2024).

[15] *See* Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197 (2012); Sean B. Hecht, *Climate Change and the Transformation of Risk: Insurance Matters*, 55 UCLA L. REV. 1559, 1585 (2008); Howard C. Kunreuther & Erwann O. Michel-Kerjan, *Climate Change, Insurability of Large-Scale Disasters, and the Emerging Liability Challenge*, 155 U. PA. L. REV. 1795, 1836–39 (2007).

[16] *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15.

[17] *See* FIO Climate-Related Financial Risk Data Collection for U.S. Homeowners Multi-Peril Underwriting Data, 88 Fed. Reg. 75380 (proposed Nov. 2, 2023).

[18] See Insurance Supervision and Regulation of Climate-Related Risks Federal Insurance Office U.S. Department of the Treasury June 2023, https://home.treasury.gov/news/press-releases/jy1579

[19] See Erwann O. Michel-Kerjan, *Catastrophe Economics: The National Flood Insurance Program*, 24 J OF ECON. PERSP. 165 (2010).

[20] *See* Ricardo Lara, *California's Sustainable Insurance Strategy*, https://www.insurance.ca.gov/01-consumers/180-climate-change/SustainableInsuranceStrategy.cfm (2024).

[21] *See* Peter Molk, *Florida's Homeowners Insurance Problems*, CONN. INS. L.J. (forthcoming 2024).

and altering the structure of state-backed residual insurance plans.[22] But these efforts have had limited success in generating more accessible and affordable insurance coverage that promotes climate change resilience.[23]

This Article offers a new way forward by arguing that the troubled homeowners insurance markets of today resemble the broken state health insurance markets that pre-dated the 2010 passage of the Affordable Care Act ("ACA"), also known as Obamacare.[24] While these parallels are obviously imperfect, the Article contends that they are sufficiently close that the basic design principles of Obamacare offer a compelling model for reforming homeowners insurance markets so that they supply affordable, accessible, and reliable coverage that drives climate change adaptation and resilience.[25]

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[22] *See* Cal. Dep't of Ins., *Commissioner Lara Continues Bold Insurance Reform Agenda with Landmark FAIR Plan Modernization* (July 26, 2024).

[23] *See* Molk, supra note 21, at 4; *see* Liz Farmer, *How California and Florida Are Trying to Stave Off the Home Insurance Crisis*, ROUTE 50, (Nov. 1, 2023), https://www.route-fifty.com/finance/2023/11/how-california-and-florida-are-trying-stave-home-insurance-crisis/391684/; *see* Laurence Darmiento, *L.A. Consumer Group Calls FAIR Plan Insurance Reforms an Industry 'Bailout'*, L.A. TIMES (July 30, 2024), https://www.latimes.com/business/story/2024-07-30/fair-plan-reform-homeowners-insurance-ricardo-lara-consumer-watchdog. See also Michael Pappas, *Climate Adaptation And Insurers Of Last Resort* (Draft on file with author) (showing how different state residual market structures prioritize either affordability of availability)

[24] Patient Protection and Affordable Care Act (ACA) of 2010, 42 U.S.C. § 18001. Today, while Obamacare continues to have its critics, *See, e.g.*, CHARLES M. SILVER & DAVID HYMAN, OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (2018), it is widely understood to be one of the most successful, impactful, and popular federal legislative reforms of the Twenty-First Century. *See KFF Health Tracking Poll: The Public's Views on the ACA*, KFF (May 15, 2024), https://www.kff.org/interactive/kff-health-tracking-poll-the-publics-views-on-the-aca/#?response=Favorable--Unfavorable&aRange=all (demonstrating increasing approval of Obamacare ever since its enactment); Allison K. Hoffman, *The ACA's Choice Problem*, 45 J. HEALTH POL. POL'Y L. 501, 501–15 (2020).

[25] I initially explored a limited version of this idea in an op-ed in 2017. *See* Daniel Schwarcz, *How to Fix America's Broken Flood Insurance Markets*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/opinions/how-to-fix-americas-broken-flood-insurance-scheme/2017/09/07/7cb5d2fe-93d9-11e7-aace-04b862b2b3f3_story.html (proposing that flood insurance markets could be reformed by embracing certain elements of the Affordable Care Act). Of course, this Article is hardly the first to offer potential solutions to the problems posed by climate change and insurance. For other proposals, see Klein, supra note 1 (proposing reforms consisting of guaranteed issue, prohibitions on discrimination by insurers based on location, and coverage for all natural disaster perils); French, supra note 1 (proposing that the government directly provide all perils insurance); Howard Kunreuther, All-Hazards Homeowners Insurance: Challenges and Opportunities, 21 Risk Mgmt. & Ins. Rev. 141, 145-46 (2018) (proposing that homeowners insurance policies bundle coverage for flood). This Article departs from all prior proposals in its use of Obamacare as a template for reform. More fundamentally, it departs from prior proposals in its combination of

Of course, this model cannot resolve every regulatory detail concerning homeowners insurance market reform. Nor is it necessarily capable of generating reforms that would prove politically viable at present.[26] Instead, the Article's goal is to reshape the long-term debate regarding more sensible regulation of property insurance markets in light of our rapidly changing climate.

Doing so starts by recognizing that states should no longer bear sole responsibility for regulating homeowners insurance markets, just as they no longer are the exclusive regulators of health insurance markets. The accelerating dysfunction in state-based homeowners markets is causing increasingly national repercussions: disrupting housing markets, prompting federal bailouts, and undermining climate change resilience.[27] States lack the resources and the incentives to effectively tackle these problems, especially given their tendency to resist fundamental regulatory reforms that challenge their entrenched authorities and practices.[28] Just as Obamacare mobilized the federal government to address long-standing health insurance market dysfunctions with nationwide consequences, so too should the federal government assume a significant role in regulating homeowners insurance markets.[29]

Obamacare also offers key lessons for structuring this federal involvement in homeowners insurance. The ACA transformed dysfunctional state health insurance markets through a distinctive cooperative federalism model in which federal actors specified the key principles for selling, underwriting, pricing, and subsidizing health insurance, while giving states the option to implement and customize these rules based on their local markets.[30] Federal intervention in state homeowners insurance markets, this

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Obamacare-inspired intertwined reforms, including embracing managed competition among private carriers, creating insurance exchanges, mandating broad-based coverage for climate-based risks, prohibiting non-causal insurance discrimination, and providing progressive subsidies. See Part III, infra.

[26] The political feasibility of implementing reforms based on this paradigm depends on numerous factors beyond the scope of this article, including legislative priorities, stakeholder interests, and economic conditions. However, political momentum for such reform is likely to increase over time as climate change places increasing stress on homeowners insurance markets, making the need for comprehensive solutions more urgent and apparent.

[27] *See* Part II, *infra*.

[28] *See id.*

[29] *Id.*

[30] *See* Abbe Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare For?* 70 STAN. L. REV. 1689, 1690 (2018); Brendan Maher*, The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1734 (2011).

Article argues, should rely on a similar cooperative federalism model.[31] As with Obamacare, this approach would appropriately reflect the strong federal interests in well-functioning insurance markets while accounting for regional variations in these markets and leveraging state insurance regulators' expertise.[32]

Because Obamacare was designed to fix broken state insurance markets, it also provides a compelling model for designing the substantive rules that should govern insurance markets. Although the Article advocates for implementing these rules using a cooperative federalism model, individual states could also take the lead, as demonstrated by Massachusetts health care reform, which served as a model for the Affordable Care Act. Regardless of whether implemented at the federal or state level, an Obamacare-inspired approach to homeowners insurance would focus on four broad and deeply interconnected areas of reform: (i) coverage terms, (ii) pricing, (iii) market structure, and (iv) coverage subsidization.

Starting with coverage terms, just as Obamacare mandated that health insurance policies must cover all "essential health benefits," so too should homeowners insurers be required to provide comprehensive coverage against the most significant catastrophic risks of climate change.[33] In both contexts, such reforms help ensure that insurance provides the protection that consumers reasonably expect, forcing insurers to compete along dimensions that are socially productive and reasonably responsive to consumer preferences. One promising approach for achieving these goals would be to mandate that homeowners policies provide coverage that is no less generous than the industry-standard policy, and that this coverage includes protection against flood damage, which surveys consistently show most consumers wrongly believe to be covered by basic homeowners insurance.[34] These reforms, collectively, would establish a uniform federal baseline for

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[31] *See* Part II, *infra*. Cooperative federalism is also a common tool in environmental policy more generally. See, e.g., Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 834 (2008).
[32] *See* Elana Ashanti Jefferson, *8 States Where Insurance Regulators Get an 'A'*, PropertyCasualty360 (Jan. 13, 2021) (quoting former R Street Director of Finance R.J. Lehmann stating "This report demonstrates that, on balance, states do an effective job of encouraging competition and ensuring solvency in insurance markets.").
[33] *See* Amy B. Monahan, *The Regulatory Failure to Define Essential Health Benefits*, 44 AM. J.L. & MED. 529, 529–77 (2018).
[34] See Part II, infra. See generally Kenneth S. Klein, The Unnatural Disaster of Insurance, Underinsurance, and Natural Disasters, 30 Conn. Ins. L.J. 1, 7 (2023) (exploring pervasive underinsurance of homeowners due to coverage limits that are insufficient to allow rebuilding in the wake of a total loss.).

homeowners insurance that addresses all major risks associated with climate change. To make these mandates practical for insurers, the NFIP would likely need to be replaced with a federal reinsurance program that offered private insurers actuarially fair premiums for reinsurance coverage, with rates aligned to private reinsurance market pricing.[35]

Obamacare also offers key lessons for reforming the pricing of homeowners insurance. To ensure that health insurers do not unfairly discriminate against individuals because of health-related factors they could not control, Obamacare flipped the default approach to insurance anti-discrimination rules; rather than barring specific types of insurance discrimination, it prohibited health insurers from pricing coverage based on any factors other than affirmatively approved policyholder characteristics, including age, smoking status, geography, and policy type.[36] Subject to these anti-discrimination rules, however, Obamacare relied on "managed competition" rather than regulation to ensure that health insurance rates were affordable.[37] A parallel approach for homeowners insurance would only allow insurers to discriminate based on pre-approved factors when doing so could plausibly serve broader social goals, like promoting resilience to climate change. This might, for instance, mean prohibiting insurers from pricing property coverage based on socio-economic factors like credit score, education, and occupation,[38] while allowing them to consider factors causally linked to risk like property location and construction type so as to incentivize risk mitigation.[39] Subject to such anti-discrimination rules, an Obamacare-

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[35] *See* Howard C. Kunreuther, *All-Hazards Homeowners Insurance: Challenges and Opportunities,* 21 RISK MGMT. AND INS. REV. 141, 141–55 (2018); *See also* Donald T, Hornstein, *The Balkanization of CAT Property Insurance: Financing and Fragmentation in Storm Risks*, 11 RUTGERS J.L. & PUB. POL'Y 9 (2013).

[36] Tom Baker, *Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577 (2011); Amy Monahan & Daniel Schwarcz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125 (2011); Wendy K. Mariner, *The Affordable Care Act and Health Promotion: The Role of Insurance in Defining Responsibility for Health Risks and Costs*, 50 DUQ. L. REV. 271 (2012); Allison Hoffman, *Oil and Water: Mixing Individual Mandates, Fragmented Markets, and Health Reform*, 36 AM. J. OF L. & MED. 7 (2010).

[37] Alain C. Enthoven, *The History and Principles of Managed Competition*, 12 HEALTH AFFAIRS 24, 24–48 (1993).

[38] Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination Law*, 69 DEPAUL L. REV. 657, 658 (2019); HOWARD C. KUNREUTHER ET AL., INSURANCE AND BEHAVIORAL ECONOMICS: IMPROVING DECISIONS IN THE MOST MISUNDERSTOOD INDUSTRY 236–38 (2013). *See, e.g.*, N.Y. DEP'T FIN. SERV., INSURANCE CIRCULAR LETTER NO. 3, OFFERING OF LOSS MITIGATION TOOLS AND SERVICES AND DISCOUNTS FOR THE INSTALLATION OF LOSS MITIGATION DEVICES AND SYSTEMS (2024).

[39] *See* Nevitt & Pappas, *supra* note 1, at 1606.

inspired approach to homeowners insurance would dispense with heavy-handed state regulation of rates, giving insurers broad freedom to price coverage subject to ordinary market constraints.[40]

To ensure the effectiveness of these market constraints, an Obamacare-inspired reform of homeowners insurance markets would encourage a more competitive market structure for the sale and purchase of homeowners insurance. Similar to Obamacare, this could be achieved through the establishment of centralized insurance marketplaces in which private insurers offer coverage.[41] By simplifying the process of shopping for and switching coverage and enabling consumers to make informed comparisons, these exchanges would promote a more dynamic and competitive market. Unlike ACA exchanges—which often face limited competition due to a shortage of health insurers in many regions[42]—homeowners insurance marketplaces could attract a broad range of competing insurers, if paired with rules allowing insurers to set prices subject only to anti-discrimination rules, as described above. That is because the barriers to entry in the homeowners insurance market are substantially lower than in the health insurance market..[43]

Obamacare also supplies compelling lessons for deploying subsidies to ensure that anti-discrimination reforms and coverage mandates do not undermine the affordability of coverage for low- and moderate-income Americans.[44] For instance, homeowners insurance reform modeled after the framework of Obamacare could incorporate progressive subsidies for low- to moderate-income consumers, ensuring they have access to affordable and

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[40] *See* Daniel Schwarcz, *Ending Public Utility Style Rate Regulation in Insurance*, 35 YALE J. REGUL. 941 (2018); *see also* Lawrence Powell, R.J. Lehman, & Ian Adams, *Rethinking Prop 103's Approach to Insurance Regulation*, INT'L CTR. L. & ECON. (Nov. 6, 2023) https://laweconcenter.org/resources/rethinking-prop-103s-approach-to-insurance-regulation/.

[41] *See* ABRAHAM & SCHWARCZ, *supra* note 8, at 408-09.

[42] *See* Sara Rosenbaum, *The Patient Protection and Affordable Care Act: Implications for Public Health Policy and Practice*, 126 PUB. HEALTH REP. 130, 130-135 (2011).

[43] The reason why insurers are leaving states impacted by climate change, like California and Florida, is not simply that risks are increasing; insurers are generally able and willing to cover increasing risks if they can charge premiums accordingly. See Part I, infra.

[44] This goal is motivated by a central lesson from the literature on environmental justice, which emphasizes that environmental benefits and burdens are not evenly distributed across different communities. Instead, environmental harm disproportionately impacts marginalized groups. See Jonathan Skinner-Thompson, Procedural Environmental Justice." 97 Wash. L. Rev. 399 (2022); Robert D. Bullard, Environmental justice-once a footnote, now a headline, 45 Harv. Envtl. L. Rev. 243 (2021); Gabriel Chan & Alexandra B. Klass, *Regulating for Energy Justice*, 97 N.Y.U. L. Rev. 1426 (2022).

comprehensive coverage.[45] Additionally, it might include subsidies for low-income renters to help defray the risk of increased rental rates associated with reform.[46]

This Article further explains and details these ideas in three parts. First, Part I supplies the necessary background, describing the current crisis in homeowners insurance markets, as well as state and federal efforts to address these problems. Part II moves from descriptive to normative, arguing that Obamacare's cooperative federalism approach provides a compelling model for structuring federal reform of homeowners insurance markets. Finally, Part III focuses on the substantive rules that an Obamacare-based solution to the homeowners insurance crisis would embrace for regulating the content, pricing, sale, and subsidization of homeowners insurance.

I. The Accelerating Homeowners Insurance Crisis

Homeowners insurance markets are increasingly straining under the weight of climate change, a reality that is most obvious in accelerating crises in the availability and affordability of homeowners coverage. After canvasing these insurance problems in Section A, Section B discusses recent policy responses to these crises in two frontline states: Florida and California. It argues that, in both cases, state reforms have largely proven ineffective due to their reliance on outdated regulatory strategies, including rate regulation designed to prevent "excessive" rates, quasi-public residual market mechanisms, and inadequate consumer information about coverage limitations. Even more, these reforms have done little to promote climate change adaptation, instead subsidizing building in areas heavily exposed to climate change risk. Finally, Section C examines the federal government's limited efforts to address the escalating homeowners insurance crisis, which primarily involve encouraging states to implement more effective reforms and making incremental adjustments to supplementary federal programs, such as the NFIP.

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[45] By contrast, the current homeowners insurance system creates hidden subsidies that disproportionately benefit wealthy and high-risk homeowners by underpricing federal flood insurance and implicitly backing under-funded state residual risk programs *See* Omri Ben-Shahar & Kyle D. Logue, *The Perverse Effects of Subsidized Weather Insurance*, 68 STAN. L. REV. 571 (2016). For basic information on Obamacare's subsidies, *see* Jennifer Sullivan, Allison Orris, & Gideon Lukens, *Entering Their Second Decade, Affordable Care Act Coverage Expansions Have Helped Millions, Provide the Basis for Further Progress*, CTR. BUDGET AND POL'Y PRIORITIES (March 25, 2024), https://www.cbpp.org/research/health/entering-their-second-decade-affordable-care-act-coverage-expansions-have-helped.

[46] *See* Part III.D, *infra*.

A. A Climate-Driven Homeowners Insurance Crisis

1. Availability, Affordability and Scope of Coverage

Homeowners insurance markets across the country are facing significant disruptions, particularly in states prone to natural hazards like hurricanes and wildfires. In California, a continuous stream of insurers, including State Farm and Allstate, ceased selling new homeowners insurance policies in 2023 and 2024, forcing many homeowners to turn to quasi-public residual market.[47] The historic Los Angeles wildfires in early 2025 are likely to accelerate these trends.[48] In Florida, premiums have surged by 40% to 100% over the past three years, pushing some cash-strapped homeowners to sell their properties.[49] Similar challenges in insurance availability and affordability are impacting other disaster-prone states, such as Louisiana[50] and Hawaii.[51]

Increasingly, these insurance market disruptions are no longer confined to states well known for their exposure to natural hazards.[52] Instead, the cost

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[47] *See* Laurence Darmiento, *California's Home Insurance Crisis: What Went Wrong, How it Can Be Fixed and What Owners Can Do*, L.A. TIMES (March 29, 2024), https://www.latimes.com/business/story/2024-03-29/californias-insurance-crisis-what-went-wrong-whats-being-done-to-fix-it-and-how-homeowners-can-help-themselves; Christopher Flavelle, Jill Cowan, & Ivan Penn, *Climate Shocks Are Making Parts of America Uninsurable. It Just Got Worse*, N.Y. TIMES (May 31, 2023), https://www.nytimes.com/2023/05/31/climate/climate-change-insurance-wildfires-california.html; Levi Sumagaysay, *350,000 Californians Are Now on the FAIR Plan, the Last Resort for Fire Insurance. Now What?* (Jan. 23, 2024), https://www.ijpr.org/wildfire/2024-01-23/350-000-californians-are-now-on-the-fair-plan-the-last-resort-for-fire-insurance-now-what.

[48] See Christopher Flavelle, California Wildfires Threaten Insurers Already Teetering From Climate Shocks (Jan. 8, 2025), https://www.nytimes.com/2025/01/08/climate/california-homeowners-insurance-fires.html

[49] Giulia Carbonaro, *Florida Considers Socialist Model to Combat Soaring Insurance Costs*, NEWSWEEK (Jan. 9, 2024), https://www.newsweek.com/florida-considers-socialist-model-insurance-costs-1858612; *Trends and Insights: Addressing Florida's Property/Casualty Insurance Crisis*, INS. INFO. INST. (Feb. 15, 2023), https://www.iii.org/sites/default/files/docs/pdf/triple-i_trends_and_insights_florida_pc_02152023.pdf.

[50] Carolyn Kousky, *Louisiana's Insurance Crisis Is a Climate Crisis*, LOUISIANA ILLUMINATOR (April 2, 2024), https://lailluminator.com/2024/04/02/insurance-climate/.

[51] Annalisa Burgos, *In Wake of Disasters, Homeowners Report Soaring Rates for Property Insurance*, HAWAII NEWS NOW (May. 23, 2024), https://www.hawaiinewsnow.com/2024/05/24/home-insurance-rates-are-skyrocketing-insurers-try-recoup-losses-will-likely-remain-high/.

[52] *See* Christopher Flavelle, *As Insurers Around the U.S. Bleed Cash From Climate Shocks,*

and availability of homeowners insurance are becoming a pressing political issue nationwide.[53] In the past year, insurers in twenty-five states have raised rates by double digits.[54] Homeowners in states including Iowa, Arkansas, Ohio, Utah, New York, North Carolina, and Washington often struggle to obtain private insurance.[55] These affordability problems are particularly acute for low-income homeowners, who do not have extra income or savings to allocate to unexpected premiums increases.[56] Given all this, major news outlets are now regularly covering the emerging crisis, with the New York Times recently devoting an entire episode of its daily Podcast to "The

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Homeowners Lose, N.Y. TIMES, May 13, 2024. Although these disruptions to homeowners insurance markets are particularly acute in the United States, they are also evident globally as well. *See* Rana Foroohar, *The Crippling Home Insurance Crisis Hitting America*, FINANCIAL TIMES, April 28, 2024 (quoting John Neal, the Chief Executive of Lloyd's of London, as saying that "the home insurance market, particularly in coastal America, 'has reached a tipping point.'"). In Australia, for instance, rising homeowners insurance premiums and the increasing unavailability of coverage prompted the country to adopt a government reinsurance pool designed to bring down premiums. *See Rising Insurance Costs to Make Home Insurance Unaffordable in Australia, Finds GlobalData*, GLOBALDATA (May 23, 2022), https://www.globaldata.com/media/insurance/rising-insurance-costs-make-home-insurance-unaffordable-australia-finds-globaldata/; Australia Competition and Consumer Commission, *Insurance Prices in Northern Australia Remain High While Cyclone Reinsurance Pool in Transition*, AUSTL. COMPETITION AND CONSUMER COMM'N (December 8, 2023), https://www.accc.gov.au/media-release/insurance-prices-in-northern-australia-remain-high-while-cyclone-reinsurance-pool-in-transition. In the EU, only about a quarter of catastrophe risks posed by climate change are insured. *See* Casper Christophersen, Margherita Giuzio, Hradayesh Kumar, Miles Parker, Hanni Schölermann et al., *What to Do About Europe's Climate Insurance Gap*, E.C.B. BLOG (April 24, 2023), https://www.ecb.europa.eu/press/blog/date/2023/html/ecb.blog.230424~4cdc3a38ba.en.html

[53] *See* Jean Eaglesham, *Buying Home and Auto Insurance Is Becoming Impossible*, WALL ST. J., Jan. 8, 2024; Nathaniel Meyersohn & Anna Bahney, *The Home Insurance Market Is Crumbling. These Owners Are Paying the Price*, CNN (April 26, 2024), https://www.cnn.com/2024/03/29/economy/home-insurance-prices-climate-change/; Rana Foroohar, The Crippling Home Insurance Crisis Hitting America, FINANCIAL TIMES (April 28, 2024), https://www.ft.com/content/7745d8ba-d498-4b1c-b877-e42a691b954f.

[54] *See* Jeanna Smialek, *Home Insurance Is Clobbering Consumers. Yet It's Barely Counted in Inflation*, N.Y. TIMES (May 29, 2024), https://www.nytimes.com/2024/05/29/business/economy/home-insurance-inflation.html; *see* White House, *The Rising Costs of Extreme Weather Events*, COUNCIL OF ECON. ADVISORS BLOG (Sept. 1, 2022).

[55] *See* Flavelle, *supra* note 1; *See* MIKE CAUSEY, NORTH CAROLINA DEPARTMENT OF INSURANCE, *INSURANCE COMPANIES ASK FOR 42.2% RATE INCREASE FOR HOMEOWNERS' INSURANCE* (January 5, 2024)

[56] Kousky, Carolyn, Helen Wiley, and Len Shabman. "Can Parametric Microinsurance Improve the Financial Resilience of Low-Income Households in the United States? A Proof-of-Concept Examination." Economics of Disasters and Climate Change 5 (2021): 301-327.

Possible Collapse of the U.S. Home Insurance System."[57]

The primary driver of these disruptions in U.S. homeowners insurance markets is clear.[58] Climate change is escalating natural hazard risks across multiple regions of the United States.[59] Coastal storms, for example, are now more likely to slow down and maintain strength after landfall.[60] In the West, wildfires are becoming more severe due to higher temperatures and disrupted precipitation patterns.[61] Increasing evidence also suggests that climate change is intensifying storms in the Midwest, leading to more devastating tornadoes and hailstorms.[62] These factors collectively result in consistently escalating losses for homeowners insurers, who are consequently regularly paying out more in claims than they collect in premiums.[63] They also result in dramatically increased reinsurance rates and decreased reinsurance availability, contributing further to the broader homeowners insurance

[57] The Daily, *The Possible Collapse of the U.S. Home Insurance System*, THE DAILY, (May 15, 2024), https://www.nytimes.com/2024/05/15/podcasts/the-daily/climate-insurance.html; Greg Allen, *Feeling the Pinch of High Home Insurance Rates? It's Not Getting Better Anytime Soon*, NPR (Oct. 26, 2023), https://www.npr.org/2023/10/26/1208590263/florida-homeowners-insurance-soaring-expensive.

[58] As discussed in the next section, there are surely secondary contributors to the crisis, including increasing construction costs and litigation abuse. *See* Molk, *supra* note 21, at 5.

[59] *See* Nevitt & Pappas, *supra* note 1, at 1606.

[60] *See* Gan Zhang, Hiroyuki Murakami, Thomas R. Knutson, Ryo Mizuta & Kohei Yoshida, *Tropical Cyclone Motion in a Changing Climate* 6 SCIENCE ADVANCES 1 (Apr. 22, 2020); Lin Li & Pinaki Chakraborty, *Slower Decay of Landfalling Hurricanes in a Warming World*. 587 NATURE 230, 230–34 (2020).

[61] *See, e.g.*, Marco Turco, John T. Abatzoglou, Sixto Herrera, & Ivana Cvijanvic, *Anthropogenic Climate Change Impacts Exacerbate Summer Forest Fires in California*, PROC. NAT'L ACAD. SCI. U.S.A. (June 2023); J. K. Balch et al., *Warming Weakens the Night-Time Barrier to Global Fire*, 602 NATURE 442, 442–48 (2022); Y. Zhuang, R. Fu, B. D. Santer, R. E. Dickinson, A. Hall, *Quantifying Contributions of Natural Variability and Anthropogenic Forcings on Increased Fire Weather Risk Over the Western United States*, PROC. NAT'L ACAD. SCI. U.S.A., (Nov. 2021).

[62] *See* Climate Central, *Severe Storm Super Hazards*, CLIMATE CENTRAL (March 26, 2024), https://www.climatecentral.org/climate-matters/severe-storm-super-hazards (emphasizing that "the relationship between climate change and severe storms is a complex and active area of research," while noting that "certain conditions favorable to thunderstorms and tornadoes are occurring more often or expanding into historically less-active seasons and regions."); *see also* Clay Masters, *Minnesota Lawmakers Try to Drive Home Climate Effects on House Insurance Costs,* MPR NEWS, (Feb. 15, 2024), https://www.mprnews.org/story/2024/02/15/minnesota-lawmakers-try-to-drive-home-climate-effects-on-house-insurance-costs.

[63] *See* Flavelle, *supra* note 1.

crisis.[64] As detailed later,[65] these climate related factors swamp alternative explanations for increasingly common homeowners insurance crises, like inflation or litigation abuse.[66]

Climate change has not only significantly increased the likelihood and magnitude of insured losses; perhaps even more importantly, it has amplified uncertainty in predicting future losses.[67] Traditionally, insurers used statistical models based on historical data to estimate natural disaster risks. However, such experience-based models are becoming progressively more inaccurate due to extreme and unpredictable weather events driven by climate change.[68] These changes are altering the location and timing of events in complex ways that scientists are still struggling to understand.[69] Insurers are adapting by employing dynamic and opaque catastrophe risk models that incorporate real-time data and leverage advanced technologies like machine learning.[70] But the reliability of these new approaches remains uncertain and constantly evolving.

Although state regulation of insurance rates can limit the extent to which climate change results in higher insurance prices in the short term, the long term impact of such regulation is often to undermine insurance availability. Virtually all states prohibit "excessive" or "unfairly discriminatory" property insurance rates.[71] But states vary significantly in how they apply these broad principles: some rubber stamp insurer rate increases, while others routinely challenge or restrict them.[72] Insurers routinely blame such rate regulation for

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[64] *See U.S. Property Reinsurance Rates Rise By Up to 50% on Jan 1-Broker Says*, REUTERS, Jan 2, 2024; Kenneth Araullo, *Reinsurance Pricing Rises Again in 2024*, IN. BUS. MAG., Jan 05, 2024, https://www.insurancebusinessmag.com/us/news/reinsurance/reinsurance-pricing-rises-again-in-2024-471849.aspx. Property insurers rely heavily on reinsurance—insurance for insurers—to protect themselves against unexpectedly frequent or severe insured losses from natural disasters. This protection is crucial because insurers struggle to cover large correlated losses that impact many policyholders simultaneously. *See* Kenneth S. Abraham & Daniel Schwarcz, *Courting Disaster: The Underappreciated Risk of A Cyber Insurance Catastrophe*, 27 CONN. INS. L.J. 407, 414 (2021).

[65] Se Part I.B.1, infra.

[66] See, e.g.,, CFO Jimmy Patronis to President Trump: You're the One Person Who Can Fix the National Insurance Crisis, 7/24/2024, https://myfloridacfo.com/news/pressreleases/press-release-details/2024/07/24/cfo-jimmy-patronis-to-trump-fix-the-national-insurance-crisis

[67] *See* Condon, *supra* note 3, at 157.

[68] See id.

[69] *See id.*

[70] *See id.*

[71] *See* Schwarcz, *Ending Public Utility Style Rate Regulation, supra* note 40, at 941.

[72] *See* Sangmin S. Oh, Ishita Sen, & Ana-Maria Tenekedjieva, *Pricing of Climate Risk Insurance: Regulation and Cross-Subsidies*, Fin. & Econ. Discussion Series (Oct. 2022),

insurance availability problems, and for good reason.[73] Homeowners insurers typically refuse coverage to applicants only if they cannot charge a profitable rate.[74] While this rate might be exceedingly high for properties with significant catastrophe risk and uncertainty, there is nearly always a price at which coverage can profitably be offered. This point is best illustrated by imagining a yearly premium approaching the coverage limit, which might be required to make a very substantial risk insurable.

In addition to impacting the cost and availability of homeowners coverage, climate change is increasingly resulting in uncovered losses that insureds wrongly thought they were protected against. This is most obvious with respect to flood-related losses, which are perhaps the most significant long-term risk to property resulting from climate change. Although homeowners policies almost universally exclude coverage for flood-related losses, consumer surveys have shown for decades that a significant percentage of homeowners are ignorant of this coverage limitation, notwithstanding persistent consumer education campaigns.[75] At least partially for this reason, the vast majority of homeowners do not purchase supplemental flood insurance through the NFIP or a private insurer.[76] Climate change is also increasingly causing insurers to restrict coverage for climate-

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https://www.federalreserve.gov/econres/feds/pricing-of-climate-risk-insurance-regulation-and-cross-subsidies.htm (developing a measure for identifying high-friction and low friction states for rate regulation by comparing the difference between insurers' proposed rate increases and those actually allowed by regulators); Schwarcz, *Ending Public Utility Regulation*, *supra* note 40, at 945. Similarly, some states allow insurers to discriminate based on any actuarially predictive factor, whereas others significantly limit such discrimination. *See* Ronen Avraham, Kyle Logue, & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195 (2014).

[73] *See Swiss Re Says Industry Failed to Estimate Impact of Extreme Weather*, FINANCIAL TIMES (June 13, 2024), https://www.ft.com/content/48b3e54a-771a-4a12-a412-527c34311ca9 (quoting APCIA's Robert Gordon saying at an industry event. "The markets where you're having a real availability crisis, it's because the government is trying to suppress those premiums.").

[74] This, of course, is a byproduct of basic corporate law, which requires corporate management to pursue profits for shareholders. But efforts to promote social goals like climate change adaptation can promote better alignment with profit-based incentives and broader social goals. See, e.g., Amelia Miazad, D&O Insurers as Climate Governance Monitors, 104 B.U. L. Rev. 1184 (2024).

[75] *See, e.g.*, *Survey: Most Homeowners Believe Their Policy Covers Flood*, INS. J. (June 20, 2024), https://www.insurancejournal.com/news/national/2024/06/20/780393.htm.

[76] Individuals in high-risk flood areas are contractually required to purchase flood insurance if they have federally-backed mortgages. Alexander Lemann, *Rolling Back The Tide: Toward An Individual Mandate For Flood Insurance*, 26 FORDHAM ENV'T. L. REV. 166 (2015). But even a high percentage of these individuals fail to purchase and maintain flood insurance.

driven losses like wildfire, hail, and hurricanes. For instance, homeowners insurers now routinely include special elevated deductibles for these risks in their coverages.[77] These restrictions—which can come in the form of special deductibles or coverage limits, exclusionary language, or altered conditions of coverage –vary both by region and by insurer.[78]

Such unexpected limitations in coverage often prove particularly devastating for low-income homeowners whose properties are impacted by disaster.[79] Unlike those with more extensive financial resources, low-income homeowners are typically unable to rebuild in the wake of uninsured disasters.[80] Not only can this result in a loss of their life-savings, but it can also trigger bankruptcy[81] and force individuals to relocate away from their long-term communities and supports, as vividly illustrated by the mass migration of low-income individuals in the wake of Hurricane Katrina.[82]

2. Adaptation to Climate Change

While the media has spotlighted disruptions in the availability and affordability of homeowners insurance, a more insidious issue lurks beneath the surface: current insurance markets are undermining climate change adaptation. By subsidizing development in many of the areas most vulnerable to climate change, these markets are inadvertently amplifying the very risks they are meant to mitigate.

This issue is most evident in public and quasi-public insurance schemes that subsidize coverage for high-risk properties. The primary offender is the National Flood Insurance Program (NFIP), created by Congress in 1968 after

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[77] See , Sarah Schlichter, Nerd Wallet, Wildfire Insurance: What You Need to Know (4/17/24), at https://www.nerdwallet.com/article/insurance/wildfire-insurance

[78] *See* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011).

[79] *See* Carolyn Kousky, and Helen Wiley. "Improving the Post-Flood Financial Resilience of Lower-Income Households through Insurance." (2021).

[80] See Xuesong You & Carolyn Kousky, *Improving Household And Community Disaster Recovery: Evidence On The Role Of Insurance*, Journal of Risk and Insurance (2024).

[81] Caroline Ratcliffe, Insult to Injury Natural Disasters and Residents' Financial Health 33 (2019), Urban Institute. https://www.urban.org/sites/default/files/publication/100079/insult_to_injury_natural_disasters_2.pdf

[82] *See* Fussell, Elizabeth, Narayan Sastry, and Mark VanLandingham. "Race, socioeconomic status, and return migration to New Orleans after Hurricane Katrina." Population and environment 31 (2010): 20-42; Landry, Craig E., et al. "Going home: Evacuation-migration decisions of Hurricane Katrina survivors." Southern Economic Journal 74.2 (2007): 326-343..

private insurers refused to cover flood damage.[83] To fill this gap, the NFIP offers flood insurance directly to individuals in communities that meet specific zoning and construction standards.[84] It is administered by FEMA, which sets premiums for flood insurance according to complex statutory criteria and flood maps that the federal agency develops and maintains.[85] However, experts from across the political spectrum agree that these premiums often fall far below actuarial risk, leading to rates that are artificially low for many high-risk homeowners.[86] This pricing discrepancy fosters moral hazard, incentivizing continued development in flood-prone areas.[87]

State residual insurance markets also weaken adaptation to climate change by artificially subsidizing premiums for high-risk property owners. Most states have legislation establishing insurers of last resort, which are mandated to provide coverage to homeowners unable to secure it in the ordinary market.[88] Unsurprisingly, those who turn to these residual markets typically live in areas prone to climate-related dangers like hurricanes and wildfires. And in many states, the coverage they receive through residual markets is heavily subsidized. Some states achieve this by requiring all insurers operating in the state to proactively contribute to residual markets, thereby supplementing the insufficient premiums paid by high-risk policyholders with funds from policyholders statewide.[89] In other states, ordinary private insurers contribute only after natural disasters generate losses that residual insurers cannot cover. The outcome, however, remains

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[83] This unwillingness is a byproduct of the correlated nature of flood risk, which can simultaneously cause property damage to a large percentage of an insurer's policyholders. *See* Abraham & Schwarcz, *Courting Disaster*, *supra* note 64, at 414.

[84] *See generally* ABRAHAM & SCHWARCZ, *supra* note 8, at 179-81. The Federal Emergency Management Agency (FEMA) administers the program, setting premiums based on complex statutory criteria and flood maps it develops. *See* CONGRESSIONAL RESEARCH SERVICE, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP) UPDATED OCTOBER 7, 2024, HTTPS://CRSREPORTS.CONGRESS.GOV/PRODUCT/PDF/R/R44593;

[85] *See* CONGRESSIONAL RESEARCH SERVICE, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP) UPDATED OCTOBER 7, 2024, HTTPS://CRSREPORTS.CONGRESS.GOV/PRODUCT/PDF/R/R44593;

[86] *See* Jennifer Wriggins, *Flood Money: The Challenge of U.S. Flood Insurance Reform in a Warming World*, 119 PA. ST. L. REV. 361 (2014); Andrew Hammond, *On Fires, Floods, and Federalism*, 111 CAL. L. REV. 1067 (2023).

[87] *See* Nevitt & Pappas, *supra* note 1, at 1629-32.

[88] *See* FIO, INSURANCE SUPERVISION AND REGULATION OF CLIMATE-RELATED RISKS (2023) (noting that "Thirty-two states and the District of Columbia offer some sort of residual market for property owners."). Most such plans offer reduced coverage compared to that supplied by the private market.

[89] *See id.*

the same: policyholders statewide subsidize those living in high-risk areas. States like Florida go even further, directly limiting rate increases that insurers of last resort can implement.[90]

The problem of distorted rates leading to ineffective risk signaling is not, however, limited to public or quasi-public insurers like state insurers of last resort. Rather, state rate regulation increasingly undermines the extent to which private insurers' rates accurately signal risk. One way this can occur is by state regulators using their broad and nebulous statutory authority to prevent "excessive" and "unfairly discriminatory" insurance rates to require cross-subsidization within the state. This causes those in less risky areas to pay higher premiums than their actuarial risk would warrant, while those in riskier areas paying artificially low rates.[91] New empirical evidence, however, shows that the distortions caused by state rate regulation are not confined to policyholders within heavily regulated states. To the contrary, this evidence suggests that insurers often increase rates in states with less stringent rate regulation to help offset losses incurred in states with stricter rate controls.[92] In other words, policyholders who live in states with less strict rate regulation ultimately pay inflated premiums to subsidize policyholders in states with more strict rate regulation.[93] And because many of the states that are hit hardest by climate change resort to more stringent insurance rate regulation in response, this dynamic tends to artificially shift risk to states that are less exposed to climate risk.

B. State Responses to the Homeowners Insurance Crisis

The accelerating homeowners insurance crisis has not gone unnoticed among state regulators and lawmakers, who have long had primary

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[90] Medders, Lorilee A., and Jack E. Nicholson. "Evaluating the public financing for Florida's wind risk." Risk Management and Insurance Review 21.1 (2018): 117-139.

[91] *See* Ben-Shahar & Logue, *supra* note 12, at 591; Patricia Born & Robert W. Klein, *Catastrophe Risk and the Regulation of Property Insurance Markets*, 35 J. INS. REGUL. 1, 9 (2016).

[92] *See* Oh et al., *supra* note 72 ("Using two distinct identification strategies and novel data on regulatory and ZIP code level rates, we find that insurers in more regulated states adjust rates less frequently and by a lower magnitude after experiencing losses. Importantly, they overcome these rate-setting frictions by adjusting rates in less regulated states, consistent with insurers cross-subsidizing across states."); Benjamin J. Keys & Philip Mulder, *Property Insurance and Disaster Risk: New Evidence from Mortgage Escrow Data* (Nat'l Bureau Econ. Rsch., Working Paper No. 32579, 2024) (finding that homeowners insurance rates often do not reflect risk on a national basis, with premiums for risk insured being more expensive in portions of the Midwest and Southwest).

[93] *See id.*

responsibility for regulating these markets.[94] States hit the earliest and hardest by insurance availability and affordability problems have adopted various strategies. This Section examines the approaches taken by two frontline states: Florida and California, arguing that these reforms either misdiagnose the underlying problem (Florida) or cling to outdated and ineffective regulatory strategies (California).

1. Florida's Reforms

Climate change does not exist in Florida—or at least that's the message conveyed by recent legislation that removes the phrase "climate change" from most Florida laws.[95] It is therefore no surprise that Florida's efforts to address its accelerating homeowners insurance crisis ignore changing weather patterns caused by climate change.

Instead, Florida has concentrated its reform efforts on curbing "litigation excesses," which many lawmakers blame for the state's property insurance woes.[96] These allegations are not entirely unfounded: Florida has seen an unusually high number of homeowners insurance lawsuits in recent years.[97] In response, Florida lawmakers passed five different reform bills between 2019 and 2024, each aimed at limiting lawsuits for insurers' alleged refusal to pay claims.[98] These reforms have imposed stricter limits on policyholder assignment of benefits to contractors, recovery of attorneys' fees in successful coverage actions, and the time within which policyholders can sue insurers.[99]

Although the full impact of these reforms remains to be seen, the evidence

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[94] *See* McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15.

[95] *See* Steve Inskeep & Amy Green, *Florida Gov. DeSantis Signs Bill that Deletes Climate Change from State Law*, NATIONAL PUBLIC RADIO (May 17, 2024).

[96] *See Trends and Insights: Addressing Florida's Property/Casualty Insurance Crisis supra* note 49; Leslie Kaufman, *Florida's Home Insurance Industry May Be Worse than Anyone Realizes*, BLOOMBERG (Apr. 24, 2024), https://www.bloomberg.com/news/features/2024-04-24/home-insurance-with-lax-oversight-hides-florida-climate-risk?srnd=undefined; Danielle Prieur, *Nothing in Life Is Free: Roofing Scams Drive up Property Insurance Rates in Florida*, CENT. FLA. PUB. MEDIA (May 23, 2022), https://www.cfpublic.org/2022-05-23/nothing-in-life-is-free-special-session-will-address-how-roofing-scams-are-driving-up-florida-property-insurance-rates. *See also A Politically Made Insurance Panic*, WALL ST. J., (June 9, 2024), https://www.wsj.com/articles/insurance-rates-home-auto-elizabeth-warren-federal-insurance-office-952400ba.

[97] *See* PROCLAMATION: STATE OF FLORIDA, EXECUTIVE OFFICE OF THE GOVERNOR (Apr. 26, 2022), https://www.flgov.com/wp-content/uploads/2022/04/SKM_C750i22042614070.pdf.

[98] *See* FLORIDA OFFICE OF INSURANCE REGULATION, PROPERTY INSURANCE STABILITY REPORT 22 (Jan. 1, 2024).

[99] *See* Molk, *supra* note 21, at 12-25 (providing an overview of this legislation).

to date suggests they have had only a mild impact on homeowners insurance availability and affordability despite significantly reducing litigation. For instance, litigation rates declined by nearly 50% after the state's 2021 reform package, yet insurance premiums initially held steady and then increased dramatically.[100] Since then, the pace of rate increases has slowed, and some new regional homeowners insurers have begun operating in the state.[101] But the state's residual homeowners insurer, Citizens, has seen approximately three-fold growth during this period of legislative reforms (2019 to 2023).[102] Moreover, the existence of any causal link between Florida's litigation reforms and its decreased rates of premium increases is complicated by the state's 2022 implementation of new subsidized reinsurance programs and funding for hardening homes vulnerable to hurricane damage.[103] As Peter Molk carefully details, these data are inconsistent with the narrative that litigation has been the primary driver of Florida's homeowners insurance woes.[104]

To the contrary, the available evidence suggests that to the extent "litigation abuse" has been pervasive in Florida, it has played a limited role in Florida's homeowners insurance crisis for two key reasons. First, Florida's homeowners insurance problems are not unique to the state, even though many of its litigation-related issues are state-specific. Louisiana, for instance, faces comparable hurricane risks and similarly disrupted homeowners insurance markets but has not experienced litigation in its homeowners insurance sector to the same extent as Florida.[105] Second, making it harder to sue insurers for failing to pay claims would predictably reduce insurance rate increases in any state. The key question is whether these benefits justify limiting policyholders' access to remedies when insurers unreasonably refuse

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[100] *See* FLORIDA OFFICE OF INSURANCE REGULATION, PROPERTY INSURANCE STABILITY REPORT 22 (Jan. 1, 2024).

[101] *See A Politically Made Insurance Panic*, *supra* note 96 ("Gov. Ron DeSantis's legal reforms in 2022 are helping to stabilize Florida's market after numerous insurers exited. Florida experienced the second smallest increase in homeowner premiums during the first three months of this year…").

[102] *See* FEDERAL INSURANCE OFFICE, INSURANCE SUPERVISION AND REGULATION OF CLIMATE-RELATED RISKS REPORT 39 ("The Florida Citizen Property Insurance Corporation, Florida's residual insurer, has seen an increase in policy counts from approximately 420,000 reported in June 2019 to over 1,272,815 in April 2023.").

[103] *See* FLA. S.B. 2-D § 1 (creating FLA. STAT. § 215.5551(3)); SB 2-A § 1 (creating FLA. STAT. § 215.5552).

[104] *See* Molk, *supra* note 21, at 6.

[105] See https://www.insurancejournal.com/blogs/right-street/2023/02/06/706330.htm (arguing that "Both Louisiana and Florida are burdened by courtroom excesses," but noting that these excesses focus on homeowner insurance in Florida and more on auto insurance in Louisiana).

to pay the coverage they owe. Answering this question is particularly challenging because there is anecdotal evidence that both insurance fraud[106] and insurers' refusal to pay legitimate claims contributed to the state's outsized rate of litigation.[107] However, the state has not made publicly available adequate data on claims payment rates to disentangle these two potential drivers of litigation in the state.[108]

2. *California's Reform*

In response to California's escalating homeowners insurance crisis, state policymakers initially double-downed on the aggressive regulatory measures that had long characterized the state's approach. Most importantly, they embraced rate regulation that barred insurers from considering non-historic wildfire projections[109] or reinsurance rate increases[110] when calculating rates. They also mandated that insurers reward community-level and property-level risk mitigation efforts with lower rates.[111] Furthermore, the state imposed a one-year moratorium on insurers canceling or non-renewing residential policies in wildfire-affected areas,[112] and sought to broaden the coverage provided by the state's residual market plan.[113]

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[106] *See, e.g.*, Jon Schuppe, *Florida Lawmakers Scramble to Fix a Property Insurance Crisis Before Hurricane Season*, NBC NEWS (May 21, 2022), https://www.nbcnews.com/news/us-news/roofing-scams-florida-property-insurance-hurricane-rcna29649; *Florida Authorities Charge 4 in Fraudulent Roof Claims, Issue Warrant for Contractor*, INS. J. STAFF REP. (Dec. 4, 2023), https://www.insurancejournal.com/news/southeast/2023/12/04/750495.htm.

[107] *See Justifiable Grievances*, AM. POLICYHOLDER ASS'N. (Nov. 2023), https://www.propertyinsurancecoveragelaw.com/blog/american-policyholder-association-publishes-study-highlighting-florida-insurance-market-claims-payment-issues/; Kenneth S. Klein, The First Thing We Do Is Kill All The Lawsuits Review of Litigation (Forthcoming, 2025).

[108] Lawrence Mower, *Florida Leaders Blame Insurance Crisis on Lawsuits, but Evidence is Thin*, TAMPA BAY TIMES (Oct. 19, 2023), https://www.tampabay.com/news/florida-politics/2023/10/19/florida-leaders-blame-insurance-crisis-lawsuits-evidence-is-thin/.

[109] *See* Cal. Dep't of Ins., *Commissioner Lara Announces Next Phase of Sustainable Insurance Strategy to Safeguard Californians' Access to Insurance*, CAL. DEP'T OF INS. (March 14, 2024).

[110] *See* Cal. Dep't of Ins., *Commission Lara Statement on San Bernadino County Supervisor's Resolution Supporting the Goals of his Sustainable Insurance Strategy,* CAL. DEP'T OF INS. (July 9, 2024), https://www.insurance.ca.gov/0400-news/0100-press-releases/2024/release027-2024.cfm.

[111] *See* Cal. Dep't of Ins., *Mitigation in Rating Plans and Wildfire Risk Models* (2022), https://www.insurance.ca.gov/01-consumers/200-wrr/Safer-from-Wildfires.cfm.

[112] *See* CAL. S.B. 824 (2018).

[113] *See* Cal. Dep't of Ins., *Insurance Commissioner Ricardo Lara orders FAIR Plan to Offer*

In recent years, however, it has become increasingly clear that this aggressive regulatory approach has had the opposite of its intended effect, prompting many major insurers to exit the state. Over the past two years, 7 of the top 12 insurance companies in California have paused or restricted writing new business after incurring consistent financial losses in the state.[114] Insurers' efforts to address these losses were repeatedly complicated by state rate regulation, with rate change requests averaging six months for the state regulator to resolve.[115] Meanwhile, policies issued by the state's residual market, the FAIR plan, have surged to nearly half a million dwellings,[116] and various assessments indicate that this plan faces substantial risk of insolvency in the event of large wildfires.[117] These projections are proving increasingly accurate in the wake of the 2025 Los Angeles wildfires.[118]

In response to these challenges, California's governor and lead insurance regulator unveiled a new "Sustainable Insurance Strategy" in 2023.[119] This strategy promised insurers reduced regulatory restrictions, such as allowing them to include California-specific reinsurance costs and prospective climate-risk models in their rate filings. Additionally, it promised expedited regulatory review of rate filings.[120] According to state officials, insurers have agreed that once these reforms are fully implemented, insurers will once again start offering coverage across the state, including in areas of the state that are particularly prone to wildfires.[121]

Over the past year, the California Insurance Department has begun

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California Homeowners Increased Coverage Options, (Sept. 24, 2021), https://www.insurance.ca.gov/0400-news/0100-press-releases/2021/release096-2021.cfm

[114] *See* Cal. Dep't of Ins., *Presentation by Lara, California's Sustainable Insurance Initiative* (reporting that property insurers reported a direct underwriting profit of -13.1% on average between 2012 and 2021).

[115] *See id.*

[116] *See,* https://www.cfpnet.com/key-statistics-data/ (noting that in September 2024, the number of FAIR policies for dwellings was 452,000 policies,

[117] *See* Thomas Frank, *California's Insurer of Last Resort Is a 'Ticking Time Bomb'* E&E NEWS (March 18, 2024), https://www.eenews.net/articles/californias-insurer-of-last-resort-is-a-ticking-time-bomb/.

[118] [Updpate as info becomes available]

[119] *See* Cal. Dep't of Ins., *Commissioner Lara Announces Sustainable Insurance Strategy to Improve State's Insurance Market Conditions for Consumers* (Sept. 21, 2023), https://www.insurance.ca.gov/0400-news/0100-press-releases/2023/release051-2023.cfm.

[120] Id.

[121] *See* Blanca Begert, *Unanswered Questions on the Wildfire Insurance Deal*, POLITICO (Sept. 21, 2023), https://www.politico.com/newsletters/california-climate/2023/09/21/unanswered-questions-on-the-wildfire-insurance-deal-00117519. The strategy also included reforms to the FAIR plan to enhance its solvency and adjust pricing to reflect the benefits of risk mitigation strategies.

implementing these reforms,[122] with decidedly mixed results. To illustrate, the state's proposed reforms to its rate review process have triggered backlash from many in the industry, who claim that they will "cause further delays by adding more bureaucracy, red tape, uncertainty, and open-ended requirements to an already complex process."[123] Throughout, insurers that previously halted writing business in the state have remained publicly non-committal about returning, despite statements from public officials suggesting their understanding that insurers will indeed reenter the market.[124] Furthermore, several additional insurers have left the state even as these reform efforts have moved forward.[125] And in the aftermath of the 2025 Los Angeles wildfires, many insurers that had shown some willingness to re-enter California's homeowners insurance market are now backtracking on those commitments.[126]

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[122] Cal. Ins. Dep't, Catastrophe Modeling and Ratemaking (March 2024), https://www.insurance.ca.gov/0250-insurers/0500-legal-info/0300-workshop-insurers/upload/Catastrophe-Modeling-and-Ratemaking-Workshop-Draft-Text-of-Regulation.pdf; Complete Property and Casualty Rate Application REG-2019-00025 (Feb. 9, 2024)

[123] *See* Mark Schoeff, *Lara Struggles to Reform California Insurance Market*, INS. BUS. MAG. (March 25, 2024), https://www.insurancebusinessmag.com/us/news/environmental/lara-struggles-to-reform-california-insurance-market-482596.aspx (quoting Jeffrey L. Brewer, spokesperson for the American Property Casualty Insurance Association: "the proposed regulations will cause further delays by adding more bureaucracy, red tape, uncertainty and open-ended requirements to an already complex process… focus on real reforms that will truly start to fix our broken market, like speeding up regulatory reviews, allowing catastrophic modeling and authorizing the use of reinsurance…"); *see also* Becca Habegger, *Newsome Wants to Expedite California Insurance Reforms,* ABC (May 13, 2024), https://www.abc10.com/article/news/politics/newsom-california-insurance-reforms/103-0e999f41-be41-4999-aaf0-f6aa961acd9a

[124] *See* Ashley Zavala, *California Insurance Commissioner Hopes to Stablize Property Insurance Market by 2025*, KCRA (Dec. 13, 2023), https://www.kcra.com/article/california-insurance-commissioner-property-insurance-2025/46122984; A.G. Gancarski, *Ron DeSantis Says Insurers Will Return to Florida After Hurricane Season*, FLORIDA POLITICS (July 23, 2023), https://floridapolitics.com/archives/622955-ron-desantis-says-insurers-will-return-to-florida-after-hurricane-season/.

[125] *See* Alexa Mae Asperin, *More Insurance Companies Leaving California*, FOX L.A. (Apr. 22, 2024), https://www.foxla.com/news/california-home-insurance-companies-leaving ("The two latest companies - Tokio Marine America Insurance Co. and Trans Pacific Insurance Co. - filed notices to California's Department of Insurance saying they would stop offering homeowners insurance and umbrella policies in the Golden State,"); Matthew Sellers, *Tens of Thousands Hit as Yet Another Insurer Looks to Leave State,* INS. BUS. MAG. (Feb. 29, 2024), https://www.insurancebusinessmag.com/us/news/property/tens-of-thousands-hit-as-yet-another-insurer-looks-to-leave-state-479343.aspx (American National leaving California).

[126] Update.

Meanwhile, consumer advocacy groups have voiced concerns that California's proposed reforms could become a mere "rubber stamp" for insurer rate hikes, disproportionately harming low-income communities without effectively promoting climate change resilience.[127] These groups argue that rate increases often lead low-income homeowners to drop coverage entirely or reduce their insurance protections, leaving them even more vulnerable to the catastrophic impacts of climate change.[128] Historically marginalized communities lack the resources to recover from uninsured losses, exacerbating their exposure.[129] Additionally, advocates stress that many residents of low-income areas did not willingly assume climate risks; instead, they often remain in the neighborhoods where they were raised, with the locations of these communities frequently shaped by discriminatory practices like redlining.[130] Finally, they underscore that the economic realities faced by low-income individuals—ranging from limited job mobility and restricted schooling options for their children to deep-rooted ties to family and social networks—typically make relocation immensely difficult, if not practically impossible.[131]

C. Limited Federal Role in Homeowners Insurance Crisis

State reforms designed to address the accelerating homeowners insurance crisis have thus proven largely ineffective. But the same can be said of the federal government's limited efforts to address this issue. Before focusing on these efforts, it is first important to understand that insurance regulation has traditionally occurred at the state, rather than the federal, level. This arrangement stems principally from historical circumstances. Before 1944, Supreme Court precedent suggested that the federal government lacked authority to regulate insurance markets under the Commerce Clause.[132] When the Supreme Court overturned this precedent in 1945,[133] it triggered intense lobbying by state insurance regulators and industry, both of whom feared

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[127] *See id.*

[128] *See* Paula Jarzabkowski, Are premium price increases really a way to reduce climate risk exposure? (May 2, 2024), Climate Change and Resilience.

[129] *See* You & Kousky, supra note 80

[130] See Wing, O.E.J., Lehman, W., Bates, P.D. et al. Inequitable patterns of US flood risk in the Anthropocene. Nat. Clim. Chang. 12, 156–162 (2022); Gregory D. Squires, Insurance Redlining is Back – But we can Fight It, ShelterForce (September 5, 2024).

[131] See Jarzabkowski, supra note 128; You & Kousky, supra note 80

[132] *Paul v. State of Virginia*, 75 U.S. 168, 183 (1869), overruled by *United States v. Se. Underwriters Ass'n*, 322 U.S. 533 (1944).

[133] *United States v. Se. Underwriters Ass'n,* 322 U.S. 533 (1944).

federal oversight.[134] This lobbying culminated in the McCarran Ferguson Act, which declared that "the continued regulation and taxation by the several states of the business of insurance is in the public interest."[135] Since then, repeated efforts to federalize elements of insurance regulation outside of the health insurance setting have largely faltered, with state lawmakers and regulators, as well as industry coalitions, resisting such changes.[136] Accordingly, federal involvement in homeowners insurance has, to date, focused on filling in holes in state insurance markets through the NFIP, and gently prodding states to implement limited reforms through the Federal Insurance Office (FIO).

1. The NFIP

The National Flood Insurance Program (NFIP) is the most significant federal program impacting homeowners insurance markets.[137] As discussed above, the NFIP has historically charged excessively low rates for many homeowners in high-risk areas, resulting in massive budget deficits in years where catastrophic natural disasters hit.[138] As of 2024, the NFIP was $20 billion in debt, notwithstanding the cancellation of $16 billion of its debt in 2018.[139] These inadequate rates often benefit high-income homeowners, who tend to live in areas (like the coast) that are heavily exposed to flood risk,[140] though this effect is muted by caps on residential coverage available through the program,[141] as well as the fact that people living in flood zones tend to have lower incomes than people living outside them.[142] Notwithstanding its ongoing debt and complex distributional impacts, the NFIP is widely viewed

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[134] KENNETH J. MEIER, THE POLITICAL ECONOMY OF REGULATION: THE CASE OF INSURANCE (1988).

[135] McCarran Ferguson Act, 15 U.S.C. § 1012.

[136] *See* Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U. L. REV. 625 (1999).

[137] 42 U.S.C. §§ 4001–4131. See generally

[138] *See* Wriggins, *supra* note 86, at 361; Andrew Hammond, *On Fires, Floods, and Federalism*, 111 CAL. L. REV. 1067 (2023).

[139] *See* CONG. RSCH. SERV., NATIONAL FLOOD INSURANCE PROGRAM BORROWING AUTHORITY (2024).

[140] *See* Ben-Shahar & Logue, *supra* note 12; *see also* Lemann, *Assumption of Flood Risk*, supra note 12, at 163.

[141] These are currently set at $250,000 for residential buildings and $100,000 on contents contained within those buildings See National Flood Insurance Program, Facts and Figures (2024).

[142] See also An Affordability Framework for the National Flood Insurance Program, (April 2018), https://perma.cc/L2ZD-4SLJ

as necessary to cover homeowners against one of the most important risks associated with climate change. For that reason, Congress enacted a remarkable 31 short-term reauthorizations of the program between 2018 and 2025.[143]

Despite its continual renewal, the NFIP fails to ensure that most potential flood victims are covered.[144] The vast majority of homeowners do not purchase flood insurance.[145] This reality is driven by a combination of several factors. Only homeowners living in federally-designated flood plains are required to maintain flood insurance as a condition of a mortgage from a federally regulated lender.[146] The vast majority of homeowners do not fall into this category, and are often unaware that homeowners policies exclude flood damage.[147] Many consumers also tend to underestimate their exposure to flood risk due to optimism bias.[148] Still other consumers forego natural flood coverage because they believe they will receive government aid after such a disaster[149] or that coverage is overpriced due to the NFIP's outdated and non-actuarial rating practices.[150] Finally, many low or moderate income consumers simply cannot afford this coverage.[151]

In response to these problems, federal officials have considered and even

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[143] *See* CONGRESSIONAL RESEARCH SERVICE, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP) UPDATED OCTOBER 7, 2024, HTTPS://CRSREPORTS.CONGRESS.GOV/PRODUCT/PDF/R/R44593;

[144] *See generally* Christine A. Klein, *The National Flood Insurance Program at Fifty: How the Fifth Amendment Takings Doctrine Skews Federal Flood Policy*, 31 Geo. Envtl. L. Rev. 285, 287 (2019) ("Despite its lofty goals, the NFIP has failed miserably: It was more than twenty billion dollars in debt to the federal treasury as it turned fifty").

[145] Adam F. Scales, (2007) A Nation of Policyholders: Governmental and Market Failure in Flood Insurance, 26 MISS. COLL. L. REV. 3 (2007); INSURANCE INFORMATION INSTITUTE, PULSE SURVEY (2017).

[146] See Scales, supra note 145.

[147] *See, e.g.*, Trusted Choice, Survey: Most Homeowners Believe Their Policy Covers Flood, June 20, 2024; Michelle Boardman, *Insuring Understanding: The Tested Language Defense*, 95 IOWA L. REV. 1075, 1091 (2010) [hereinafter Boardman].

[148] *See* H. Kunreuther & M. Pauly, *Neglecting Disaster: Why Don't People Insure Against Large Losses?*, 20 J. RISK AND UNCERTAINTY 5, 6 (2006); Howard Kunreuther, *Improving the National Flood Insurance Program*, 5 BEHAVIOURAL PUB. POL'Y 318, 321-22 (2021).

[149] *See* Meri Davlasheridze & Qing Miao, *Does Governmental Assistance Affect Private Decisions to Insure? An Empirical Analysis of Flood Insurance Purchases*, 95 LAND ECON. 124, 139-40 (2019); Carolyn Kousky et al., *Does Federal Disaster Assistance Crowd out Flood Insurance?*, 87 J. ENV'T ECON. & MGMT. 150, 162 (2018).

[150] KOUSKY, *supra* note 1.

[151] *See* Mark J. Browne & Robert E. Hoyt, *The Demand for Flood Insurance: Empirical Evidence*, 20 J. RISK & UNCERTAINTY 291, 294 (2000); Carolyn Kousky & Howard Kunreuther, *Addressing Affordability in the National Flood Insurance Program*, 1 J. EXTREME EVENTS 1, 2, 5-8 (2014).

adopted numerous reforms to the NFIP.[152] The latest NFIP reforms, adopted by FEMA in 2022, introduced a new pricing methodology known as Risk Rating 2.0, which adds several risk-based factors to FEMA's pricing of coverage, including a property's distance from a water source, exposure to a wider range of flood types, and projected costs of rebuilding.[153] Views on the impact of these reforms are mixed.[154] However, most acknowledge that their ultimate capacity to drive climate change resilience is limited by the low take-up of flood insurance protection. Meanwhile, consumer advocates emphasize that these reforms may ultimately harm low-income individuals, who cannot shoulder rate increases and will consequently be forced to drop coverage altogether or be forced out of the communities on which they rely.[155]

2. *Treasury/FIO*

The Federal Insurance Office (FIO), established by the Dodd-Frank Act in 2010, also plays a notable role in the homeowners insurance market.[156] Though not a regulator, FIO monitors all aspects of the insurance industry, focusing on regulatory gaps that could trigger a systemic crisis in the broader financial system.[157] In recent years, FIO has used this mandate to focus attention on climate risk.[158]

One key component of FIO's climate-related efforts has involved

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[152] The most significant reform of the program in recent decades was implemented the Biggert-Waters Flood Insurance Reform Act of 2012, whiach aimed to significantly reduce subsidized flood insurance. But the Act quickly produced massive political backlash, resulting in its partial repeal in 2014. See Diane Horn & Baird Webel, Private Flood Insurance and the National Flood Insurance Program, Congressional Research Service Report (2019).

[153] *See* FEMA, NFIP'S PRICING APPROACH, (Apr. 1, 2023), https://www.fema.gov/flood-insurance/risk-rating; CONG. RSCH. SERV., NATIONAL FLOOD INSURANCE PROGRAM RISK RATING 2.0: FREQUENTLY ASKED QUESTIONS (May 28, 2024).

[154] *See* Francesc Ortega & Ivan Petkov, *To Improve is to Change? The Effects of Risk Rating 2.0 on Flood Insurance Demand, IZA*, INST. OF LAB. ECON., (2024); *See* Lars T. de Ruig et al., *How the USA can Benefit from Risk-Based Premiums Combined with Flood Protection*, 12 NATURE CLIMATE CHANGE 995, (2022).

[155] See Moira Birss Zac J. Taylor, Home Insurance Should Be for Safety, Not Profits, at https://jacobin.com/2024/11/home-insurance-climate-diaster-policy

[156] *See* Elizabeth F. Brown, *Will the Federal Insurance Office Improve Insurance Regulation?*, 81 U. CIN. L. REV. 551, 563 (2012); David Zaring, *The Federal Deregulation of Insurance*, 97 TEX. L. REV. 125, 128 (2018).

[157] 31 U.S.C. § 313.

[158] *See* FIO, INSURANCE SUPERVISION AND REGULATION OF CLIMATE-RELATED RISKS (June 2023) (concluding that while there are "nascent and important efforts to incorporate climate-related risks into state insurance regulation and supervision, "these efforts are fragmented across states and limited in several critical ways.").

encouraging state insurance regulators to collect more granular and consistent data on the availability and affordability of homeowners insurance. Although such data is critical to assess the risks that climate change poses to insurance markets, FIO concluded that state insurance regulators historically did not collect or otherwise have access to this information.[159] As a result, in 2023, FIO proposed directly collecting this data from insurers.[160] In response, state insurance regulators, acting through the National Association of Insurance Commissioners (NAIC), initiated their own data call in 2024, which aims to comprehensively evaluate the availability and affordability of homeowners insurance across the nation.[161] This sequence—federal pressure followed by state action—illustrates a recurring pattern in the history of major developments in state insurance regulation.[162]

3. Legislative Reform Proposals: The Insure Act

Given the ongoing turmoil in homeowners insurance markets, legislative proposals for broader federal involvement in these markets are increasingly emerging. One of the most significant such proposals, the INSURE Act, would create a federal reinsurance program for catastrophic property losses to replace the NFIP.[163] Insurers would be eligible to participate in this

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[159] *See id.* at 57-58; FIO, Agency Information Collection Activities; Proposed Collection; Comment Request; Federal Insurance Office Climate-Related Financial Risk Data Collection, 87 Fed. Reg. 64134 (October 21, 2022). This concern echoed longstanding issues raised by consumer activists and academics. *See* Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394 (2014).

[160] *See* 2023 FIO REPORT, at 57-58; FIO, Agency Information Collection Activities; Proposed Collection; Comment Request; FIO Climate-Related Financial Risk Data Collection, 87 Fed. Reg. 64134 (October 21, 2022). To fulfill its mandate, the FIO can subpoena essential information from insurers if state regulators cannot provide the necessary data. 31 U.S.C. § 313 (e)(6). Although FIO has never actually uses this subpoena authority, it is a constant target of partisan attacks. *See, e.g.*, H.R. 5535 Insurance Data Protection Act (Apr. 17, 2024). Of course, this data call has important limits. https://www.americanprogress.org/article/transparency-and-accountability-in-insurance-next-steps-on-climate-risk-data-collection/

[161] *See States Issue Property & Casualty Market Intelligence Data Call Covering Over 80% of U.S. Market*, NAT'L ASS'N INS. COMM'R (March 8, 2024),. The data call encompasses ZIP-code-level information on premiums, policies, claims, losses, limits, deductibles, non-renewals, and coverage types, amounting to more than 70 data points.

[162] *See* Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Non-Bank Problem,* 84 U. CHI. L. REV. 1813 (2017).

[163] *See* INCORPORATING NATIONAL SUPPORT FOR UNPRECEDENTED RISKS AND EMERGENCIES (INSURE) ACT, H.R. 6944, 118TH CONG. (2024), https://schiff.house.gov/news/press-

program only if they offered coverage for risks reinsured by the Act, such as floods, earthquakes, and wildfires.[164] Furthermore, participating insurers would be required to offer "loss prevention partnerships" with policyholders, such as covering the cost of loss mitigation efforts or conditioning coverage on the implementation of such measures. [165] Reinsurance premiums would be set on an actuarially sound basis by the Treasury Department. [166] The Act also includes provisions for a pilot program for multi-year insurance policies and federal grants to states to provide financial assistance, helping consumers afford coverage. [167]

II. Obamacare-Style Cooperative Federalism in Homeowners Insurance

Today's dysfunctional homeowners insurance markets bear various similarities to pre-Obamacare health insurance markets. Although these parallels are imperfect, they illustrate that states alone should not be relied upon to regulate homeowners insurance markets, just as Obamacare recognized that the federal government must play a key role in fixing health insurance markets. Section A, below, details this argument. Section B then explores how federal efforts to fix homeowners insurance markets can leverage state expertise and infrastructure using Obamacare's cooperative federalism model. Under that model, federal law sets key rules governing private insurers' policy terms, underwriting and rating, sale of coverage, and subsidies. At the same time, state lawmakers and regulators retain the option to implement and customize many of these federal rules to their local markets and risks. Federal regulators facilitate these state efforts while retaining the authority to directly implement federal reforms in states that choose not to do so on their own.

A. A Federal Role in Regulating Homeowners insurance markets.

The case for federal involvement in regulating homeowners insurance markets in many ways mirrors the argument for federal intervention in state

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releases/icymi-schiff-introduces-bill-to-ensure-homeowners-vulnerable-communities-not-excluded-from-catastrophic-coverage#:~:text=Adam%20Schiff%20introduced%20federal%20legislation,the%20creation%20of%20federal%20reinsurance.

[164] See id.

[165] See id.

[166] See id.

[167] See id.

health insurance markets prior to the passage of Obamacare. First, state insurance markets in both settings suffered from significant availability, affordability, and reliability problems, which state reforms largely failed to resolve due to entrenched state regulatory strategies and difficulties coordinating with targeted federal programs. Second, such disruptions had significant national consequences that extended well beyond individual state borders. Finally, the underlying causes of insurance market disruptions were broad in scope, resulting in key efficiencies to tackling them, at least in part, at the national level.[168]

1. Intractable Crises in State Insurance Markets

As with current homeowners insurance markets, states functioned as the primary regulators of individual (i.e., non-group) health insurance markets before the 2010 passage of Obamacare.[169] And just like today's homeowners insurance markets,[170] these health insurance markets were highly dysfunctional. Most critically, health insurance was either unavailable or unaffordable for large segments of the population that insurers deemed excessively high-risk.[171] Further paralleling current homeowners markets, this problem worsened over time as the cost of health care grew at rates consistently outpacing inflation.[172]

States' efforts to address availability and affordability problems in their health insurance markets also parallel current reform efforts in homeowners markets. As in today's homeowners insurance setting,[173] states in the pre-ACA era experimented with measures designed to promote the availability and affordability of health insurance coverage.[174] However, just as in homeowners insurance, these interventions often focused on rejiggering outdated regulatory tools, such as rate regulation intended to limit insurers'

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[168] See generally Martin F. Grace, Economics of state versus federal regulation, in Research Handbook on the Economics of Insurance Law (Daniel Schwarcz & Peter Siegelman, Eds.) (2015).

[169] *See* Mila Kofman & Karen Pollitz, *Health Insurance Regulation by the States and the Federal Government: A Review of Current Approaches and Proposals for Change*, 24 J. INS. REGUL. 77, 78 (2006).

[170] *See supra* Part I.

[171] *See* Bernadette Fernandez et. al., CONG. RSCH. SERV., R40517, HEALTH CARE REFORM: AN INTRODUCTION (2009).

[172] Allison Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1873, 1917 (2011).

[173] *See supra* Part I.

[174] *See* Amy B. Monahan, *Health Insurance Risk Pooling and Social Solidarity: A Response to Professor David Hyman*, 14 CONN. INS. L.J. 325, 328 (2008).

ability to price coverage.[175] And, just as in current homeowners insurance markets,[176] these state efforts to regulate health insurers' rates generally worsened availability problems by causing either insurer market exit or increased underwriting restrictions.[177]

Federal interventions in pre-Obamacare health insurance markets also share some parallels with current federal involvement in homeowners insurance markets. In both settings, the federal government initially avoided direct interventions in state insurance markets because of the McCarran Ferguson Act,[178] instead creating federal programs designed to fill gaps in these markets. In homeowners insurance, this strategy led to the establishment of the NFIP,[179] while in health insurance, it resulted in federal programs like Medicare and Medicaid.[180] And as with the NFIP,[181] these supplemental federal efforts were ultimately unable to patch the underlying problems in state insurance markets. To the contrary, they often created complex coordination problems between federal programs and state insurance markets. For example, Medicaid coverage frequently did not cover many low-income individuals who lacked access to affordable coverage in private insurance markets,[182] just as many homeowners lack flood insurance notwithstanding the federal NFIP.

Of course, the problems in pre-Obamacare health insurance markets were hardly identical in scope, scale or type to those in present-day homeowners insurance markets. For instance, individual state health insurance markets had been in disrepair at the time of Obamacare's passage for longer than current homeowners insurance markets.[183] Consequently, state experimentation in health insurance markets was more robust than current

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[175] *See id.*; Mark A. Hall, *The Structure and Enforcement of Health Insurance Rating Reforms*, 37 INQUIRY 376, 377 (2000).
[176] *See supra* Part I.
[177] *See* David A. Hyman & Mark Hall, *Two Cheers for Employment-Based Health Insurance*, 2 YALE J. HEALTH POL'Y, L., & ETHICS 23, 36–38 (2001); Monahan, *supra* note 174, at 325.
[178] See generally Jonathan R. Macey, & Geoffrey P. Miller, *The Mccarran-Ferguson Act Of 1945: Reconceiving The Federal Role In Insurance Regulation*, 68 NYUL Rev. 13 (1993).
[179] *See id.*
[180] *See* CONG. RSCH. SERV., RL47881, LONG-TERM SERVICES AND SUPPORTS: HISTORY OF FEDERAL POLICY AND PROGRAMS (2023); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749, 1761–63 (2012).
[181] *See supra* Part I.
[182] David Orentlicher, *Medicaid at 50: No Longer Limited to the "Deserving" Poor?*, 15 YALE J. HEALTH POL'Y, L., & ETHICS 185, 187 (2015).
[183] Timothy S. Jost, *Our Broken Health Care System and How to Fix It: An Essay on Health Law and Policy*, 41 WAKE FOREST L. REV. 537, 555 (2006).

homeowners insurance reforms, as exemplified by the Massachusetts health reform model that inspired Obamacare.[184] Additionally, pre-Obamacare individual health insurance markets were smaller than today's homeowners markets, counterbalanced by larger, reasonably well-functioning employer-sponsored health insurance programs that the federal government subsidized.[185] Adverse selection—in which relatively high risk insureds disproportionately purchase coverage, driving up costs—was also perceived to be a more acute problem in health insurance markets than in today's homeowner insurance markets, a difference attributable largely to the differences in measuring health and property risk.[186] At the same time, health insurance is generally not subject to the risk of catastrophic correlated losses that plagues property insurance.

Despite these differences, the bottom line remains: both current homeowners insurance markets and pre-Obamacare health insurance markets faced deep and persistent problems in the availability and affordability of coverage. Multiple state reforms and supplemental federal programs largely, but not entirely, failed to address these issues effectively. And at least part of the explanation for these state failures involved states' reliance on outdated regulatory strategies and the inherent difficulties associated with coordinating the regulation of products sold on state markets with supplemental federal insurance programs.

2. The National Consequences of Dysfunctional Insurance Markets

A second important parallel between present-day homeowners insurance markets and pre-Obamacare health insurance markets is that the consequences of market dysfunction extend well beyond state borders. In the pre-Obamacare setting, broken health insurance markets had obvious national implications.[187] The difficulty of securing reliable coverage in individual health insurance markets negatively impacted labor markets, resulting in "job-lock," where individuals with reliable employer-sponsored

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[184] Richard Kirsch, *The Politics of Obamacare: Health Care, Money, and Ideology*, 81 FORDHAM L. REV. 1737, 1741 (2013).
[185] *See* Hyman & Hall, *supra* note 177, at 26; Monahan & Schwarcz, *supra* note 36, at 143.
[186] *See* Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1256–58 (2003) (discussing the importance of adverse selection to the discourse surrounding health insurance reform while providing evidence that the risk of adverse selection in fact varied significantly by context).
[187] *See* Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 252 (2004); INST. OF MED., A SHARED DESTINY: COMMUNITY EFFECTS OF UNINSURANCE (Nat'l Acads. Press 2003).

health insurance avoided jeopardizing this benefit to pursue entrepreneurial opportunities.[188] It led to the frequent accumulation of medical debt, a major contributor to federal bankruptcy filings.[189] It contributed to consistently high medical care costs by inducing excessive consumption of healthcare,[190] a trend that contributed to unsustainable federal expenditures on programs like Medicare and Medicaid.[191] And most fundamentally, it limited the ability of large segments of the population to secure necessary medical services, which many Americans considered a basic right.[192]

The wide-ranging national implications of broken state health insurance markets were crucial in generating both the political will and the policy rationale for passing Obamacare.[193] Although the McCarran-Ferguson Act endorses state regulation of insurance markets, a fundamental principle of federalism is that regulatory authority should reside, at least in part, with the level of government that best internalizes the full costs of the regulated

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[188] *See, e.g.*, Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 NEB. L. REV. 885, 900 (2011); Jonathan Gruber & Brigitte C. Madrian, *Health Insurance and Job Mobility: The Effects of Public Policy on Job-Lock*, 48 INDUS. & LAB. RELS. REV. 86, 95-100 (1994).

[189] Melissa B. Jacoby et al., *Rethinking the Debates over Health Care Financing: Evidence from the Bankruptcy Courts*, 76 N.Y.U. L. REV. 375, 377 (2001). At the time of Obamacare's passing, uninsurance was also thought to distort hospital financing and operations, causing emergency rooms that were required by federal law to provide emergency treatment to become loss centers at hospitals and to suffer from overcrowding. Subsequent evidence has suggested that this effect was not as strong as many had believed. See Sarah Miller, *The Effect of Insurance on Emergency Room Visits: An Analysis of the 2006 Massachusetts Health Reform*, 96 J. PUB. ECON. 893, 904 (2012); Ruohua Annetta Zhou et al., *The Uninsured Do Not Use the Emergency Department More—They Use Other Care Less*, 36 HEALTH AFFS. 2115, 2115 (2017). Debt collection efforts are now one of the most common types of cases in state courts. See Nora Freeman Engstrom & David Freeman Engstrom, The Making of the A2j Crisis, 75 Stan. L. Rev. Online 146, 149 (2024).

[190] *See, e.g.,* SILVER & HYMAN, *supra* note 24; Gideon Parchomovsky & Peter Siegelman, *Third Party Moral Hazard and the Problem of Insurance Externalities*, 51 J. LEGAL STUD. 93, 102 (2022).

[191] See generally Katherine Baicker, et al. *Future of Social Security, Medicare, and Medicaid: Is US Entitlement Spending Sustainable?*, 11 Risk Management & Insurance Rev. 1 (2008)..

[192] *See* Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POLS., POL'Y & L. 287, 288–90 (1993).

[193] *See* Barack Obama. *United States Health Care Reform: Progress to Date and Next Steps*, 316 JAMA 525, 526 (2016) ("Health care costs affect the economy, the federal budget, and virtually every American family's financial well-being. Health insurance enables children to excel at school, adults to work more productively, and Americans of all ages to live longer, healthier lives. When I took office, health care costs had risen rapidly for decades, and tens of millions of Americans were uninsured. Regardless of the political difficulties, I concluded comprehensive reform was necessary.").

activity.[194] The reason is straightforward: democratically accountable officials in local governments lack the right incentives to manage activities whose risks and costs extend beyond their borders.[195]

Like pre-Obamacare health insurance markets, dysfunctional state homeowners insurance markets have broad national implications. This is true even though these implications are particularly concentrated in certain frontline states like Florida and California. Although these implications differ from those raised by health insurance, their national scope justifies federal intervention in insurance markets for the same reason: problems that create significant national costs and risks will generally receive insufficient attention from individual states, which only shoulder a fraction of the negative consequences.[196]

The national implications of broken homeowners insurance markets can be split into four categories. First, unreliable homeowners insurance markets can undermine real estate markets across the country, as home lenders universally require borrowers to maintain adequate insurance on their homes.[197] This insurance protects lenders' collateral—the home itself—against physical perils that lenders lack the expertise or capacity to assess or monitor.[198] Consequently, prospective buyers cannot purchase a home without securing homeowners insurance, and current homeowners risk defaulting on their loans if they fail to maintain insurance.[199] More expensive or less available homeowners insurance can therefore decrease demand for home purchases and increase the supply of homes for sale, resulting in broad-based reductions in real estate prices. These forces can also inhibit the free flow of labor by making it harder to purchase new homes in connection with relocating.

Second, such widespread disturbances in real estate markets are significant not just because of their direct impact on consumers; they can also result in broader financial market disruptions.[200] Real estate and financial markets have long been closely linked, as evidenced by the 2008 financial

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[194] *See, e.g.*, WALLACE E. OATES, FISCAL FEDERALISM 14–16 (Harcourt 1972); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 137 (2010). *See also* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1498–1500 (1994).
[195] *See* Schwarcz & Schwarcz, *supra* note 7, at 1628–29.
[196] *See supra* Part II.A.1.
[197] *See* Nevitt & Pappas, *supra* note 1, at 1617.
[198] *See* ABRAHAM & SCHWARCZ, *supra* note 8, at 296.
[199] *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1205, 1208 (9th Cir. 2010).
[200] *See* FSOC, REPORT ON CLIMATE-RELATED FINANCIAL RISK (2021); Haedtler & Lewis, *supra* note 9. See generally Atif Mian & Amir Sufi, House of Debt: How They (and You) Caused the Great Recession, and How We Can Prevent It from Happening Again (2014).

crisis, where a broad-based downturn in real estate markets triggered a financial panic involving mortgage-backed securities.[201] The federal government ultimately spent trillions of dollars bailing out impacted firms and pumping funds into the broader economy to stem this panic.[202]

Third, broken homeowners insurance markets can also have national implications by necessitating post-disaster federal aid; the less protection individual homeowners have from private insurers after a natural disaster, the greater the federal government's need to step in and provide aid directly.[203] For instance, the federal government spent $75 billion on emergency relief after Hurricane Katrina, a figure significantly inflated by the lack of insurance coverage for many victims, primarily for flood damage.[204] Broken homeowners insurance markets also increase the potential need for federal bailouts of underfunded state residual markets.[205] This is partly because the size of residual markets balloons when private markets fail to function and partly because states rely on private insurers to cover any shortfalls in these markets' ability to pay.[206] The unavoidable political and moral imperative to provide post-disaster aid to victims of catastrophic losses is not only costly but counterproductive, as it paradoxically undermines climate risk adaptation by offering de facto unpriced insurance coverage.[207]

Finally, and perhaps most importantly, broken homeowners insurance markets significantly undermine the nation's ability to adapt to climate change, whereas well-functioning markets can have the opposite effect. Like all insurance, homeowners insurance can result in moral hazard.[208] In the property insurance setting, this can manifest in people building or developing

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[201] *See* Franklin Allen et al., *Financial Crises: Theory and Evidence*, 1 ANN. REV. FIN. ECON. 97 (2009).
[202] Schwarcz & Zaring, *supra* note 162, at 1833.
[203] *See* Christopher Flavelle, *Home Insurance Rates in America Are Wildly Distorted. Here's Why.*, N.Y. TIMES, July 8, 2024 (noting that Senator Whitehouse, chairman of the Senate Budget Committee, warned that climate change's impact on homeowners insurance rates could ultimately threaten financial stability in a way that "sounds eerily reminiscent of the run-up to the mortgage meltdown of 2008.").
[204] *See* Todd M. Richardson, *A Look Back at Hurricane Katrina*, OFF. OF POL'Y & DEV., https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-092121.html#:~:text=1%2C833%20lives%20were%20lost.,spent%20on%20the%20recovery%20effort; Howard Kunreuther & Mark Pauly, *Rules Rather than Discretion: Lessons from Hurricane Katrina*, 33 J. RISK & UNCERTAINTY 101, 102–03 (2006).
[205] See *supra* Part I.A.1.
[206] *See id.*
[207] This is sometimes referred to as the Samaritan's Dilemma. See James Buchanan, The Samaritan's dilemma, in E. S. Phelps (ed), Altruism, morality and economic theory, pp. 71-85, Sage Foundation. (1975).
[208] *See* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238–39 (1996).

in areas susceptible to climate-induced weather risks or failing to adopt affordable and effective remediation measures.[209] In theory, insurance can not only counteract such moral hazard but also generate the opposite result by inducing insureds to take precautions they might otherwise neglect.[210] However, these possibilities depend heavily on market dynamics, including how well insurance prices communicate to insureds strategies for mitigating risk.[211] And often, the insurance markets that most effectively reduce risk do so through a range of private-public partnerships.[212]

Current homeowners insurance markets fail to effectively communicate climate-related risks associated with building or owning property.[213] As discussed earlier, this shortcoming is starkly evident in the NFIP, where heavily subsidized flood insurance for high-risk properties leads to overdevelopment in climate-vulnerable areas, particularly coastal regions.[214] Importantly, though, the problem of homeowners ignoring flood risk is likely even more common for the vast majority of homeowners who do not purchase flood insurance. This is because many of the most important reasons that homeowners forego purchasing flood insurance also cause them to disregard or minimize climate-driven natural catastrophe risks when building or investing.[215] After all, why mitigate a risk that you (wrongly) believe to be covered by homeowners insurance?[216] Similarly, there is no reason to mitigate risks that homeowners believe will be covered by post-disaster government aid, or that they believe to be unlikely to occur at all.[217] These

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[209] See generally Jantsje M. Mol,, WJ Wouter Botzen, & Julia E. Blasch, Risk reduction in compulsory disaster insurance: Experimental evidence on moral hazard and financial incentives, 84 Journal of Behavioral and Experimental Economics 101500 (2020).

[210] *See* Abraham & Schwarcz, *The Limits of Regulation by Insurance, supra* note 12, at 217; Tom Baker and Anja Shortland, *The Government Behind Insurance Governance: Lessons for Ransomware*, 17 REGUL. & GOVERNANCE 1000, 1000–1001 (2023); Ben-Shahar & Logue, *Outsourcing*, *supra* note 15, at 199–202; Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1412 (2013).

[211] *See* Abraham & Schwarcz, *The Limits of Regulation by Insurance*, *supra* note 12, at 273; Ronen Avraham & Ariel Porat, *The Dark Side of Insurance*, 19 REV. L. & ECON. 13, 20–21 (2023).

[212] *See* Baker & Shortland, *supra* note 210, at 1001.

[213] *See* Flavelle, *supra* note 1.

[214] *See supra* Part I.B; see also Ben-Shahar & Logue, *supra* note 12, at 611–16.

[215] Ben-Shahar & Logue, *The Perverse Effects*, supra note 12, at 611–16; Martin F. Grace & Robert W. Klein, *The Perfect Storm: Hurricanes, Insurance, and Regulation*, 12 RISK MGMT. & INS. REV. 81, 106–07 (2009). *See also* Abraham & Schwarcz, *The Limits of Regulation by Insurance, supra* note 12, at 272-73.

[216] See Abraham & Schwarcz, Limits of Regulation by Insurance, *supra* note 12.

[217] See Katherine R.H. Wagner, *Adaptation and Adverse Selection in Markets for Natural Disaster Insurance*, 14 AM. ECON. J.: ECON. POL'Y 380, 383 (2022).

problems are not limited to flood risk; as discussed in Part I, ordinary homeowners insurance rates also communicate distorted risk signals due to state rate regulation, which often result in high-risk insureds paying premiums that do not accurately reflect their risk of loss.[218] Recent evidence suggesting that policyholders in less stringently regulated states frequently shoulder rate increased due to losses in more stringently regulated states is particularly troubling, as it indicates that states most exposed to climate risk can quietly shift this risk to more insulated states.[219]

Not only do current homeowners insurance markets fail to adequately signal risk to property owners, but they also provide surprisingly limited information to homeowners and communities about effective methods to mitigate climate-related risks. Although there are occasional reports of insurers rewarding homeowners' risk mitigation efforts, evidence suggests that such incentive programs are limited in scope relative to their potential benefits.[220] For instance, despite clear evidence of the effectiveness of certain wildfire and flood mitigation strategies[221] insurers have largely failed to incentivize such measures.[222] Two key explanations for this trend stand out: first, the overall benefits of many risk-mitigation strategies produce long-term benefits, while insurers focus only on their short-term interests

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[218] *See supra* Part I.b.

[219] See Oh et al., *supra* note 72.

[220] *See* Abraham & Schwarcz, *The Limits of Regulation by Insurance*, *supra* note 12, at 223.

[221] These measures include, in the context of wildfire, creating defensible space around homes by clearing flammable vegetation, thinning tree canopies, removing dead wood, and strategically planting fire-resistant vegetation. It also includes hardening homes with fire-resistant building materials, and developing community-wide wildfire mitigation plans that address fuel reduction and access routes. See generally WILLIS TOWERS WATSON & NATURE CONSERVANCY, WILDFIRE RESILIENCE INSURANCE: QUANTIFYING THE RISK REDUCTION OF ECOLOGICAL FORESTRY WITH INSURANCE (2021).

[222] *See* WILLIS TOWERS WATSON & NATURE CONSERVANCY, WILDFIRE RESILIENCE INSURANCE: QUANTIFYING THE RISK REDUCTION OF ECOLOGICAL FORESTRY WITH INSURANCE (2021) (finding that insurers could substantially decrease wildfire risks in California by pricing coverage based on five wildfire mitigation factors, but that the insurers have failed to take this information into account in their pricing models); Carolyn Kousky, *Insurance-Sector Tools to Combat Biodiversity Loss*, 377 SCI. 714, 714 (2022) ("Despite myriad reports and papers suggesting possible approaches for insurers to have an impact in this area, the number of pilots or programs that have actually been implemented is much smaller and is the focus of this discussion."); Olivia Wilson-Holt & Paul Steele, *Human–Wildlife Conflict and Insurance: Can Insurance Reduce the Costs of Living with Wildlife?* (Int'l Inst. Env't & Dev., Discussion Paper, 2019); MUNICH RE & NATURE CONSERVANCY, NATURE'S REMEDY: IMPROVING FLOOD RESILIENCE THROUGH COMMUNITY INSURANCE AND NATURE-BASED MITIGATION (2021); Carolyn Kousky & Sarah E. Light, *Insuring Nature*, 69 DUKE L.J. 323, 364–65 (2019).

corresponding to the policy term.[223] Second, mitigation strategies are often effective only at the community or regional level, offering minimal benefits to individual insurers who cover only a fraction of the affected population.[224] As a consequence, homeowners insurers currently fail to achieve their much-heralded potential to promote property resilience to climate change.

In sum, dysfunctions in state homeowners insurance markets have significant national consequences, ranging from threatening financial stability to undermining climate change adaptation.[225] In many ways, these national implications are just as significant as the concerns that motivated the federal government to intervene in state health insurance markets with Obamacare. And in both cases, the ultimate logic of federal intervention is that states do not have the appropriate incentives to tackle problems that pose substantial costs and risks to broader national interests.

3. The National Causes of Dysfunctional Insurance Markets

Leading up to Obamacare's passage, it was broadly understood that many of the underlying causes of broken health insurance markets were national, rather than regional, in scope.[226] Factors such as the limited supply of doctors, the perverse incentives created by fee-for-service compensation of providers, and the moral hazard generated by health insurance were not confined to individual states.[227] For these reasons, Obamacare mobilized federal resources to help state actors address national challenges.[228]

There was good reason for Obamacare to activate the federal government to help address these national causes of dysfunctional health insurance

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[223] *See* Abraham & Schwarcz, *The Limits of Regulation by Insurance*, *supra* note 12, at 257–58; Madison Condon, Market Myopia's Climate Bubble, 2022 Utah L. Rev. 63, 84 (2022).
[224] *See* Kousky & Light, *supra* note 222, at 365; Howard Kunreuther et al, Externalities in the Wildland - Urban Interface: Private Decisions, Collective Action, and Results from Wildfire Simulation Models for California, https://www.nber.org/papers/w30348
[225] See Peter Molk, The Government's Role in Climate Change Insurance, B.C. Environmental Affairs Law Review 411, 422-23 (2016) (Discussing the government's capacity to shift climate-related losses across the country and over time, while noting some of the risks of losing price discipline via government insurance).
[226] *See* Jost, *supra* note 183, at 572–73.
[227] *See id.* at 540–56. This was true even though some regions of the country had more successfully counteracted these forces than others. *But see* Zack Cooper et al., *Geographical Variation in Health Spending Across the U.S. Among Privately Insured Individuals and Enrollees in Medicaid and Medicare*, 5 JAMA NETWORK OPEN (July 20, 2022), http://jamanetwork.com/journals/jamanetworkopen/fullarticle/2794446.
[228] Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 580–82 (2011).

markets. First, there are clear efficiencies to centrally coordinating and supporting efforts to address common problems, rather than simply relying on fifty-plus different jurisdictions to independently address these issues.[229] This is particularly true when individual states have already had an opportunity to experiment with reforms, thus producing initial results from the "laboratories of democracy."[230] These efficiencies allowed federal and state actors to successfully develop and implement numerous elements of healthcare reform, such as the technology behind health insurance exchanges, the structure of consumer disclosures, and the design of new approaches for paying providers so as to incentivize better, rather than more, medical care.[231] And in some cases, such as with insurance exchanges, federal coordination and support were able to incentivize productive experimentation at the state level and to catalyze adoption of the most promising results.[232]

Second, the federal government has distinct resources and capabilities, relative to states, for addressing the root causes of national problems; it can leverage its unique capacity to borrow, to draw from leading experts across the country, and to coordinate federal and state programs so they better support each other.[233] Once more, Obamacare offers a good illustration: leading national experts in health insurance and health policy played major roles in all facets of Obamacare's implementation, joining federal agencies to assist with the effort and helping externally through advocacy and research. Multiple federal agencies, such as the Department of Health & Human Services and the Department of Labor assisted in these efforts. Meanwhile, the federal government's role as the single largest payer for healthcare services through Medicare allowed it to experiment with new approaches to

[229] *See* Dale B. Thompson, *Optimal Federalism Across Institutions: Theory and Applications from Environmental and Health Care Policies*, 40 LOY. U. CHI. L.J. 437, 445, 481 (2009) (articulating "economies of scale" argument for federal regulation); Gluck & Huberfeld, *supra* note 30, at 1704–05; Cooter & Siedel, *supra* note 194, at 117.
[230] *See* Kristen H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 182–83 (articulating "laboratories of democracy" rationale for federalism); Gluck & Huberfeld, *supra* note 30, at 1701 (highlighting state experimentation before the ACA); *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
[231] *See* Abbe R. Gluck & Nicole Huberfeld, *Health Care Federalism and Next Steps in Health Reform*, 46 J.L. MED. & ETHICS 841, 843 (2018).
[232] *See* Gluck & Huberfeld, *supra* note 30 (suggesting that federal statutes like the ACA can "jump-start" experimentation in the states); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 579 ("The [ACA] also grants states significant flexibility and freedom to experiment.").
[233] *See* Gluck & Huberfeld, *supra* note 30, at 1700.

paying for care that ultimately were embraced by many private insurers and providers.[234]

Again, there are strong parallels to the current homeowners insurance crisis, which is driven largely by national and global, rather than local or regional, realities. The root cause of the homeowners insurance crisis is climate change, a global phenomenon caused by worldwide emissions.[235] As with health insurance, this is true even though geographic differences result in some states experiencing more significant impacts of climate change than others and post-disaster damage and mitigation efforts need to be adapted to local conditions. For these reasons, involving the federal government in developing solutions to homeowners insurance market disruptions can provide key benefits that simply are not reasonably available to states acting alone.

Consider two illustrations of this basic point. First, a federal regulator would be better positioned than state agencies to develop and leverage expertise in climate catastrophe risk modeling, which is relevant to a broad range of insurance regulatory issues.[236] Climate change disrupts insurance markets by complicating insurers' ability to predict future weather events based on historical trends. Because climate change is a global problem, efforts to solve this forecasting issue are also global in scope. A complex web of companies, academics, and government actors across the world are working to produce, update, and continuously reevaluate models for forecasting property damage that may result as the climate continues to change.[237] Just as federal agencies like HHS were able to leverage national health policy expertise in implementing Obamacare, so too would a federal agency be better situated than state agencies to build on this expertise to improve the operation and regulation of homeowners insurance markets.[238]

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[234] *See* NICOLE HUBERFELD, ELIZABETH WEEKS LEONARD, KEVIN OUTTERSON, & MATTHEW LAWRENCE, THE LAW OF AMERICAN HEALTH CARE 83-96 (3d ed. 2023).

[235] See Steele, supra note 7

[236] To take just a few examples, appropriate modeling of climate risk is relevant to how insurers set reserves on their balance sheets, how they price products, and how they purchase reinsurance.

[237] *See* Condon, *supra* note 3, at 157.

[238] Federal regulators might, for instance, facilitate the development of a public and transparent national catastrophe model, which could be freely used by insurers while providing transparency to consumers. See Memo Council of Economic Advisers, Tools to support the management of near-term macroeconomic and financial climate risks (12/22/23). Implicitly recognizing these dynamics, state insurance regulators have developed their own national support system to help evaluate catastrophe models. Acting through the National Association of Insurance Commissioners (NAIC), state insurance regulators have established a Catastrophe Modeling Center of Excellence that is designed to provide them with technical

Reinsurance provides a second key illustration of the federal government's unique advantages relative to states in combatting climate-based disruptions to homeowners insurance markets. Reflecting the need for reinsurers to diversify their exposure to physical catastrophe risk by aggregating risks worldwide, the reinsurance market is dominated by a small number of immense global companies, like Swiss Re and Munich Re.[239] As a global phenomenon, climate change has disrupted these reinsurance markets, making coverage less available and more expensive.[240] For that reason, individual states such as California and Florida have created their own state-specific reinsurance programs for homeowners insurers, both explicitly and implicitly through residual market mechanisms.[241] But the global nature of reinsurance markets and climate change-driven disruptions make these state-based reinsurance programs inherently problematic. Individual states cannot diversify risk outside of their borders, and they face barriers to borrowing money due to state constitutional prohibitions on running deficits.[242]

By contrast, the federal government is uniquely well situated to coordinate a reinsurance program for homeowners insurers. Unlike any state, the federal government can diversify catastrophe risk due to its size; while any given year could see widespread damage from hurricanes in Florida, wildfires in California, and tornados in Iowa, the likelihood of all three occurring at historically anomalous rates in a single year is quite low, even in an era of climate change.[243] Second, unlike individual states, the federal

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expertise, tools, and information to effectively regulate their markets. *Catastrophe Modeling Center of Excellence*, NAIC (2024), https://content.naic.org/research/catastrophe-modeling-center-of-excellence. But as with many similar efforts to provide individualized states with centralized support through the NAIC, this solution is, at best, incomplete. NAIC staff members are private employees who ultimately act at the direction of state regulators. See Daniel Schwarcz, *Is U.S. Insurance Regulation Unconstitutional?*, 25 CONN. INS. L.J. 197 (2018). Although NAIC staff members can provide important technical assistance to individual states when that assistance is requested, they generally cannot drive reform or compel states to coordinate. *See id.*

[239] See Peter Molk, Barriers to Insurance Contract Innovation (Draft, on file with author)

[240] See Benjamin J. Keys & Philip Mulder, Property Insurance and Disaster Risk: New Evidence from Mortgage Escrow Data, NBER Working Paper No. w32579 (2024).

[241] See Part I.B., *supra*.

[242] See Shaw, Robert Ward. "The States, Balanced Budgets, and Fundamental Shifts in Federalism." NCL Rev. 82 (2003): 1195

[243] Schwarcz, Steven L. "Insuring the 'Uninsurable': catastrophe bonds, pandemics, and risk securitization." Wash. UL Rev. 99 (2021): 853; Faure V. Bruggeman et al., The Government as Reinsurer of Catastrophe Risks?, 35 GENEVA PAPERS ON RISK & INS. (ISSUES AND PRAC.) 369, 370 (2010).

government has a unique capacity to borrow cheaply.[244] This borrowing capacity is essential for providing reinsurance, because one of the major difficulties involved with reinsuring catastrophe risk involves the costs associated with maintaining the ability to pay large claims, especially if they happen to occur before a significant amount of premiums have been collected.[245]

B. Modeling Reform on Obamacare's Cooperative Federalism

Part A argues that the federal government should play a pivotal role in addressing the accelerating homeowners insurance crisis given its national causes and implications. Yet the state-based framework of insurance regulation has distinct merits. For instance, state insurance regulators bring deep expertise to the table.[246] State insurance markets also differ widely across regions—a reality that climate change only intensifies.[247] Furthermore, state-level experimentation with market reforms continues to provide valuable information; indeed, evidence is still emerging about the impacts of recent homeowners insurance reforms in states such as California, Florida, and Louisiana.[248] Finally, the specific risks posed by climate change are eminently local, turning on issues like land use, zoning, and property development.[249]

These key virtues of state insurance regulation also applied to health insurance before Obamacare. Consistent with the McCarran-Ferguson Act, states functioned as the predominant regulators of individual health insurance

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[244] See Cummins, J. David. "Reinsurance for Natural and Man-Made Catastrophes in the United States: Current State of the Market and Regulatory Reforms." Risk Management and Insurance Review 10.2 (2007): 179-220; Ho, Christina S. "With Liberty and Reinsurance for All: The Deep Case for a Government Backstop in Health Care." Denv. L. Rev. 100 (2022): 39.

[245] *See* Dwight M. Jaffee & Thomas Russell, *Catastrophe Insurance, Capital Markets, and Uninsurable Risks*, 64 J. RISK & INS. 205, 207 (1997).

[246] *See* FED. INS. OFF., HOW TO MODERNIZE AND IMPROVE THE SYSTEM OF INSURANCE REGULATION IN THE UNITED STATES (2013). State regulators and lawmakers have managed this responsibility on their own since the origins of these markets, developing elaborate systems for coordinating every element of insurance regulation, including solvency regulation, market-conduct regulation, form regulation, and rate regulation.

[247] Alejandro Drexler & Richard Rosen, *Exposure to Catastrophe Risk and Use of Reinsurance: An Empirical Evaluation for the U.S.*, 47 GENEVA PAPERS ON RISK & INS.: ISSUES & PRAC. 103, 116–22 (2022); Born & Klein, *supra* note 91, at 6–10.

[248] *See supra* Part I.

[249] See Fox, Sarah. "Localizing Environmental Federalism." UC Davis L. Rev. 54 (2020): 133.

markets since their inception in the mid-20th century.[250] Moreover, healthcare delivery and costs have long varied significantly across regions,[251] a disparity amplified in the pre-Obamacare years by state differences in Medicaid structures.[252] Finally, ongoing state-level variation in health insurance regulation retained certain advantages, especially amidst debates over alternative models like single-payer systems.[253]

Obamacare navigated these competing considerations by adopting a cooperative federalism model in which state and federal actors collaborated to reform health insurance markets.[254] First, Obamacare established key principles for selling, underwriting, pricing, and subsidizing health insurance, while allowing states to implement and customize such rules to suit their local markets. This strategy was particularly evident in the statute's approach to insurance exchanges: each state could create its own exchange, with federal regulators stepping in only if a state declined to do so.[255] Over time, however, Obamacare's reliance on states to customize and implement many of its key provisions expanded in response to legal, logistical, and political challenges, as evident with respect to its rules governing the content of health insurance policies and Medicaid.[256] A second key cooperative federalism strategy of the ACA involved allowing states to apply for waivers of many of its key provisions.[257] To date, 20 states have received such waivers.[258] A third strategy was incorporation by reference of NAIC models or other state

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[250] *See* KENNETH ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 112-115 (2008).
[251] *See generally Dartmouth Atlas Project*, DARTMOUTH INST. HEALTH POL'Y & CLINICAL PRAC. (2024), https://www.dartmouthatlas.org; Jonathan Skinner, *Causes and Consequences of Regional Variations in Health Care*, *in* 2 HANDBOOK OF HEALTH ECONOMICS 45–93 (2011); John E. Wennberg, *Unwarranted Variations in Healthcare Delivery: Implications for Academic Medical Centres*, 325 BMJ 961 (2002); Tom Rosenthal, *Geographic Variation in Health Care*, 63 ANN. REV. MED. 493 (2012).
[252] *See* Gluck, *supra* note 180, at 1761–63.
[253] *See* Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. PA. L. REV. 389, 397–99 (2020).
[254] *See* Gluck & Huberfeld, *supra* note 30, at 1693–94.
[255] 42 U.S.C. § 18031(b)(1).
[256] *See* Gluck & Huberfeld, *supra* note 30, at 1734–46; Monahan, *Regulatory Failure*, *supra* note 33, at 540–42; Mark A. Hall, *States' Decisions Not to Expand Medicaid*, 92 N.C. L. REV. 1459, 1459–62 (2013). *See also NFIB v. Sebelius*, 567 US 519 (2012).
[257] 42 U.S.C. § 18052. To receive such a waiver, a state must convince federal regulators that their plan would better serve its population than the ACA provisions being waived.
[258] Although these waivers were only permitted starting in 2017, 20 states have received them to date, and 18 states continue to operate under such waivers. See CTRS. MEDICARE & MEDICAID SERVS., DATA BRIEF ON STATE INNOVATION WAIVERS: SECTION 1332 WAIVERS (2024).

standards, as with external review.[259] Finally, Obamacare structured many of its key provisions as regulatory floors, allowing states to implement more stringent rules if they so desired. Thus, the statute's provisions governing issues like rate regulation, mandated benefits, and reinsurance allow states to experiment with more expansive regulation if they choose to do so.

An Obamacare-inspired approach to fixing the regulation of homeowners insurance markets can and should employ many similar cooperative federalism strategies. As described in detail in Part III, this approach would see the federal government set key rules governing the content, underwriting, rating, sale, and subsidization of homeowners policies. As with Obamacare, however, it also would encourage individual states to customize elements of this framework, including the mandated coverage floor and the design of centralized insurance marketplaces, to reflect their particular risk profile and insurance markets. Similarly, this approach could replicate almost verbatim Obamacare's provision governing state waivers. And at least in some settings (such as with the terms of coverage), it could operate as a floor rather than a ceiling, allowing states to retain or impose new consumer protections that go beyond the federally mandated baseline. By contrast, as described more fully in Part III, more complete preemption of state law is likely to be both appropriate and necessary in domains like the regulation of rates. It is to these issues that we now turn.

III. Obamacare-Style Substantive Reforms for Homeowners Insurance

Obamacare comprehensively reformed dysfunctional state health insurance markets, yielding reasonably effective and durable results. However, many of the basic problems with pre-Obamacare health insurance markets are common to stressed insurance markets generally. For this reason, Obamacare's basic approach to remaking state health insurance markets can serve as a compelling initial template for reforming state homeowners insurance markets in a time of climate change.

This is true even though the details of this template must of course be adapted to reflect important differences between health and homeowners insurance markets generally, and the particular problems facing these markets today and prior to Obamacare. Perhaps most notably, employer provided group health insurance and Medicare/Medicaid have long played a massive role in health insurance markets, meaning that the magnitude of dysfunctional private individual markets was much smaller in the pre-Obamacare setting

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[259] *See* Timothy S. Jost, *Reflections on the National Association of Insurance Commissioners and the Implementation of the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 2043, 2059 (2011).

than in today's homeowners context. These differences in scale raise substantial complications for subsidizing homeowners insurance markets at levels comparable to Obamacare.[260] There are also, of course, significant differences in the factors driving insurance unaffordability between health insurance and homeowners insurance, as well as in the degree of state-level variation in insurance market dysfunction.

Despite these important differences, this Part advances an Obamacare-inspired model for homeowners insurance reform by focusing on four broad reform areas: terms of coverage, pricing and underwriting of risk, marketing and distribution of policies, and state subsidization. In each area, this Part first discusses the key challenges facing current homeowners insurance markets in a time of climate change, and then shows how these challenges mirror those that faced pre-Obamacare health insurance markets. Next, it shows how Obamacare addressed the underlying market problems and how these strategies could be adapted to reform homeowners insurance markets in a time of climate change. Due to the breadth of markets and rules involved, the analysis focuses on highlighting key points rather than addressing all details, objections, and complications.

A final prefatory note: The substantive reforms outlined in this Part could largely be implemented by an individual state, rather than requiring national reform like Obamacare. While Part II contends that federal actors are structurally better positioned than state actors to address homeowners insurance market reform, insurance market reforms often originate at the state level before expanding nationally. Indeed, Obamacare itself followed this trajectory, beginning as health care reform in Massachusetts and later becoming a national model after the Massachusetts experiment proved largely successful.

A. Terms of Insurance Coverage

1. Limited Homeowners Coverage for Catastrophic Climate Risks

As discussed earlier, homeowners insurance policies fail to cover many of the most critical property risks associated with climate change.[261] This reality is starkly illustrated by the universal exclusion of flood risk from coverage,[262] as well as the fact that remarkably few homeowners purchase

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261 *See generally*, Jay M. Feinman, *What Is a Protection Gap? Homeowners Insurance as a Case Study*, 27 CONN. INS. L.J. 82 (2020).

262 *See* Adam F. Scales, *A Nation of Policyholders: Governmental and Market Failure in*

supplemental flood insurance due to a wide variety of market failures, including faulty information, expectations of ex post government assistance, and limited financial resources.[263] Increasingly, many insurers also restrict coverage for other climate-related natural disaster risks, including wildfires, hail, wind, and non-flood water damage.[264] These exclusions primarily aim to limit insurers' exposure to large, correlated losses that could exceed their financial capacity to pay.[265] Although these coverage exclusions serve essential purposes for insurers, they leave homeowners generally—and low- and moderate income homeowners particularly—vulnerable to potentially catastrophic property risks from climate change.

Widespread underinsurance against climate-driven natural disaster risks has far-reaching public policy implications that extend beyond individual homeowners. As indicated earlier, under-insurance can have the perverse effect of causing homeowners to ignore climate risk, either because they wrongly believe they are covered for this risk or expect ex post government assistance.[266] Coverage gaps for natural catastrophes also impose substantial hidden costs on state and federal governments, as the need for post-disaster aid rises when private insurance is insufficient,[267] and governments must frequently bail out public insurance programs designed to fill gaps in private insurance markets, like the NFIP.[268] Moreover, because local government services are funded through property taxes, decreased property values from climate events and the increasing unaffordability or unavailability of insurance may have significant fiscal implications for local governments.

2. Limited Catastrophic Health Coverage in Pre-Obamacare Markets

Like current homeowners insurance policies, health insurance policies sold in state markets before Obamacare featured extensive coverage gaps that exposed insureds to catastrophic health risks. Exclusions for preexisting

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Flood Insurance, 26 MISS. COLL. L. REV. 3, 7 (2007); Alexander B. Lemann, *Assumption of Flood Risk*, 51 ARIZ. ST. L.J. 163, 172 (2019); Wriggins, *supra* note 86, at 367-373.
[263] *See supra* Part I.C.
[264] *See* KOUSKY, *supra* note 1.
[265] *See* Abraham & Schwarcz, *Underappreciated Risk, supra* note 64, at 3, 7-9.
[266] Ben-Shahar & Logue, *The Perverse Effects*, supra note 12, at 611–16; Martin F. Grace & Robert W. Klein, *The Perfect Storm: Hurricanes, Insurance, and Regulation*, 12 RISK MGMT. & INS. REV. 81, 106–07 (2009). *See also* Abraham & Schwarcz, *The Limits of Regulation by Insurance, supra* note 12, at 272-73.
[267] Howard Kunreuther & Rosemary Lyster, *The Role of Public and Private Insurance in Reducing Losses from Extreme Weather Events and Disasters*, 19 ASIA PACIFIC J. ENV'T L. 29, 36-37 (2016).
[268] *See* Wriggins, *supra* note 86, at 379-80.

conditions left individuals without coverage for health care expenses related to conditions they had before purchasing insurance.[269] Lifetime and annual coverage limits imposed quantitative restrictions on otherwise covered medically necessary care.[270] And individual health insurers varied widely in their coverage of prescription drugs, preventive care, and disease-specific treatments.[271]

As with current homeowners insurers, health insurers had legitimate reasons for restricting coverage in these ways: most importantly, doing so limited the risk of adverse selection. But these coverage exclusions left many policyholders vulnerable to the denial of medically necessary care following a catastrophic medical event or diagnosis.[272] Like today's homeowners, informed and well-resourced purchasers could mitigate these risks by purchasing plans without annual or lifetime limits or maintaining uninterrupted coverage. However, much like with homeowners insurance, these theoretical solutions rarely materialized in practice due to common insurance market failures: purchasers had an incomplete understanding of coverage gaps, unwarranted confidence in their health, insufficient financial resources to purchase coverage, and an expectation of government or charitable aid should they become severely ill.[273]

These gaps in health insurance had public policy implications that extended far beyond affected individuals, just as with homeowners insurance markets. Many insureds resorted to bankruptcy after catastrophic health events, burdening federal judicial resources and creditors across the economy.[274] Insurers' refusal to cover care often shifted costs to other healthcare payers, including Medicare and Medicaid.[275] And the unreliability of coverage in individual markets contributed to job-lock, causing many to forgo entrepreneurial ventures to maintain comparatively reliable employer-

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[269] *See* Mary Crossley, *Discrimination Against the Unhealthy in Health Insurance*, 54 U. KAN. L. REV. 73, 76 (2005).
[270] *Id*. at 115.
[271] Office of the Assistant Secretary for Planning and Evaluation, *Essential Health Benefits: Individual Market Coverage*, U.S. Department of Health and Human Services (Dec. 16, 2011) https://aspe.hhs.gov/basic-report/essential-health-benefits-individual-market-coverage.
[272] *See* Crossley, *supra* note 269, at 152-53.
[273] *See generally* Russell Korobkin, *Efficiency of Managed Care Patient Protection Laws: Incomplete Contracts, Bounded Rationality, and Market Failure*, 85 CORNELL L. REV. 1 (1999).
[274] *See* Tal Gross & Matthew J. Notowidigdo, *Health Insurance and the Consumer Bankruptcy Decision: Evidence from Expansions of Medicaid*, 95 J. PUB. ECON. 767, 768 (2011).
[275] *See* David M. Cutler, *Cost Shifting or Cost Cutting?: The Incidence of Reductions in Medicare Payments*, 12 TAX POL'Y & ECON. 1, 19 (1998).

sponsored coverage.[276]

3. The Obamacare Solution to Coverage in Health Insurance Markets

Obamacare addressed these pervasive gaps in coverage for catastrophic health events by requiring that all health insurance policies offered in the individual market provide a minimum baseline of coverage. It accomplished this in part by prohibiting insurers from using common exclusions, like preexisting condition exclusions and annual or lifetime limits.[277] Additionally, Obamacare mandated that health insurers cover a comprehensive suite of "essential health benefits" (EHBs), including hospitalization, outpatient care, ambulatory care, maternity care, prescription drug coverage, and preventive care.[278] It required these EHBs to be comparable in scope to the benefits provided by "a typical employer plan."[279]

Although the ACA initially contemplated that the Department of Health and Human Services (HHS), a federal agency, would further define the content of EHBs, HHS ultimately delegated this responsibility to states. Under this approach, state insurance regulators select a "benchmark" plan recently offered in the state, with EHBs linked to that plan, subject to certain adjustments.[280] Additionally, the ACA specifically allowed states to impose coverage mandates beyond those contained in the statute, though states must defray the additional subsidy-related costs of such additional benefits.[281]

To ensure that these coverage mandates did not drive insurers from the marketplace or unreasonably inflate prices, the ACA directly addressed the underlying market concern that had previously motivated insurers to restrict coverage: adverse selection.[282] First, the ACA adopted various provisions to prevent adverse selection. These included providing policyholder subsidies for coverage, imposing a tax penalty on those who failed to maintain coverage (now zeroed out), limiting purchase outside of open-enrollment periods, and allowing insurers to discriminate based on policyholder age and smoking history. Second, the ACA implemented several reforms designed to shield insurers from any adverse selection that occurred notwithstanding the

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[276] *See* Rebecca Lewin & Job Lock, *Will HIPAA Solve the Job Mobility Problem?*, 2 U. PA. J. LAB. & EMP. L. 507, 518 (2000).
[277] See Daniel Béland et al., *Obamacare and the Politics of Universal Health Insurance Coverage in the United States*, 50 Soc. Pol'y & Admin. 428, 432 (2016).
[278] 42 U.S.C. § 18022.
[279] *See id*.
[280] 45 CFR §§ 156.100-120.
[281] 42 USC 18031(d)(3)(B)(i)-(ii).
[282] *See* Siegelman, *supra* note 186, at 1239; See generally Liran Einav & Amy Finkelstein, We've Got You Covered: Rebooting American Health Care (2023).

above safeguards. These principally took the form of reinsurance and risk adjustment mechanisms that protected insurers from the costs of covering unusually high-risk individuals.[283]

Obamacare's coverage rules have substantially improved individual health insurance markets for consumers while addressing broader policy goals. Although insurance purchased on state insurance exchanges is still not as generous as most employer-sponsored coverage, it does reliably protect insured from virtually all catastrophic health events.[284] It also provides a consistent and well-publicized set of benefits, such as preventive care and prescription drugs.[285] These coverage rules have decreased bankruptcy filings by those with health insurance and limited cost-shifting to other parts of the healthcare system.[286]

4. Adapting the Obamacare Solution to Homeowners Insurance Markets

Because the coverage gaps in homeowners insurance policies mirror pre-Obamacare gaps in health insurance, Obamacare's basic solution to this problem holds great promise for homeowners insurance. This approach would involve a federal or state mandate that homeowners insurance policies protect against high-profile catastrophic risks and meet a comprehensive minimum baseline of coverage. If that mandate were federally enacted pursuant to a cooperative federalism model, it could allow individual states to customize elements of this baseline based on their circumstances and preferences, similar to Obamacare. Additionally, Obamacare-based reforms of homeowners insurance would aim to directly address the underlying market dynamics that initially drove insurers to restrict coverage for catastrophic natural disasters like flood: whereas this supply-side problem consisted of adverse selection for health insurance, it involves the risk of correlated losses for homeowners insurers.

Of course, the details of any homeowners insurance market reforms would differ from those in Obamacare. To illustrate, while quantitative coverage limits make little sense for health insurance consumers, such limits are sensible in property insurance due to the clear and ascertainable monetary

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[283] Two of these were temporary reinsurance programs designed to ensure short-term market stability, whereas a third was an indefinite risk assessment mechanism designed to limit the negative and positive results to insurers of covering an atypical pool of policyholders.

[284] Barack Obama, *United States Health Care Reform: Progress to Date and Next Steps*, 316 JAMA 525 (2016).

[285] *See* id.

[286] Philip M. Pendergast et al., *Health Insurance and Bankruptcy Risk: Examining the Impact of the Affordable Care Act*, 86 BROOK. L. REV. 975, 994-95 (2021).

limit on the damage that can occur to covered property.[287] But adapting the Obamacare solution—consisting of legally mandated coverage floors and prohibited exclusions, with rules designed to offset the insurance-market dynamics that initially causes insurers to limit coverage—to property insurance can be accomplished by combining several reforms developed extensively elsewhere.

For instance, one component of Obamacare-inspired reforms to the content of homeowners insurance might require all such policies to cover flood loss.[288] Like the ACA's prohibitions on preexisting condition exclusions and quantitative coverage limits, a ban on flood exclusions would provide homeowners with protection against a significant catastrophic risk that a majority of insureds already believe they have.[289] Even more than in Obamacare, these benefits of mandated coverage would extend beyond individual homeowners. Most importantly, a flood coverage mandate would ensure that homeowners insurance prices more accurately reflect the climate-related risks associated with purchasing and building dwellings.[290] Over time, this would encourage less building in flood-prone areas and the adoption of more effective precautions when doing so.[291] Additionally, a flood insurance mandate would prevent homeowners insurers from shifting flood losses to the government through emergency disaster assistance or the NFIP, just as Obamacare's coverage mandates limited private insurers' ability to shift costs to Medicare, Medicaid, or publicly funded hospitals by refusing to insure high-risk individuals.[292]

As with Obamacare, a flood insurance mandate would need to be paired with direct government efforts to address the underlying market problem that caused insurers to exclude this coverage in the first place. Here, that problem is not adverse selection, as most homeowners are already practically required

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[287] Moreover, there is little sense in requiring that homeowners policies cover long-excluded catastrophic risks having little to do with climate change, such as nuclear hazards and earthquakes, given the climate-change driven nature of insurance market problems and disruptions.

[288] The idea of bundling flood and other natural peril insurance with homeowners insurance is a staple of many other reform proposals. *See, e.g.*,. French, supra note 1, a 821; Klein, supra note 1, a 711-714; Howard Kunreuther, *All-hazards Homeowners Insurance: Challenges and Opportunities*, 21 RISK MGMT. & INS. REV. 141, 144 (2018).

[289] *See* Donald T, Hornstein, *The Balkanization of Cat Property Insurance: Financing and Fragmentation in Storm Risks*, 11 RUTGERS J.L. & PUB. POL'Y 9, 15 (2013). See also Jeffrey W. Stempel, Rediscovering the Sawyer Solution: Bundling Risk for Protection and Profit, 11 Rutgers J.L. & Pub. Pol'y 170, 182-87 (2013) (discussing the benefits of bindling coverage for multiple different risks in a single policy).

[290] *See* Kunreuther, *supra* note 290, at 146-47.

[291] *Id*. at 149.

[292] *Id*. at 152.

to purchase homeowners insurance as a condition of their mortgages.[293] Instead, the underlying problem is correlated risk exposure.[294] Although insurers can partially mitigate this risk by purchasing reinsurance or utilizing alternative risk-transfer mechanisms, the availability of such coverage is far from certain due to significant capacity constraints in these markets. Consequently, transforming the NFIP into a federal reinsurance program for catastrophic flood risk—as some proposals to mandate flood insurance coverage within homeowners policies suggest—could effectively address this challenge.

Crucially, such a federal reinsurance scheme would need to charge insurers actuarially fair prices that reflected the actual flood risk associated with their books of business.[295] Otherwise, insurers' pricing of primary policies would fail to accurately reflect risk, and insureds in comparatively risky regions of the country (like Florida and California) would end up being subsidized by homeowners living in comparatively less risky states. The political economy of such a system is admittedly difficult, as illustrated by the NFIP's distorted pricing of coverage.[296] At the same time, actuarially fair pricing of reinsurance is likely to be much more politically feasible than actuarially fair pricing of direct flood risk, given that insurers, rather than individuals, would be directly paying these premiums. Moreover, a federal reinsurance scheme could plausibly promote actuarially fair pricing by linking rates to market-based indicators, such as catastrophe bonds, parametric insurance policies, or private reinsurance premiums. For instance, federal reinsurance of flood risk might cover 80% of the risk, and transfer 20% of this risk to private reinsurance markets. Federal reinsurance premiums could then be based on the private costs of this coverage.[297] Public-private partnerships of this kind are not merely theoretical; the NFIP itself has purchased private reinsurance in recent years, demonstrating the feasibility of such collaborative risk-sharing models.[298]

The concept of requiring homeowners insurance to include flood coverage is not new, nor are its well-known drawbacks, which cannot be fully explored here. The most significant challenge is that this mandate would inevitably increase coverage costs for many homeowners. While the earlier

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[293] *Compare* Siegelman, *supra* note 186, at 1223-24.
[294] *See generally* Abraham & Schwarcz, *The Limits of Regulation by Insurance, supra* note 12, at 217.
[295] Indeed, such a scheme is akin to that contained within the recently proposed INSURE Act. See Part I.,C.,3, *supra*.
[296] See Part I.,C.,2, *supra*.
[297] Thanks to Jospeh Sommer for this suggestion.
[298] https://www.fema.gov/flood-insurance/work-with-nfip/reinsurance

discussion highlights this cost increase as a potential benefit—encouraging adaptation to climate risks by making those risks more explicit—it also presents clear disadvantages. Most notably, higher premiums could impose financial strain on low- and moderate-income homeowners. However, similar to how Obamacare paired cost-increasing reforms with measures to offset those costs, a comparable approach could be applied here. Specifically, the added expense of mandatory flood coverage could be partially or fully mitigated through increased market competition via insurance exchanges and progressive subsidies for low-income homeowners. Both of these strategies are discussed in greater detail below.

A second potential Obamacare-inspired reform to the scope of homeowners insurance would require all homeowners insurance policies to provide coverage at least as generous as the presumptive industry standard policy, known as the ISO HO3 policy.[299] This would ensure a standardized coverage floor for non-flood perils tied to climate risk, including wildfire, hail, wind, and non-flood water losses. Like Obamacare's requirement that health insurance policies cover EHBs, this proposal aims to guarantee homeowners a comprehensive set of protections against catastrophic risks beyond flooding. Just as importantly as these guaranteed protections against catastrophic risks, a standardized coverage floor for homeowners insurance would facilitate insurance pricing that accurately signals risk, rather than allowing insurers to covertly shift risk onto policyholders using hidden and poorly understood coverage exclusions. It would also promote consumer comparison shopping by allowing consumers to compare coverages from different carriers on an apples-to-apples basis.

If enacted federally pursuant to a cooperative federalism model, states could be permitted to customize this coverage floor by selecting alternative baselines that account for state-specific mandates, risks, and preferences. For example, a state facing significant hail or wildfire risk might reasonably establish a lower minimum coverage baseline than other states to help control costs. This might be achieved by permitting insurers in that state to include enhanced deductibles for these specific perils, which are not part of the standard ISO HO3 policy. Similarly, states with existing coverage mandates that surpass the requirements of the ISO policy could adjust their baselines accordingly—much like how Obamacare allows states to impose coverage mandates beyond the federal essential health benefits. Additionally, states could have the flexibility to choose which proposed updates to the ISO HO3 homeowners policy to incorporate into their coverage floor. As with Obamacare, to the extent that these state-specific decisions impacted federal

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[299] *See* Schwarcz, *Reevaluating Standardized Insurance Policies*, *supra* note 78, at 1273-74.

subsidies (which are described later),[300] it would be sensible for states to absorb this increased or decreased cost.

B. Pricing and Underwriting of Risk

1. Broken Pricing of Homeowners Insurance Coverage

The pricing of homeowners insurance in the United States is currently broken, largely due to state regulation of insurance rates.[301] Notwithstanding the hundreds of insurers that sell homeowners insurance in the country and low entry barriers,[302] states extensively regulate homeowners insurance rates to prevent them from being "excessive."[303] This regulatory approach, akin to public utility oversight, began in the mid-20th century in response to insurers colluding on prices through the exchange of industry data and advisory rates.[304] However, such price fixing is now impossible due to significant reforms in insurers' data sharing practices implemented decades ago.[305]

Although the original rationale for preventing "excessive" homeowners insurance rates is obsolete, this regulation generates numerous market problems. As starkly illustrated by California's recent experiences, insurance rate regulation, like all price regulation, can lead to widespread shortages.[306] It can also distort the risk-signaling function of insurance, resulting in both intrastate and interstate cross-subsidization, where low-risk insureds subsidize high-risk insureds.[307] Furthermore, this regulation can cause temporal distortions in risk-based pricing, leading to price swings based on the insurance commissioner's political leanings.[308] Finally, such regulation imposes extensive compliance costs on insurers, which are partially passed on to consumers, while consuming a large percentage of state regulators'

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[300] See Part III.D., infra.
[301] *See supra* Part II.A.
[302] Grace & Klein, *supra* note 266, at 105.
[303] *See supra* Part I.
[304] Schwarcz, *Ending Public Utility Regulation*, *supra* note 40, at 958-60. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).
[305] *See id.* at 971-72. Although it is certainly true that a limited number of firms produce catastrophe models that insurers can use to project changing risk landscapes, this reality should not undermine price competition among insurers
[306] *See supra* Part I.
[307] *See supra* Part II.A.
[308] *See* SCOTT E. HARRINGTON, EFFECTS OF PRIOR APPROVAL RATE REGULATION OF AUTO INSURANCE, IN DEREGULATING PROPERTY CASUALTY INSURANCE (J. David Cummins ed., 2000).

limited resources.[309]

Ironically, states not only over-regulate homeowners insurance prices, but they also under-regulate them. Homeowners insurers routinely price and underwrite coverage using factors that disproportionately harm economically and historically disadvantaged groups and that bear no relationship to risk-reducing choices or behaviors by policyholders.[310] Examples include insurer discrimination based on policyholders' credit information, employment status, educational background, and marital status.[311] Increasingly, insurers also use broader "big data" sources to rate and underwrite coverage, a practice most states permit so long this data is predictive of losses.[312]

Such discrimination based on policyholders' socio-economic characteristics is problematic for three interrelated reasons. First, while socio-economic factors do correlate with homeowners insurance risk, they often do so for non-causal reasons.[313] As a result, this type of discrimination fails to provide policyholders with price signals that might encourage them to mitigate their risk or make safer decisions. To illustrate, charging higher premiums to homeowners with poor credit histories does nothing to reduce their risk of property losses; even if insureds improved their credit, that would not impact their likelihood of suffering a covered property loss because there is no causal relationship between credit-related information and insurance risk. Second, discrimination based on socio-economic factors can crowd out efforts by insurers to mitigate risk. Insurers can, and sometimes do, directly reduce risk, offer discounts for specific precautions, or coordinate more broad-based risk mitigation efforts. But such efforts are expensive.[314] When insurers can instead shift risks using non-causal discrimination, they have less

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[309] *See generally* J. T. Leverty & Junhao Liu, *Compliance Costs of Contract Regulation* (Working Paper, 2019).

[310] Ronen Avraham et al., *Understanding Insurance Anti-Discrimination Laws*, 87 S. CAL. L. REV. 195, 201 (2014).

[311] Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination Law*, 69 DEPAUL L. REV. 657, 660 (2020); Jennifer Wriggins, *The Color of Property and Auto Insurance: Time for Change*, 49 FLORIDA ST. U. L. REV. 203, 209, 233 (2022).

[312] *See* CATHY O'NEILL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2016). *But see* COLO. REV. STAT. ANN. § 10-3-1104.9 (restricting insurers' use of external data that is predictive of losses when such data produces other forms of unfair discrimination).

[313] Patrick L. Brockett & Linda L. Golden, *Biological and Psychobehavioral Correlates of Credit Scores and Automobile Insurance Losses: Toward an Explication of Why Credit Scoring Works*, 74 J. RISK & INS. 23, 35-36 (2007); Darcy Steeg-Morris et al., Do Credit *Based Insurance Scores Proxy for Income in Predicting Policyholder Risk?,* 14 J. EMPIRICAL LEGAL STUD. 397, 398-403 (2017).

[314] *See* Ben-Shahar &Logue, *supra* note 15, at 201-02, 214-15.

incentive to reduce risk.[315] Finally, and most obviously, discrimination based on socio-economic factors reinforces social and economic hierarchies by making homeowners insurance, and consequently home ownership, more expensive and less accessible to those facing preexisting disadvantages.[316] This is particularly notable given that home ownership is a primary vehicle for economic advancement in modern society and benefits from substantial tax subsidies.[317] and low- and moderate-income populations are disproportionately impacted by climate change.[318]

2. *Broken Pricing in Pre-Obamacare Health Insurance Markets*

Insurance pricing and underwriting were also broken in pre-Obamacare health insurance markets. Like all insurers in competitive unregulated markets, pre-Obamacare health insurers devoted extensive resources to pricing and underwriting coverage based on individual policyholders' risks.[319] However, because those with past medical problems faced significant risks of needing expensive future care, such risk-based pricing and underwriting often resulted in them being charged astronomical and unaffordable premiums for health insurance or being denied coverage entirely.[320]

As with socio-economic discrimination by homeowners insurers, health-based discrimination by health insurers may have been "actuarially fair," but it was neither socially productive nor fair by prevailing social norms.[321] Despite the causal link between past health history and future health risk, health-based discrimination by insurers did not improve health outcomes as

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[315] *See* Abraham & Schwarcz, *The Limits of Regulation by Insurance, supra* note 12, at 217, at 238.

[316] *See* Wriggins, Color of Money, *supra* note 311, at 225.

[317] See Laurie S. Goodman & Christopher Mayer, Homeownership and the American dream, 32 J Econ Perspectives 31 (2018); See, e.g., Carolyn Kousky & Karina French, Inclusive Insurance for Climate-Related Disasters: A Roadmap for the United States (2023), available through https://www.ceres.org/resources/reports/report-inclusive-insurance-climate-related-disasters.

[318] White House Council of Economic Advisors, Economic Report of the President (March 2023), Box 9-2, https://www.whitehouse.gov/wp-content/uploads/2023/03/ERP-2023.pdf..

See Laurie S. Goodman & Christopher Mayer, Homeownership and the American dr
eam, 32 J Econ Perspectives 31 (2018).

f173769902 145, at 327-28.

[321] *See* Allison Hoffman, *Three Models of Health Insurance: The Conceptual Pluralism of the Patient Protection and Affordable Care Act*, 159 U. PENN. L. REV. 1873, 1906, 1932 (2011).

most individuals have limited control over their health.[322] Additionally, the few ways individuals can improve their health, such as exercising more or eating better, are only marginally affected by the availability or cost of health insurance.[323] Consequently, health-based discrimination by insurers principally created costs that were passed on to consumers and shifted risk to individuals, governments, and other insurers. Just as with homeowners insurers, it also crowded out more socially productive but expensive efforts by health insurers to limit risk, such as coordinating care for chronic conditions or providing personalized guidance on when and how insureds could access care. Finally, such discrimination unfairly sought to hold individuals responsible for their own health histories in ways that were inconsistent with broader notions of social solidarity.[324]

Further parallelling homeowners insurance markets, state efforts to solve these problems through rate regulation consistently backfired. Many states adopted community rating laws that limited health insurers' capacity to discriminate in rating or underwriting based on individuals' health status.[325] States also implemented regulatory review of rate changes to prevent health insurers from charging "excessive" or "unfairly discriminatory" rates.[326] But with the notable exception of Massachusetts—whose reform law was a model for Obamacare—these regulatory efforts produced many of the same dysfunctions as rate regulation in homeowners insurance rates.[327] Most importantly, they routinely produced massive insurance availability problems, with many insurers refusing to issue policies to large segments of the population or else leaving state health insurance markets entirely.[328]

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[322] Nicole Huberfeld & Jessica L. Roberts, *Health Care and the Myth of Self-Reliance*, 57 B.C. L. REV. 1, 44 (2016); *see also* Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 279 (1996) (noting that insurance cannot impact risks over which insureds have no control).

[323] *See* Anderson E. Stanciole, *Health Insurance and Lifestyle Choices: Identifying Ex Ante Moral Hazard in the US Market*, 33 GENEVA PAPERS ON RISK & INS. - ISSUES & PRAC. 627, 629 (2008); Dhaval Dave & Robert Kaestner, *Health Insurance and Ex Ante Moral Hazard: Evidence from Medicare*, 9 INT'L J. HEALTH CARE FIN. & ECON. 367, 368, 385 (2009).

[324] *See* Erin C. Fuse Brown et al., *Social Solidarity in Health Care, American-Style*, 48 J.L., MED., & ETHICS 411, 417 (2020); Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL., POL'Y & L. 287, 290-92 (1993); Wendy K. Mariner, *Social Solidarity and Personal Responsibility in Health Reform*, 14 CONN. INS. L.J. 199, 205-07 (2007).

[325] Monahan, *supra* note 174, at 328-29.

[326] *See* Reed Abelson, *Health Insurers Raise Some Rates by Double Digits*, N.Y. TIMES, Jan. 5, 2013.

[327] *See* Part II.A.1, *supra*.

[328] *See* Hyman & Hall, *supra* note 177, at 32, 36-38.

3. The Obamacare Solution

Obamacare fundamentally reformed the pricing and underwriting of health insurance in state markets. Rather than prohibit specific forms of insurance discrimination, Obamacare flipped the default by banning insurers from basing their rates on any factors other than four specifically permitted ones: age, geographic rating area, individual or family enrollment, and tobacco use.[329] These permitted rating factors were designed to align with broad social understandings of fair discrimination in health insurance while allowing insurers to link premiums roughly to anticipated claims.[330] Moreover, these rules aimed to impact health outcomes by targeting a behavior that insureds could control and that could plausibly be reduced by insurance surcharges: smoking.[331] Obamacare paired these robust reforms on insurer pricing with even stricter rules on underwriting, requiring insurers to offer and renew coverage to all applicants, with limited exceptions.[332]

These rating and underwriting reforms are just as notable for what they did not include. In particular, the ACA ultimately did not prohibit "excessive" health insurance rates, nor did it establish any regulatory pre-approval process for health insurance rate changes.[333] Instead, it required merely that health insurance rate increases deemed excessive by federal regulators must be publicly posted online.[334] Obamacare did, however, allow states to continue their own rate review process for "excessive" health insurance rates.[335]

In place of rate regulation designed to suppress premiums, Obamacare relied on managed competition among insurers to keep prices reasonable. Such managed competition aims to channel competition among insurers towards larger social goals, like reducing the cost of health care.[336] In addition to prohibiting health-based discrimination, which did not produce meaningful

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[329] 42 USCA § 300gg–11-19 (adding § 2701 to the PHSA).
[330] *See Tom Baker, Health Insurance, Risk and Responsibility After the Affordable Care Act*, 159 U. PA. L. REV. 1577, 1578–1606 (2011).
[331] *See* Wendy K. Mariner, *The Affordable Care Act and Health Promotion: The Role of Insurance in Defining Responsibility for Health Risks and Costs*, 50 DUQ. L. REV. 271, 278, 287, 325 (2012).
[332] 42 USCA § 300gg–11-19 (adding §§ 2702, 2703 to the PHSA).
[333] John Aloysius Cogan Jr., *Health Insurance Rate Review*, 88 TEMP. L. REV. 411, 447-48 (2015).
[334] 42 U.S.C.A. § 300gg-94 (adding § 2794 to the PHSA). HHS issued final rules on this topic in 2013. *See* 78 Fed. Reg. 13406–13442 (2013).
[335] *See, e.g.*, Anthem Health Plans of Me. v. Superintendent of Ins., 40 A.3d 380, 381 (Me. 2012).
[336] See generally Alain C. Enthoven The History and Principles of Managed Competition, 12 Health Affairs 1 (1993).

social benefits, Obamacare embraced this approach by using exchanges to structure insurance-markets,[337] setting a standardized coverage floor,[338] and promoting simple and easily understandable disclosures and summaries of key plan features, such as varying "metal tiers" of competing plans.[339] Obamacare also initially contemplated promoting competition among private insurers by allowed insureds to select a public option for coverage; that proposal, however, was ultimately removed from the law after vigorous opposition from private insurers.[340]

Although these reforms have not dramatically reduced health insurance rates, they have resulted in reasonably stable, affordable, and fair insurance prices for consumers. Required to only discriminate based on the four permitted factors, health insurers have not sought to indirectly discriminate through proxies for health status.[341] Meanwhile, rate increases for health insurance have generally stayed at or below pre-Obamacare rates of health care inflation.[342] Further progress on this issue has remained elusive for several reasons: there are only a small handful of health insurers competing in many state marketplaces due to the relatively large barriers to entry in health insurance;[343] healthcare providers are consolidating to increase their market power relative to insurers;[344] and health insurers continue to cover care that may not most efficiently deliver benefits.[345] But despite these

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[337] See Part III.C.

[338] See Part III.A.

[339] See Stan Dorn & Timothy Jost. ACA Metal-Tier Mispricing: Improving Affordability By Solving An Actuarial Mystery., Health Affairs Forefront (1/27/2023).

[340] See Allison K. Hoffman, The ACA's Choice Problem, 45 Journal of Health Politics 501, 510 (2020).

[341] *See* Daniel Schwarcz, *Health-Based Proxy Discrimination, Artificial Intelligence, and Big Data*, 21 HOUS. J. HEALTH L. & POL'Y 95, 119-20 (2021).

[342] KFF, 2023 Employer Health Benefits Survey (2023) https://www.kff.org/report-section/ehbs-2023-section-1-cost-of-health-insurance/#:~:text=Average%20annual%20health%20insurance%20premiums,2018%20and%2047%25%20since%202013.

[343] *See* Office of the Assistant Secretary for Planning and Evaluation, *Health Insurance Marketplaces: 10 Years of Affordable Private Plan*, U.S. Department of Health and Human Services 1, 13 (2024) ("The number of issuers participating in Marketplaces has grown in recent years providing nearly all Marketplace consumers (96 percent) with a choice of plan offerings of at least three different issuers." "Empirical research indicates that more insurers competing in a market leads to lower premiums and lower premium growth."); Leemore Dafny et al., *More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces*, 1 AM. J. HEALTH ECON. 53, 53-54 (2015).

[344] Hannah Neprash & Michael McWilliams, *Provider Consolidation and Potential Efficiency Gains: A Review of Theory and Evidence*, 82 ANTITRUST L.J. 551, 557 (2019).

[345] Govind Persad, *Choosing Affordable Health Insurance*, 88 GEO. WASH. L. REV. 819, 822, 830-32 (2020); SILVER & HYMAN, *supra* note 24.

factors, coverage has remained affordable since passage of Obamacare (at least after hefty government subsidies), as evidenced by the fact that the highest number of Americans ever (21 million) purchased health insurance through state exchanges in 2024.[346]

4. Adapting Obamacare's Rating Solution to Homeowners Insurance

The pricing and availability challenges in today's homeowners insurance markets resemble the problems that plagued health insurance markets before Obamacare. Consequently, the ACA's rating and underwriting strategies provide a compelling starting point for reforming homeowners insurance. This approach would foster managed competition among insurers, granting them the freedom to set prices while requiring compliance with anti-discrimination rules that guide competition toward socially beneficial outcomes. Unlike health insurers under the ACA, however, this approach would allow homeowners insurers to consider a broader range of risk-based factors when setting premiums, reflecting the socially beneficial role such discrimination can play in promoting climate change adaptation. To better understand this Obamacare-inspired framework, it is helpful to examine its two core components separately: anti-discrimination measures and market-based pricing.

a. Anti-Discrimination

The anti-discrimination component of an Obamacare-inspired model for homeowners insurance would foster socially beneficial competition by banning insurers from discriminating based on factors that do not promote social welfare. In the context of Obamacare, this approach led to a prohibition on health insurers discriminating based on health-related factors, with the exception of smoking. Evidence showed that such discrimination did not effectively incentivize healthier behaviors, whereas the exception for smoking acknowledged that higher premiums could motivate individuals to quit.[347]

Starting from the principle that insurers should only discriminate when doing so advances socially beneficial goals leads to a different outcome in

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[346] U.S. Department of Health and Human Services, *In Celebration of 10 Years of ACA Marketplaces, the Biden-Harris Administration Releases Historic Enrollment Data* (2024) https://www.hhs.gov/about/news/2024/03/22/celebration-10-years-aca-marketplaces-biden-harris-administration-releases-historic-enrollment-data.html.

[347] See Jessica L. Roberts & Elizabeth Weeks, Healthism: Health-Status Discrimination and the Law (2019).

homeowners insurance compared to health insurance. As explained earlier, many forms of discrimination by homeowners insurers serve the critical social function of signaling to homeowners the risks associated with their location, building practices, and risk-mitigation efforts.[348] Consequently, adopting a community-rating model for homeowners insurance without carefully adapting it from Obamacare's framework could result in disastrous consequences.[349]

Given these realities, the most effective way to ensure that homeowners insurance discrimination aligns with socially beneficial goals is to prohibit the use of factors that lack a clear causal connection to covered property losses. This approach would mark a significant departure from existing state-based insurance regulations, which typically allow insurers to discriminate based on any factor that correlates with risk, regardless of causality.[350] Under this model, insurers could still assess risk based on many conventional factors—such as a property's location, physical characteristics, and individual or community risk mitigation efforts. But they would be prohibited from discriminating based on factors like credit information, marital status, or occupation, which have a limited casual connection to the risk of property damage.[351]

Requiring insurers to price homeowners insurance exclusively based on factors that are causally linked to risk would enhance climate change adaptation by more effectively connecting homeowners' risk-related decisions to their insurance premiums.[352] This approach would ensure that premiums signal the risks associated with where homeowners live, how they build, and the mitigation measures they adopt. As a result, it would encourage behaviors and decisions that reduce risk, such as implementing mitigation strategies, limiting development, or building in areas less vulnerable to climate risks.[353] By contrast, as discussed earlier, discrimination based on mere correlates of risk, such as socio-economic status, fails to provide meaningful information to insureds about how to reduce their risk. It also undermines the importance of causal factors in determining premiums, reducing the effectiveness of insurance in promoting risk-informed decision-

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[348] See Part II.A.2, supra.

[349] Compare Klein, supra note 1 (proposing community rating for homeowners insurance so as to share climate risk broadly across the American population).

[350] See Daniel Schwarcz, *Towards a Civil Rights Approach to Insurance Anti-Discrimination Law*, 69 DePaul L. Rev. 657 (2020).

[351] See id.

[352] *See* Abraham & Schwarcz, *The Limits of Regulation by Insurance*, *supra* note 12, at 273;

[353] See Part II.A.2, supra.

making.[354]

Of course, allowing insurers to discriminate based on factors causally linked to risk also carries significant social costs. Chief among these is the reality that many individuals, particularly those with low incomes, have limited short-term control over these risk factors.[355] For example, they may lack the resources to relocate or leave the communities where they were raised. A related concern is that many policyholder factors that are causally linked to risk, such as property location and construction type, are also correlated with socio-economic factors like income and race.[356] Both of these considerations raise important environmental justice concerns with allowing insurers to price climate risk.[357] It is for precisely this reason that Obamacare-style reform of homeowners insurance should include targeted progressive subsidies, as detailed in the next Section.[358] By contrast, the best solution to the inevitable inequities associated with adapting to climate change is not to suppress awareness of the environmental risks faced by historically marginalized vulnerable groups by undermining socially-valuable risk signaling through insurance pricing.

For this type of anti-discrimination regime to be effective, it must transparently inform homeowners about the factors influencing their insurance rates and strictly prohibit insurers from using factors that merely correlate with risk. Obamacare achieves these goals by reversing the default approach in insurance rate regulation—prohibiting insurers from setting premiums based on any policyholder-specific factors other than those that are explicitly allowed by law or regulation.[359] This approach has been easy to implement under Obamacare because the statute permits insurers to discriminate based only on a small handful of factors.

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[354] See Part II.A.2, supra.

[355] *See* Lemann, *supra* note 12, at 185, 188, 218. Linda Shi & Susanne Moser, *Transformative Climate Adaptation in the United States: Trends and Prospects*, 372 SCIENCE eabc8054 (2021).

[356] See Anya Prince & Daniel Schwarcz, Proxy Discrimination in the Age of Artificial Intelligence and Big Data, 105 IOWA L. REV. 1257 (2020).

[357] See Skinner Thompson, supra note 44; Bullard, supra note 44.

[358] See Part III.D, infra.

[359] This approach has some similarities to California's regulation of auto insurance rates, which also flips the default by only allowing auto insurers to discriminate based on specific factors linked to risk. *See* Dwight M. Jaffee & Thomas Russell, *The Regulation of Automobile Insurance in California*, *in* DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY (2002); Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years*, 27 SAN DIEGO L. REV. 683, 693-95 (1990). Unlike California's scheme, though, an Obamacare approach would eliminate rate regulation based on "excessive" rates, which is a key part of the California approach. *See id*. at 692-93.

Although the anti-discrimination framework outlined above would allow homeowners insurers to engage in broader discrimination than health insurers, adopting Obamacare's structural approach—reversing the default to permit discrimination only on explicitly approved factors—offers a promising model for homeowners insurance.[360] This approach is sensible because many factors causally linked to property risk, such as location and construction type, are relatively straightforward to identify in advance. Furthermore, insurers could have the opportunity to propose new permissible rating factors through a regulatory process, allowing them to demonstrate to regulators a clear causal connection between the proposed factor and policyholder losses. This approach would result in a single, comprehensive list of approved rating factors in each state. It would thus prevent insurers from circumventing anti-discrimination rules and enhance public awareness of steps homeowners can take to reduce their risk and lower future insurance premiums.

Plausible objections to these anti-discrimination proposals are easy to imagine. For instance, insurers would be certain to argue that limiting their ability to discriminate would increase premiums for some insureds. Although this might well be true, any such price increase would better reflect the risks associated with factors within homeowners control. Moreover, it would pose minimal risk of triggering adverse selection, as the vast majority of homeowners are practically required to maintain homeowners insurance under the terms of their mortgage.[361] A second objections is that distinguishing between factors that merely correlate with risk and those that have a causal connection with risk is hardly trivial, especially as information about climate risk continues to evolve. As such, effective policing of this boundary would be difficult. Although fair, such diffiuclties could be managed by placing the burden of proof to establish causality on insurers, who have the resources and know-how to demonstrate causal relationships when they are clear.

Ultimately, an Obamacare-inspired anti-discrimination regime for

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[360] This approach has some similarities to California's regulation of auto insurance rates, which also flips the default by only allowing auto insurers to discriminate based on specific factors linked to risk. *See* Dwight M. Jaffee & Thomas Russell, *The Regulation of Automobile Insurance in California*, *in* DEREGULATING PROPERTY-LIABILITY INSURANCE: RESTORING COMPETITION AND INCREASING MARKET EFFICIENCY (2002); Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years*, 27 SAN DIEGO L. REV. 683, 693-95 (1990). Unlike California's scheme, though, an Obamacare approach would eliminate rate regulation based on "excessive" rates, which is a key part of the California approach. *See id*. at 692-93.

[361] Martin F. Grace et al., *The Demand for Homeowners Insurance with Bundled Catastrophe Coverage*, 71 J. RISK & INS. 351, 357 n. 3 (2004).

homeowners insurance provides a promising pathway for channeling insurance discrimination towards socially productive goals. This is especially true if it is paired with mechanisms to promote effective competition among insurers.

b. Effective Competition

Subject to the anti-discrimination rules described above, an Obamacare-inspired model for homeowners insurance would give insurers broad freedom to price their coverage, free of any requirement to charge rates that are not "excessive." In place of such rate regulation, regulatory strategies would structure markets and information to promote more robust competition among homeowners insurers. Strategies for achieving this, which build on Obamacare's insurance exchange and consumer information models, ideas which are developed in the next section.[362]

Unlike with Obamacare, this managed competition approach would require the federal government to affirmatively prohibit states from regulating "excessive" insurance rates.[363] Such preemption of state insurance rate regulation is sensible for homeowners insurance markets, even if it was ultimately deemed inappropriate for health insurance. In part, that is because this type of state rate regulation is more pervasive in current homeowners insurance markets than it was in pre-Obamacare health insurance markets.[364] More importantly, though, regulation designed to artificially suppress homeowners rates is the central cause of insurance availability problems across the country.[365] Yet, as detailed above, such regulation has no compelling justification in homeowners insurance markets.[366]

Although achieving managed competition in health insurance has proven challenging, it is far easier to implement effectively in homeowners insurance. The difficulties in health insurance stem primarily from two factors: the dominance of a small number of insurers in most regions due to high market entry barriers, and the increasing consolidation of health care providers.[367] In contrast, homeowners insurance does not face these structural challenges. Most notably, the homeowners insurance market has low barriers

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[362] See Part III.C.
[363] *See supra* Part I.
[364] See Abraham & Schwarcz, casebook.
[365] See Part I, supra.
[366] See Part III.B.1.
[367] See Part III.B.3.

to entry, with hundreds of insurers operating nationwide.[368] While states like California and Florida have recently experienced significant insurer departures, these exits are directly linked to state regulations that restrict insurers' ability to price coverage appropriately.[369] Evidence from the auto insurance market shows that reducing rate regulation consistently increases the number of competing insurers, suggesting that eliminating restrictive laws could reverse this trend. [370] Additionally, homeowners insurers operate in a competitive market for the services they support. The home repair and risk mitigation industries are characterized by broad competition, with numerous service providers offering a wide range of solutions. This competitive landscape further supports the feasibility of managed competition in homeowners insurance.[371]

C. Structuring Markets

1. Difficult to Navigate Homeowners Insurance Markets

Homeowners insurance markets have long proven difficult for consumers to navigate. Consumers shopping for homeowners insurance must typically provide each potential insurer with extensive information about their personal situation and property to get a price quote.[372] To select appropriate coverage, they must navigate complex and frequently misunderstood insurance jargon.[373] Often, all this must be done, as an initial matter, in the midst of

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[368] Paul L. Joskow, Cartels, Competition, and Regulation in the Property-Liability Insurance Industry, 4 Bell J. Econ. &Mgmt. Sci. 375, 381 (1973).

[369] See Part I, supra.

[370] See, e.g., Stephen P. D'Arcy, Insurance Price Deregulation: The Illinois Experience, in Deregulating Property-Liability Insurance 248 (J. David Cummins ed., 2002); Martin F. Grace, Robert W. Klein & Richard D. Phillips, Auto Insurance Reform: Salvation in South Carolina, in Deregulating Property-Liability Insurance, supra, at 148-49; Sharon Tennyson, The Impact of Rate Regulation on State Automobile Insurance Markets, 15 J. Ins. Reg. 502, 516 (1997); Scott E. Harrington, Insurance Deregulation and the Public Interest 16 (2000).

[371] This competitiveness stems from the lower training requirements and greater availability of providers in this sector.. As a result, homeowners insurers have far more opportunities to manage and reduce the costs associated with responding to property losses—particularly those driven by climate change—than health insurers do in managing healthcare expenses.

[372] *See* ABRAHAM & SCHWARCZ, *supra* note 8, at 18-29.

[373] *See* Brenda J. Cude, *Insurance Disclosures: An Effective Mechanism to Increase Consumers' Insurance Market Power?*, 24 J. INS. REG. 57, 65 (2005); Jay M. Feinman, *Improving State Regulation of Homeowners Insurance: The Essential Protections for Policyholders Project*, 24 CONN. INS. L.J. 163, 168-69 (2017).

navigating the purchase of a new home.[374] And the result of these efforts is not the acquisition of a new tangible product, helpful service, or immediately useful financial resource.[375] Instead, consumers merely receive a document that promises future payments in the event of a calamity.[376]

Collectively, these frictions in consumer shopping often undermine robust comparison shopping in homeowners insurance markets. For instance, a surprisingly large percentage of consumers regularly renew coverage from their longtime carrier, even in the face of significant premium increases.[377] When initially selecting insurers, many consumers get quotes from a small handful of insurers, or simply purchase coverage without getting more than a single price quote.[378] And consumers' purchasing decisions are strongly influenced by name recognition, resulting in nationally dominant insurers like State Farm, Farmers, and Allstate writing a significant percentage of homeowners coverage in many state insurance markets.[379]

Even though most homeowners rarely shop for coverage, they often pay significant recurring and hidden fees to insurance agents. A large percentage of consumers purchase homeowners coverage through insurance agents, rather than directly from insurers.[380] Although insurance agents sometimes

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[374] *See* Daniel Schwarcz, Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection, 61 UCLA L. REV. 394 (2014).

[375] *See* Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT TRIAL & INS. PRAC. L.J. 813, 816-21 (2009).

[376] Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1404 (2007).

[377] *See* Christopher Flavelle, *Home Insurance Rates in America Are Wildly Distorted. Here's Why.*, N.Y. TIMES, July 8, 2024 (noting that Sen's research shows that "after choosing an insurer, people often stick with that same company, even if their premiums go up"); *See* Deloitte Center for Financial Services, *US Insurance Consumers Open to Innovative Personal Lines Concepts* (2020) ("among homeowners, only 30% of US respondents had switched in the prior three years … while 29% in the United States had never changed insurers."); Homeowners Insurance Buying Guide, CONSUMER REPORTS, https://www.consumerreports.org/money/homeowners-insurance/buying-guide/ (last visited July 28, 2024) ("Among Consumer Reports members surveyed recently about the experiences they'd had with their homeowners insurance companies, 21 percent said they'd switched carriers in the previous five years).

[378] *See* Elisabeth Honka, *Quantifying Search and Switching Costs in the US Auto Insurance Industry*, 45 RAND J. ECON. 847, 848 (2014).

[379] Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1413 (2007); NAIC, 2022 MARKET SHARE REPORTS FOR PROPERTY/CASUALTY GROUPS AND COMPANIES BY STATE AND COUNTRYWIDE, (2023).

[380] *See* INSURANCE INFORMATION INSTITUTE, 2016 CONSUMER INSURANCE SURVEY HOMEOWNERS INSURANCE: UNDERSTANDING, ATTITUDES AND SHOPPING PRACTICES (2017).

provide limited coverage advice, their primary function is to effectuate consumers' insurance application and purchase, as well as to provide routine customer service.[381] Nonetheless, insurance agents typically receive commissions between 5-15 percent of premiums per year, even in years when consumers auto-renew coverage.[382]

Compounding these problems, consumers often make highly consequential mistakes when purchasing coverage. For instance, consumers regularly select an inappropriate coverage limit or deductible, or purchase too much or too little supplemental coverage.[383] Except in unusual circumstances, insurance agents have no legal obligation to advise consumers on these issues at all, or to provide accurate advice when they do so.[384] In fact, insurance intermediaries often have strong financial incentives to push coverage options that are inconsistent with consumers' interests.[385] Because most consumers never experience a significant loss, they typically do not know when they have been provided with bad advice.

2. Difficult to Navigate Pre-Obamacare Health Insurance Markets

Consumers shopping for health insurance prior to Obamacare faced many of the same basic difficulties as current consumers navigating homeowners insurance markets, for many of the same basic reasons.[386] Shopping for health insurance required consumers to make highly consequential decisions involving unfamiliar jargon about issues that they frequently did not fully

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[381] *See generally* Daniel Schwarcz and Peter Siegelman, *Insurance Agents in the Twenty-first Century: The Problem of Biased Advice*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW (2015).

[382] *See* Mark Rosanes, How do Insurance Agents Make Money?, INSURANCE BUSINESS (2023), https://www.insurancebusinessmag.com/us/guides/how-do-insurance-agents-make-money-452548.aspx (reporting that insurance agents earn 5% and 15% of premiums in commissions for homeowners insurance policies in the first year, and between 2% and 15% in renewal years).

[383] *See* Daniel Schwarcz, *Regulating Consumer Demand in Insurance Markets*, 3 ERASMUS L. REV. 23, 26-30 (2010); Kenneth S. Klein, *Minding the Protection Gap: Resolving Unintended, Pervasive, Profound Homeowner Underinsurance*, 25 CONN. INS. L.J. 34, 38 (2018); Sydnor, J. (2022). Dominated Options in Health-Insurance Plans *American Economic Journal: Economic Policy Sydnor, J. (2010). (Over)Insuring Modest Risks American Economic Journal: Applied Economics*

[384] *See* Schwarcz & Siegelman, *supra* note 381.

[385] Daniel Schwarcz, *Differential Compensation and the Race to the Bottom in Consumer Insurance Markets*, 15 CONN. INS. L.J. 723, 731 (2009).

[386] *See* Pamela Nadash & Rosemarie Day, *Consumer Choice in Health Insurance Exchanges: Can We Make It Work?*, 39 J. HEALTH POL. POL'Y & L. 209, 217-26 (2014).

understand.[387] It was a time consuming process because of the extensive information individual insurers required to price and underwrite coverage.[388] It typically required going through an insurance agent, who often received a significant chunk of premiums to facilitate this process, even though they had no legal duty to supply advice in consumers' interest.[389] And the end result of these efforts was not some tangible product or benefit, but instead an insurer's promise to pay potential future claims. All of this often resulted in consumers making significant errors when purchasing coverage, choosing cost-sharing options or coverages that were a poor fit for their particular circumstances given available market options.[390]

3. The Obamacare Solution: Insurance Exchanges

To address the difficulties facing health insurance consumers, Obamacare required the creation of public insurance marketplaces, known as insurance exchanges, in each state.[391] A central goal of these exchanges was to facilitate effective consumer shopping among different private health insurance plans.[392] The most straight-forward way that exchanges did so was to allow consumers to enter their relevant information only once through a centralized online tool, and then to receive competing quotes from private insurers on an apples-to-apples basis.[393] Additionally, the ACA required exchanges to organize plan options into four categories—Bronze, Silver, Gold, and Platinum—based on their actuarial value over a standard population of policyholders.[394] As noted above, the ACA also required that all plans sold in exchanges offer a minimum set of essential health benefits.[395] Over time, insurance exchanges also implemented a range of additional consumer decision-making tools, user interfaces, and presentation strategies to help consumers make better decisions among competing health insurance

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[387] George Loewenstein, et al., *Consumers' Misunderstanding of Health Insurance*, 32 J. HEALTH ECON. 850, 852-53 (2013); Brendan S. Maher, *Some Thoughts on Health Care Exchanges: Choice, Defaults, and the Unconnected*, 44 CONN. L. REV. 1099, 1106 (2012).
[388] *Cf.* Wendy K. Mariner, *Health Reform: What's Insurance Got to Do with It? Recognizing Health Insurance as a Separate Species of Insurance*, 36 AM. J.L. & MED. 436, 439-41 (2010).
[389] See Isaac D. Buck, Affording Obamacare, 71 Hastings L.J. 261, 289 (2020).
[390] Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 MICH. L. REV. 643, 647 (2008).
[391] 42 U.S.C. § 18031(b)(1)
[392] *See* Maher, *supra* note 387, at 1106-09. Barry R. Furrow, *Cost Control and the Affordable Care Act: Cramping Our Health Care Appetite*, 13 NEV. L.J. 822, 865 (2013)
[393] *See id*.
[394] 42 U.S.C. § 18022.
[395] *See id*.

options.[396]

Although the ACA permitted each state to establish its own insurance exchange, it did not require states to do so, nor could it have, given constitutional limits on the federal government commandeering state resources.[397] Instead, the ACA provided that the federal government would itself create an insurance exchange for any state that opted not to do so on its own.[398] As of 2025, the federal government operates exchanges for roughly half of the states through Healthcare.gov.[399]

Although not without their challenges, Obamacare's insurance exchanges have played an important role in fixing state health insurance markets. There is good evidence that they help promote competition in health insurance markets, particularly with respect to price and particularly when there are more than a small handful of competing insurers operating through these exchanges.[400] They also have helped to decrease the share of policyholder premiums that goes to paying expensive market intermediaries like insurance agents.[401] To be sure, consumers shopping on exchanges often pay too little attention to factors other than price, such as provider networks and cost-sharing provisions.[402] But better consumer decision-making aids and interfaces have helped address that issue, at least to some degree.[403] Additionally, while federal insurance exchanges initially experienced substantial and embarrassing technical problems, these "glitches" were quickly addressed by a federal "tech surge" and have not persisted in recent years.[404]

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[396] Charlene A. Wong et al., *Shopping on the Public and Private Health Insurance Marketplaces: Consumer Decision Aids and Plan Presentation*, 33 J. GEN. INTERNAL MED. 1400, 1401-02 (2018).

[397] Printz v. United States, 521 U.S. 898, 902 (1997).

[398] 42 U.S.C. § 18041(c)(1).

[399] *The Marketplace in Your State,* Healthcare.gov, https://www.healthcare.gov/marketplace-in-your-state/ (last visited July 28, 2024).

[400] Jon R. Gabel et al., *An Early Look at SHOP Marketplaces: Low Premiums, Adequate Plan Choice in Many, But Not All, States*, 34 HEALTH AFF. 732, 732 (2015); Leemore Dafny et al., *More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces*, 1 AM. J. HEALTH ECON. 53, 53-54 (2015).

[401] Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1299 (2017).

[402] John V. Jacobi et. al., *Health Insurer Market Behavior After the Affordable Care Act: Assessing the Need for Monitoring, Targeted Enforcement, and Regulatory Reform*, 120 PENN ST. L. REV. 109, 153 (2015).

[403] *See* Anna D. Sinaiko et al., *Consumer Health Insurance Shopping Behavior and Challenges: Lessons from Two State-based Marketplaces*, 76 MED. CARE RSCH. & REV. 403, 416 (2019).

[404] Edward Lee, *Informal Governance of the United States*, 36 BYU J. PUB. L. 199, 208 (2022).

4. *Insurance Exchanges for Homeowners Insurance Markets*

Because consumers in today's homeowners insurance markets face challenges similar to those in pre-Obamacare health insurance markets, implementing Obamacare-style insurance exchanges for homeowners insurance presents a compelling solution. If implemented federally, this approach could give states the option to establish their own homeowners insurance exchanges or to allow federal regulators to do so on their behalf, just as Obamacare.[405] Alternatively, states could establish their own homeowners insurance exchange without any federal involvement. Either way, much of the technical infrastructure developed for Obamacare exchanges—such as user interfaces, consumer decision-making aids, and exchange governance structures—could be repurposed for the homeowners insurance setting.[406] Pairing these reforms with the proposed substantive reforms to homeowners policies described above—which would create a minimum comprehensive floor for homeowners policies and bundle them with flood protection—would provide assurances to consumers that coverage purchased on exchanges met minimum quality thresholds, thus facilitating consumer comparison shopping.

Even more than Obamacare's insurance exchanges, there is good reason to believe that these reforms would promote more robust competition among insurers and improved decision-making among consumers. Most importantly, this is because there are so many more competing homeowners insurers than health insurers, and research suggests that this is the single most important factor in the extent to which competition on exchanges can drive down prices.[407] Additionally, homeowners insurance is in many ways a less complex product than health insurance, particularly to the extent that the substantive reforms described above are implemented. Although there would certainly continue to be important non-price variations in the coverage available from different carriers—including the availability of supplemental coverage, customer service, claims handling speed and quality, and financial strength—centralized consumer decision making tools could more easily assist consumers in navigating these issues than is possible in health insurance, where questions about issues like provider networks are

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[405] 42 U.S.C. § 18031.

[406] See Jay Feinman, Improving the Market for Homeowners Insurance, 30 Conn. Ins. L J 169 172-192 (2024) (exploring ways to improve consumer information about homeowners insurance, and suggesting disclosures regarding homeowners insurance that are similar to those required by Obamacare).

[407] *See* Dafny et al., *supra* note 400, at 78-80.

particularly thorny to address.

Of course, none of this is to suggest that there would not be some particular complications with implementing homeowners insurance exchanges. To take one example, a large percentage of consumers currently bundle their homeowners insurance with other forms of protection, such as auto.[408] Whether and how that would be facilitated on an insurance exchange is an open question. Politically, homeowners insurance agents are a particularly vocal and powerful group in state politics,[409] and they would obviously have good reason to vigorously oppose this type of reform. But ultimately the experience of the Obamacare insurance exchanges, when considered through the lens of current homeowners insurance market problems and opportunities, offers a compelling reform option.

D. State Subsidies and Support

1. Unaffordable Homeowners Insurance

In recent years, homeowners insurance has become increasingly unaffordable for many Americans, driven by rapidly rising premiums since they initially purchased their homes.[410] Consumer protection rules established in 2013 mandate that lenders make a reasonable, good faith determination that borrowers can repay their residential mortgages, including the costs of homeowners insurance.[411] Although these rules aim to ensure borrowers can manage their home loans over time,[412] they do not account for future increases in insurance costs, which lenders cannot reasonably predict.[413]

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[408] *See* INSURANCE INFORMATION INSTITUTE, 2016 CONSUMER INSURANCE SURVEY HOMEOWNERS INSURANCE: UNDERSTANDING, ATTITUDES AND SHOPPING PRACTICES (2017).

[409] *See* ABRAHAM & SCHWARCZ, *supra* note 8, at 69-78.

[410] *See supra* Part I. Unfortunately, states are only now beginning to gather data to measure this issue.

[411] *See* Consumer Financial Protection Bureau, Ability to Repay and Qualified Mortgage Standards Under the Truth in Lending Act (Regulation Z) (2013). The CFPB's rules require lenders to consider the borrower's ability to repay the loan, which includes the consideration of "mortgage-related obligations," including lender-required homeowners insurance. The obligations that must be considered include current premiums for mortgage-related insurance required by the creditor.

[412] *See* Patricia A. McCoy & Susan M. Wachter, *Why the Ability-to-repay Rule Is Vital to Financial Stability*, 108 GEO. L.J. 649, 680-81 (2019); Adam J. Levitin, *The New Usury: The Ability-to-Repay Revolution in Consumer Finance*, 92 GEO. WASH. L. REV. 425, 460 (2024).

[413] For adjustable-rate mortgages (ARMs), lenders must calculate the borrower's ability to

Moreover, while some of the proposed reforms—such as establishing an insurance exchange—are intended to lower coverage costs, others could potentially drive costs higher. For example, bundling flood insurance with homeowners insurance would likely raise premiums for nearly all homeowners. Similarly, loosening regulations on insurance rates could lead to higher premiums for individuals living in areas with significant climate risk.

Unaffordable homeowners insurance premiums caused by rapid cost increases can devastate the financial stability of low-income homeowners and the broader communities in which they live. When premiums rise beyond reach, homeowners may initially forgo insurance altogether, exposing themselves to catastrophic financial loss in the event of damage or disaster.[414] But this is rarely a sustainable solution, as lenders typically force-place homeowners who fail to maintain coverage into even more expensive and less comprehensive policies, adding these costs to monthly mortgage bills.[415] Ultimately, unaffordable insurance thus leads to homeowners defaulting on their loans or being compelled to sell their homes to wealthier buyers.[416] As insurance costs continue to escalate, the latter option may increasingly involve incurring substantial losses as homeowners sell properties whose market values have diminished due to the high cost of maintaining coverage. In extreme cases, it may even result in underrepresented and low-income residents – who often disproportionately face environmental risks due to factors like historical redlining and discrimination – experiencing housing instability.[417]

State and federal rules offer limited protections to low-income homeowners facing these unanticipated realities, instead indirectly subsidizing disproportionately wealthy homeowners. This indirect subsidization occurs through residual market mechanisms, which almost always charge implicitly subsidized premiums that do not fully account for

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repay using the fully indexed rate or the maximum rate that could apply during the first five years of the loan term, whichever is higher. And for step-rate mortgages and other loans with variable rates not tied to an index, lenders must use the maximum interest rate that could apply at any time during the loan term to determine the borrower's repayment ability. *See* McCoy & Watcher*, supra* note 412, at 672.

[414] See Bailey Schulz & Jessica Guynn, Soaring insurance costs are making more homeowners go without it, USA Today (6/23/24).

[415] *See* Dana Cronkite, *Force-Placed Insurance: The Lending Industry's "Dirty Little Secret"*, 91 CHI.-KENT L. REV. 687, 691 (2016).

[416] *See* Carolyn Kousky & Howard Kunreuther, *Addressing Affordability in the National Flood Insurance Program*, 1 J. EXTREME EVENTS 1450001 (2014).

[417] See generally Gabriel Chan & Alexandra B. Klass, Regulating for Energy Justice, 97 N.Y.U. L. Rev. 1426, 1429 (2022).

catastrophic risk.[418] To illustrate, California's FAIR plan reportedly had just $377 million available to pay claims in the wake of the 2025 LA wildfires—a sum that was overwhelmed by claims, even after accounting for the plan's billions in reinsurance coverage.[419] Yet many, if not most, of the residual market's policyholders were wealthy California homeowners. Other state residual insurance programs, like Florida's Citizens Insurance, subsidize those most exposed to risks like wind, which correlate strongly with policyholder wealth because wind risk is greatest in coastal areas.[420] Unaffordability problems are even more acute for those in designated flood plains, who must purchase flood insurance if they have a mortgage from a federally regulated or insured lender.[421] Although NFIP insurance includes significant implicit subsidies, these often benefit wealthy homeowners.[422] Owners of high-value properties are more likely to purchase flood insurance, to live in a designated flood plain (often by the coast), and to opt for the maximum coverage available under the NFIP.[423]

2. *Unaffordable Pre-Obamacare Health Insurance*

As with current homeowners insurance markets, countless low and moderate income Americans struggled to purchase affordable health insurance before Obamacare's passage.[424] While many had access to employer-sponsored coverage and others qualified for public insurance programs like Medicare or Medicaid, millions without access to these sources of coverage could not afford insurance on the individual market.[425] As a result, about one-seventh of the U.S. population was uninsured before the ACA's enactment.[426] Without health insurance, most without significant

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[418] In some states, coverage through residual insurance markets is costly by design, to encourage homeowners to buy from private insurers when possible. *See, e.g.*, La. R.S. § 22:2303.

[419] https://www.nytimes.com/2025/01/14/climate/californias-insurance-fair-plan-fires.html#:~:text=As%20of%20last%20Friday%2C%20the,Alex%20Padilla%2C%20Democrat%20of%20California. [UPDATE]

[420] *See* Ben-Shahar & Logue, *The Perverse Effects*, *supra* note 12, at 579.

[421] This requirement is part of the National Flood Insurance Program (NFIP) regulations in the United States.

[422] *See* Ben-Shahar & Logue, *The Perverse Effects*, *supra* note 12, at 607 (showing that a 1% increase in household value is associated with either a 0.847% or 0.571% increase in the percentage subsidy received through the NFIP, depending on the measure of wealth used).

[423] *See id*. at 609-10.

[424] *See supra* Part II.A.

[425] See Part II.A.1, *supra*.

[426] *See* BOB LYKE, CONGRESSIONAL RESEARCH SERVICE, HEALTH CARE REFORM: AN INTRODUCTION (2009).

savings could not access expensive, medically necessary care for serious illnesses or injuries.[427] Although federal law required hospitals to provide emergency care regardless of the patient's ability to pay, this only covered care needed to stabilize the patient.[428] Moreover, recipients of such care often faced bankruptcy to avoid massive hospital bills.[429]

Despite the massive affordability problems facing many low- and moderate-income consumers, federal and state law prior to Obamacare did little to subsidize the costs of individual market coverage from private insurers.[430] To the contrary, as with flood insurance, subsidies for the purchase of private insurance instead disproportionately went to relatively wealthy individuals and households.[431] This was a direct result of tax benefits for employer-provided health insurance. Not only did these rules disproportionately benefit those employed by large employers who offered generous health insurance, but it did so in large part by allowing employees to exclude health insurance benefits from their income. The ultimate effect of this approach is to provide greater subsidies to those paying higher marginal tax rates because of their income.[432]

3. Obamacare's Approach to the Unaffordability Problem

In addition to using managed competition to reduce health insurance costs, Obamacare created several categories of subsidies to promote affordable coverage.[433] Most importantly, it created a sliding-scale tax credit

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[427] *See* Saul Weiner*, I Can't Afford That!" Dilemmas in the Care of the Uninsured and Underinsured*, 16 J. INTERNAL MED. 412, 412 (2001).
[428] Lindsay Wiley, *EMTALA: Duty to Stabilize Regardless of Whether Patient Is Still in the Emergency Room*, 29 J.L. MED. & ETHICS 235, 235-36 (2001).
[429] *See* David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 122.8 741, 742 (2009).
[430] To be sure, there were some provisions in the tax code that could support the costs of health insurance and health care even before the passage of the ACA. But these were limited and those who purchased insurance on the individual market generally had to pay for this with after-tax dollars.
[431] *See* Clark C. Havighurst & Barak D. Richman, *Distributive Injustice(s) in American Health Care*, 69 L. & CONTEMP. PROBS. 7, 8 (2006); Lindsay F. Wiley et al., *Health Reform Reconstruction*, 55 U.C. DAVIS L. REV. 657, 723 (2021)
[432] David Gamage, *Perverse Incentives Arising From the Tax Provisions of Healthcare Reform: Why Further Reforms are Needed to Prevent Avoidable Costs to Low- and Moderate-income Workers*, 65 TAX L. REV. 669, 672 (2011).
[433] The ACA also established more limited cost-sharing subsidies designed to limit policyholders' out-of-pocket expenses for deductibles, coinsurance, and copayments. These are less relevant to the homeowners setting because losses are so much less frequent in the homeowners setting than in the health insurance setting, meaning that the affordability of cost-sharing provisions is a less significant issue.

for individual market coverage purchased through insurance exchanges.[434] This credit, based on an individual's or family's prior-year income, caps the amount they must pay for a benchmark plan in their area.[435] Furthermore, eligible individuals and families can have the premium tax credit paid directly to their insurance company, reducing their monthly premiums.[436] These subsidies have dramatic improved access to affordable health insurance coverage. Since Obamacare's passage, the rate of uninsured Americans has decreased from approximately 18% of the population to about 8%. Nearly half of this reduction in uninsurance is directly attributable to the ACA's premium subsidies for the purchase of private insurance coverage.[437]

4. Redesigning Subsidies for Homeowners Insurance

Rather than implicitly subsidizing homeowners insurance for the relatively wealthy through residual-market mechanisms and federal flood insurance, an Obamacare-inspired overhaul of the homeowners insurance market would adopt an explicit and progressive subsidy structure.[438] Mirroring Obamacare's approach to health insurance, this strategy would direct financial assistance for insurance premiums to low and moderate income individuals and families.

To be sure, replicating Obamacare's subsidy approach in the homeowners insurance market presents numerous challenges. First, as previously discussed, a key goal of reform is to better signal climate risk to property owners and induce effective risk mitigation measures. Subsidizing coverage could undermine these objectives.[439] Second, the cost of Obamacare's subsidies were, and continue to be, massive, even though they only apply to the relatively small fraction of people who purchase coverage on insurance

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[434] 26 U.S.C. § 36B; 42 U.S.C. § 18071.

[435] *See id*. In 2024, the federal poverty line for a family of four was $31,200 a year in income, meaning that a family of four earning over $120,000 a year would be eligible for these premium subsidies. Over 90% of those with coverage through an individual insurance exchange received premium subsidies in 2023. *See* CENTERS FOR MEDICARE & MEDICAID SERVICES, EFFECTUATED ENROLLMENT: EARLY 2023 SNAPSHOT AND FULL YEAR 2022 AVERAGE (2023).

[436] See Jost, Timothy. "IRS Finalizes Premium Tax Credit Rules Virtually Unchanged." *Health Affairs Forefront* (2017).

[437] *See* Molly Frean et al., *Premium Subsidies, the Mandate, and Medicaid Expansion: Coverage Effects of the Affordable Care Act*, 53 J. HEALTH ECON. 72, 73 (2017).

[438] *See* Liran Einav et al., *Market Design in Regulated Health Insurance Markets: Risk Adjustment vs. Subsidies*, 1, 30 (Nat'l Bureau of Econ. Rsch., Working Paper no. 32586, 2024); Amy Finkelstein et al., *Subsidizing Health Insurance for Low-Income Adults: Evidence from Massachusetts*, 109 AM. ECON. REV. 1530, 1531 (2019).

[439] *See* Ben-Shahar & Logue, *The Perverse Effects*, *supra* note 12, at 611-18.

exchanges.[440] As alluded to earlier, providing comparable subsidies to all low- and moderate-income homeowners would require significantly larger expenditures, as the size of private homeowners insurance markets today are much larger than private individual health insurance markets given how many Americans receive health insurance through employer-sponsored insurance, Medicare, and Medicaid. Third, because homeowners are generally more economically advantaged than renters, structuring subsidies to disproportionately benefit homeowners might fail to achieve the intended progressive redistributive impact of reform.[441]

Although these complications cannot be fully resolved here, there are a variety of reasonable approaches to adapting Obamacare's progressive subsidy structure to homeowners insurance. Consider four potential design options, each of which has key benefits and downsides. First, to address both the cost and potential perverse effects of progressive subsidies, these subsidies might only be available to homeowners for a limited time period, similar to the small employer tax credit in Obamacare.[442] Limiting the duration of subsidies would align with the broader goal of facilitating the transition to climate resilience for low- and moderate-income Americans by giving these homeowners time to either sell their homes before the subsidies expire or invest in remediation measures that would make unsubsidized premiums affordable. Of course, the downside of making subsidies temporary is that doing so could eventually undermine homeownership among low- communities living in climate-exposed regions. This might be a particularly unacceptable result for communities with long-standing ties to climate-exposed regions or that were previously relocated to these regions as a result of forces like red-lining and housing discrimination.

To address this concern, the duration of subsidies might itself be linked to income and/or home value, with those who have fewer resources being provided with longer-term subsidies. This approach would reflect the reality that relocating or investing in hardening one's home is often least feasible for those with limited financial resources; given that reality, longer-term subsidies for low-income individuals are not only comparatively necessary to shield low-income communities from the disruptive effects of increased insurance prices, but also relatively less likely to undermine adaptation to

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[440] CHAPLIN WHITE, CONGRESSIONAL BUDGET OFFICE, FEDERAL SUBSIDIES FOR HEALTH INSURANCE AND POLICIES TO REDUCE THE PRICES PAID BY COMMERCIAL INSURERS (2024).

[441] Zhu Xiao Di et al., *Do Homeowners Achieve More Household Wealth in the Long Run?*, J. HOUS. ECON. 274, 288-89 (2007). It is possible that subsidies for property insurance that landlords received might help defray the costs of rents.

[442] *See* Amy Monahan & Daniel Schwarcz, *Saving Small Employer Health Insurance*, 98 IOWA L. REV. 1935, 1947-50 (2013).

climate change risks that would otherwise be fostered by actuarially-fair premiums.

Second, progressive subsidies should likely only be made available to homeowners who purchased their homes prior to the passage of reform. By contrast, affordability efforts for post-reform purchasers might focus on reforming mortgage ability-to-pay rules by requiring lenders to assume that insurance rates will significantly increase over time due to climate change.[443] Additionally, these reforms might mandate appropriate disclosures warning of projected increased insurance rates, specific to the region where homes are being purchased. The difficulty with this approach, however, is that it might not effectively inform purchasers of the risks of future price increases for coverage, especially given both the notorious ineffectiveness of many disclosures[444] as well as the complexities involved with appropriately structuring and enforcing ability-to-pay regimes.[445]

Third, the cost of subsidies for low- and moderate-income homeowners might be significantly reduced relative to Obamacare subsides by focusing on slowing or preventing increases in insurance costs that occur after recipients' purchase of a home. This approach would aim to target the underlying causes of increasingly unaffordable homeowners insurance by addressing costs that homeowners did not have fair warning of when they initially purchased coverage. Moreover, it would mean that the costs of subsidies would diminish over time. At the same time, this subsidy structure could conceivably discourage the purchase and sale of homes by linking such transactions with the cessation of insurance subsidies.

Finally, progressive subsidies for homeowners insurance might also be made available to low and moderate income renters. One plausible way to accomplish this would be to expand Section 8 housing vouchers to reflect any increased costs of housing associated with climate change.[446] This expansion of federal housing vouchers might focus on counteracting the impact on rents of climate-induced costs of insurance for commercial landlords. The most obvious downsides to this approach would, of course, be its cost. Moreover, implementing this subsidization approach so that it operated for the benefit of low- and moderate-income tenants, rather than commercial landlords, could prove immensely challenging.

As all this suggests, there are significant challenges to appropriately

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[443] *See supra* Section D (1).

[444] *See generally* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Discourse*, 159 U. PA. L. REV. 647 (2011).

[445] See Levitan, supra note 412, at 460.

[446] Noah M. Kazis, *The Failed Federalism of Affordable Housing: Why States Don't Use Housing Vouchers,* 121 MICH. L. REV. 221, 289 (2022).

designing subsidies for property insurance markets. Nonetheless, viewing this issue through the lens of Obamacare illuminates that the best way to help low- and moderate-income individuals struggling with the costs of property insurance is by providing them with progressive and explicit federal subsidies. By contrast, state efforts to manipulate private insurers' rates to ensure that they are not "excessive" while subsidizing quasi-public residual insurance markets does not offer a viable or effective means for protecting vulnerable Americans from the insurance implications of climate change.

IV. Conclusion

The parallels between today's homeowners insurance markets and state health insurance markets prior to the Affordable Care Act (ACA) are striking. Both markets have endured sustained nationwide disruption, posing significant economic risks beyond the confines of the insurance sector. In both contexts, state-level efforts to mitigate these risks have largely fallen short. Given that health and property insurance markets share fundamental characteristics, the structural and substantive elements of the ACA offer a promising blueprint for reforming the U.S. homeowners insurance system.

An ACA-inspired framework for homeowners insurance markets would harness insurer competition to more effectively communicate climate risk to consumers. Allowing insurers to set rates freely within transparent, centralized, and standardized markets—covering major climate-related property risks such as floods and wildfires—would ensure premiums accurately reflect the true cost of insuring against catastrophic events driven by climate change. Government-provided reinsurance, priced at market-based rates, would support this market by shielding insurers from excessive risks. By directly reflecting the financial implications of living in high-risk areas through insurance premiums, homeowners would be better equipped to make informed decisions about where to live and how to invest in protective measures. Those unable to afford necessary adjustments should receive targeted support through progressive subsidies, rather than relying on residual markets and rate regulations that distort incentives and often disproportionately benefit wealthier homeowners.

Furthermore, restricting insurers from pricing coverage based on non-causal predictors of insurance losses, such as credit scores, while mandating coverage for climate-related catastrophic losses, would drive insurers to develop innovative risk mitigation programs. Competitive market pressures would motivate insurers to offer premium discounts or specialized coverage to homeowners who adopt climate-resilient construction and maintenance practices. This dynamic empowers consumers to proactively reduce their exposure to climate risks and aligns the insurance industry's financial interests with broader societal goals of climate adaptation and resilience. Ultimately, these reforms would promote protection against catastrophic climate loss while promoting behavioral changes that mitigate climate vulnerability, encourage safer development patterns, and bolster long-term community resilience.