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# Challenges in Designing Equitable Public Options

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One of the aspirations of a public option is to expand equality and opportunity by offering universal access to a good or service at an affordable price.<sup>2</sup> But in practice, public options are not always equitable and inclusive, and people of color, the poor, the less-educated, and rural residents are often on the losing end. Policymakers who want public options to live up to the promise of expanding equality and opportunity therefore need to think seriously about the challenges that prevent public options from achieving those aims. Some of these challenges stem from the structure of the public options themselves, which can be designed in ways that advance or constrict equality and opportunity. Others will require broader reforms to politics and the allocation of power. Understanding the broader context is essential in designing public options that can advance inclusionary goals.

In this chapter, we identify six challenges in designing equitable public options. The elements on our list are not mutually exclusive; barriers to equity are often compounded, with two or more operating at the same time within the same area of public policy. Nor is our list of six exhaustive; we make no claim that these are the only challenges to designing equitable public options. But we hope that this list can be a starting point for policymakers and scholars to anticipate the factors that prevent public options from being equity-enhancing and, as a result, to develop solutions.

### 3.1 CHALLENGE 1: RACISM

Racist ideas, norms, and practices uphold racist policies and institutions. Any public option, like any public policy, can be racist – but they can also be designed to be deliberately anti-racist.<sup>3</sup>

<sup>1</sup> Thanks to K. Sabeel Rahman and Joelle Gamble for helpful comments and suggestions.

<sup>2</sup> Ganesh Sitaraman & Anne L. Alstott, *The Public Option: How to Expand Freedom, Increase Opportunity, and Promote Equality* (2019).

<sup>3</sup> Ibram X. Kendi, *How to be an Antiracist* (2019).

The United States has a long history of racist public policies, including some public options. Some public options have failed to advance equity goals because of de jure racism. In the Jim Crow South, state laws prevented equal access to common carriers and public accommodations.<sup>4</sup> “Separate but equal” was anything but, and a variety of public options – buses, railroad cars, public schools, public water fountains – were subjected to two-tiered systems by race. After decades of segregation within public options, the Civil Rights Act of 1964 prohibited discrimination in public facilities and public schools.<sup>5</sup>

Housing policy in the mid-twentieth century was also defined by racist laws. Federal programs were designed to expand middle class homeownership, including by insuring mortgages and subsidizing builders. But as Richard Rothstein has documented, the Home Owners Loan Corporation, Federal Housing Administration, and Veterans Administration mapped black neighborhoods as “risky,” a process called redlining, and ultimately excluded them from federal insurance programs. Homebuilders, subsidized by federal tax and highway policies, were also producing subdivisions of new homes – so long as they were not sold to black people.<sup>6</sup> The Fair Housing Act sought to remedy these laws and practices, but the legacy of redlining remains even today.<sup>7</sup>

These are just a few instances of the racism that has been toxic for both people of color and society writ-large.<sup>8</sup> To take one further example of the community destruction involved, consider the history of public recreation. After the civil rights laws were passed, many communities destroyed public options – like draining public swimming pools – rather than allow them to integrate. Parks, recreation centers, even zoos were shuttered because of racism, harming both white and black members of these communities.

The creation of public options for some people (often, privileged and white) has also come at the direct expense of others (typically, marginalized and nonwhite). For example, America’s land grant colleges expanded opportunity for many people since their founding in the late nineteenth century. The federal government allocated public lands to states, with the proceeds of sales of those lands going to the colleges. The acquisition of these lands, however, was part of the federal government’s policy of conquest of Native Americans and seizure of their lands.<sup>9</sup> Equality and opportunity for some was achieved at the cost of misery and subjugation for others.

<sup>4</sup> A. K. Sandoval-Strausz, *Travelers, Strangers, and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 *L. & Hist. Rev.* 53 (2005).

<sup>5</sup> See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 298–99 (1964) (upholding Congress’s power to ban racial discrimination in restaurants).

<sup>6</sup> Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017).

<sup>7</sup> Kriston Capps & Kate Rabinowitz, *How the Fair Housing Act Failed Black Homeowners*, CityLab, April 11, 2018, [www.citylab.com/equity/2018/04/how-the-fair-housing-act-failed-black-homeowners/557576/](http://www.citylab.com/equity/2018/04/how-the-fair-housing-act-failed-black-homeowners/557576/)

<sup>8</sup> Heather McGhee, *Racism has a Cost for Everyone*, TEDWomen 2019, [www.ted.com/talks/heather\\_c\\_mcgee\\_racism\\_has\\_a\\_cost\\_for\\_everyone/transcript?language=en](http://www.ted.com/talks/heather_c_mcgee_racism_has_a_cost_for_everyone/transcript?language=en).

<sup>9</sup> Margaret Nash, *Entangled Pasts: Land-Grant Colleges and American Indian Dispossession*, 59 *Hist. Ed. Q.* 437 (2019).

Racist policies are not always written directly into law, of course. Racist lawmakers have often drafted laws that are racially neutral on their face, even though the law's design will disproportionately harm people of color. The original design of Social Security provides one example. In order to pass the landmark baseline public option, the Roosevelt Administration had to compromise with southern segregationist Democrats in Congress. Law did not exclude people by race explicitly, but it excluded agricultural and domestic workers, many of whom were black.<sup>10</sup>

Other seemingly neutral policies – like stimulus spending – can also exacerbate racial inequalities. As Professor Olatunde Johnson has argued, federal spending programs with massive scale can produce and reproduce racial inequality if they are not designed to “impose explicit inclusionary norms.”<sup>11</sup> For example, the American Recovery and Reinvestment Act of 2009 included funding for initiatives ranging from highways and low-income housing to education. Some of these programs, like K-12 education funding, deliberately seek to advance racial equity. Others, including low-income housing tax credits, do not include affirmative policies to advance inclusion. The consequence, Johnson argues, is that this flow of these funds can end up reproducing the racially unequal baselines that currently exist.

Early evidence suggests that the 2020 pandemic relief program reflects the dynamic Johnson identifies. Relief efforts that disproportionately benefit large businesses rather than smaller ones and individuals are likely to direct aid disproportionately to white-owned businesses. The Paycheck Protection Program, for instance, provided forgivable loans to businesses but did not make inclusion a priority. The program utilized a complex and decentralized structure, requiring businesses to apply to private lenders for public loans, and did not set priorities for lending or track demographic data. An early survey suggests that minority-owned businesses received little help from the program.<sup>12</sup>

The physical design and layout of transit, bridges, and other infrastructure can also be indirectly designed to exclude populations, rather than enhance equity. Across the country, wealthier white neighborhoods have objected to public transit stops, with a motivation of keeping people of color away. Highways have been located to divide communities by race; bridges built so low that buses cannot pass – restricting access to areas by people who don't have private transportation. Each of these modes of “architectural exclusion,” as Sarah Schindler has called them, operates in an indirect way to render public options less equitable.<sup>13</sup>

<sup>10</sup> Jill Quadagno, *The Color of Welfare* (1996); Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (2013).

<sup>11</sup> Olatunde C. A. Johnson, *Stimulus and Civil Rights*, 111 *Colum. L. Rev.* 154, 160 (2011).

<sup>12</sup> Christopher J. Brooks, *Few Minority Business Owners Got Paycheck Protection Program Loans, Survey Shows*, CBS News Moneywatch, May 20, 2020.

<sup>13</sup> Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation through Physical Design of the Built Environment*, 124 *Yale L. J.* 1836 (2015).

De facto racism can also undermine public options. Public swimming pools are a good case. In the early twentieth century, public swimming pools became segregated by race – not necessarily by law, but by force. Intimidation and violence segregated pools, as Jeff Wiltse has noted in his history of this public option.<sup>14</sup>

De facto racism has also skewed the impact of two critical public options – public housing and public education. As we discuss in *The Public Option*, public housing has been an important source of decent and affordable housing for many Americans. But the program has been vilified in racialized terms as the locus of gangs and crime, and the location of public housing projects in minority neighborhoods has too often reinforced patterns of housing segregation.<sup>15</sup>

Public schools have also been a focal point for racism. Both Southern and Northern communities fought racial integration in the schools. Today, de jure racial segregation is outlawed, but de facto segregation remains a powerful force, because school districts map onto segregated neighborhoods, and political boundaries function to isolate (poorer and minority) city districts from (richer and whiter) suburbs.<sup>16</sup> Economist Raj Chetty and his coauthors have shown that residential segregation and other factors are correlated with economic opportunity: segregated areas have lower intergenerational mobility.<sup>17</sup>

In many cases, public options have failed to live up to the aspiration of expanding freedom and equality because of background social conditions. But race has also been deliberately used – explicitly or implicitly – to make public provision of goods and services more difficult to achieve and sustain. Racism has long been used as a divide-and-conquer strategy to prevent economic policies that would help working-class Americans.<sup>18</sup> Racist dog-whistles have served the same function, as neutral-sounding narratives like the “undeserving poor” place racially inflected pressure on public options, creating a wedge between users and nonusers and degrading the quality of public options.<sup>19</sup>

In a context of pervasive, overt, and legal racism, it may seem difficult to see how design can address these underlying problems. But policymakers can make design choices that make public options more equitable; policies must – and can – be designed to anticipate the racists and holdouts who will seek to defend their privilege and undermine the full potential of public options.

<sup>14</sup> Jeff Wiltse, *Contested Waters: A Social History of Swimming Pools in America* (2007).

<sup>15</sup> Sitaraman & Alstott, *The Public Option*, at 119–128.

<sup>16</sup> *Id.* at 113–119.

<sup>17</sup> Raj Chetty et al., Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States, 129 *Quarterly J. Econ.* 1553 (2014).

<sup>18</sup> Martin Luther King, Jr., Address at the Conclusion of the Selma to Montgomery March, March 25, 1965.

<sup>19</sup> Ian Haney-Lopez, *Dog-Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class* (2013); Michael Katz, *The Undeserving Poor: America's Enduring Confrontation with Poverty* (2nd ed. 2013).

### 3.2 CHALLENGE 2: SECOND-CLASS PUBLIC OPTIONS?

One of the central features of public options is that they coexist with private options. Competitive public options offer effectively the same service as a private option and compete with the private option. Baseline public options provide a universal service to everyone but coexist with the private option in the sense that people may top up the basic good or service by buying more from a private provider. One of the consequences of competition is that overall social provision of the goods or services in question might end up as a two-tiered system, in which the public option is of lower quality or has a different population using it than private options. For example, in some cities, the public transportation system is used primarily by poorer residents without cars, while in other places, public transit is widely used by all social classes.

Selection effects like these can set in motion a set of dynamics that can undermine the public option in a hurry. If richer or more privileged people opt out of the public option, the result could be that the public option might not provide the same level of service or opportunity. Users of the private option might withhold their support for investing in the public option, and multiple tiers of provision can create or entrench racial and class segregation.

Policymakers must therefore anticipate selection effects that can lead to two-tier provision and think about ways around that problem. The first and most important design point is that there is a category of goods for which a competitive public option is unlikely to be the right policy choice, and the better policy is either a regulated (private) monopoly or exclusive public provision. The heartland of this category is network infrastructure, in which we want to ensure universal access at an affordable price and where financing has historically involved cross-subsidies.

The post office provides a good example. It is more expensive to send a letter from Manhattan to rural Montana than it is to send it down the street. But the price of a stamp is the same in either case. In essence, a mandate of universal service at regulated prices sets up a cross-subsidy, in which high volume and profit routes are subsidizing lower volume and profit routes. Part of the purpose of this system – which is a common feature of regulated network industries including transportation and telecommunications – is to ensure access across America's expansive geography while making the system more resilient from political attacks. These systems usually include an exclusive franchise. The post office, for example, has had a monopoly over letter delivery since its earliest years. The reason for monopoly power is simple: if private competition was allowed, the private market would capture the highest-profit routes and ignore the lower-profit routes. The result would be extremely high cost of mail service in rural areas – and likely collapse of that service. Indeed, with the shift in the 1970s and early 1980s from a regulated system based on cross-subsidies to a deregulated private marketplace for airlines, buses, and trucking, this is precisely what happened.<sup>20</sup>

<sup>20</sup> See, e.g., Ganesh Sitaraman, Morgan Ricks, and Christopher Serkin, *Regulation and the Geography of Inequality*, Duke L. J. (forthcoming).

A related problem of selection occurs in health insurance. The most profitable population to insure are young, healthy people because they pay premiums, but do not (on average) consume much health care. People who are older and sicker are likely to consume more health care, thereby reducing the profits for insurance companies. Ideally, in a large pool, these populations offset each other – effectively producing a cross-subsidy akin to that in letters or air-transportation. But insurance companies still have an incentive to exclude sick people, such as those with preexisting conditions, from coverage or to deny coverage to policyholders who need it. One solution would be to have a system of private insurance, in which companies are regulated akin to network industries – for rates, service, and access. The Affordable Care Act thus mandated offering insurance even in the case of preexisting conditions. Another solution is a baseline public option – like Medicare for All – which would place everyone in the same insurance pool. This would prevent private insurance from cream-skimming the healthiest people and leaving the sickest to taxpayers. A universal pool – exclusive public provision – incorporates the cross-subsidy idea that is at the heart of insurance.

In addition to cases where financing is tied to cross-subsidies, a second design consideration will be whether there is likely to be degradation in the service quality of the public option compared to the private one. And that, in turn, depends primarily on the political power of the users. Users with political power can use that power to get better funding and maintain higher quality public options. Public golf courses, for example, are used by comparatively wealthy and well-connected people. Public playgrounds and parks might be sited in wealthy areas because residents in those areas have political connections, and might not get sited in communities that have historically wielded less influence over politicians. As in other arenas, discrete groups are also often able to organize and exercise political power to benefit themselves.<sup>21</sup>

Part of combating these unequal power dynamics is to design public options in a way that expands political voice and builds political support for equitable public options. If usage rates of the public option are extremely high – for example, universal provision – then some degree of selection out of the public option into the private option might not matter much. High usage can create a political constituency that is committed to the public option and will advocate for its continued funding and for efforts to improve it. The elderly's ability to preserve Social Security is one good example.<sup>22</sup>

Whether public options have high usage rates, including a broad composition of users will partly depend on politics itself, and the structure of the program will in turn shape politics. Professor Suzanne Mettler has shown, for example, that the GI Bill affected veterans' political participation. But it did so differently among white

<sup>21</sup> Cf. Bruce Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713 (1985).

<sup>22</sup> See, e.g., Andrea Louise Campbell, *How Politics Make Citizens: Senior Political Activism and the American Welfare State* (2003).

and black veterans, who experienced benefits differently. White veterans became more active in political and fraternal organizations, while black GI Bill veterans mobilized more to change political structures.<sup>23</sup> Political scientists have also shown that these “policy feedback loops” – policy choices that influence public engagement – can be used strategically as a political weapon to build or break support for specific policies. Conservative organizations’ advocacy for anti-union legislation at the state level, for example, contributed to a decline in the strength in public sector unions, which had feedback effects on the unions’ political power – and the political power of the workers they represented.<sup>24</sup> Policymakers should design public options in a way that accounts for feedback loops in order to prevent second-class service.

### 3.3 CHALLENGE 3: NECESSARY AND SUFFICIENT GOODS

Whether a public option advances equity also depends on whether access to a good or service at a reasonable price, is sufficient to achieve equity or whether, instead, it is one input (among others) toward equity. For example, clean drinking water is a sufficient good; as long as a person has access to healthy tap water, that will be sufficient to keep them hydrated. Not having access to expensive, bottled spring water is not significant, except perhaps as a matter of class stratification or signaling. For a sufficient good, the public option by itself can expand equality and access. Of course, a public option can simply fail, as in the case of the lead-tainted drinking water in Flint, Michigan. But in places where the public option provides clean water, the water itself is sufficient to ensure equity.

What is sufficient may change over time, of course, based on social needs, commercial development, and technological advances. For example, access to low-speed dial-up Internet might have been a sufficient good in the late 1990s, but in the early 2020s, high-speed broadband and wireless connectivity are essential.

In other situations, a public option may be necessary and helpful, but not sufficient. For example, even an important public good, like free K-12 public education, will not be sufficient to guarantee equity if some students cannot fully benefit from the education because of hunger or homelessness (just to take two examples). For these children, a free K-12 education is necessary but not sufficient, and the public option needs to be supplemented or even reconceived to bundle wraparound services like meals, housing assistance, and more. Or consider the GI Bill. After World War II, GI Bill benefits provided a college tuition benefit that was instrumental in building the white middle class. Although GI Bill benefits were formally available to black soldiers as well, segregation in higher education was a barrier that restricted opportunity. Financial access to higher education, without

<sup>23</sup> Suzanne Mettler, “The Only Good Thing was the G.I. Bill”: Effects of the Education and Training Provisions on African-American Veterans’ Political Participation, 19 *Stud. Am. Pol. Dev.* 31 (2005).

<sup>24</sup> Alexander Hertel-Fernandez, Policy Feedback as Political Weapon: Conservative Advocacy and the Demobilization of the Public Sector Labor Movement, 16 *Perspect. Polit.* 364 (2018).

equal access to colleges and universities, was one of the reasons the GI Bill did not achieve the promise of being an equitable public option.

More generally, any public option may be inadequate when one-size-fits-all cannot achieve a meaningful degree of equity. All kids start with different levels of capacity, talent, home support, and opportunities. Children with disabilities, for example, may require very particular supports or accommodations in order to learn. As a result, offering access to a standardized public option for education is unlikely to be sufficient to accomplish the aim of advancing equality and opportunity. Federal special education law now offers a public option that takes the approach of targeted universalism. Different policies may be required (the targeted part) to ensure that all groups reach the public policy goals (the universal part).<sup>25</sup>

### 3.4 CHALLENGE 4: COMPLEXITY AS A BARRIER TO EQUITY

Any law or government program (or private sector product, for that matter) can be designed and administered in a way that is simple and easy to use – or extremely complicated. Simple designs and simple administration are likely to be more equitable, though it is perhaps not obvious that they would be. A complicated policy might be perfectly tailored to help every population and sub-population with precisely the service they need. But the problem is that a complicated policy is often harder for people to use. Increased paperwork, bureaucracy, and multiple steps to access a good or service may make it harder for anyone – and especially those without wealth or copious amounts of free time – to navigate program complexity and bureaucratic red tape. Simple designs and simple administration are likely to be more equitable.

Consider a few examples, starting with the Earned Income Tax Credit. Despite generally being considered a successful anti-poverty program, the EITC has complex rules including a filing requirement, an income test, a work (wages) test, and a non-intuitive definition of “child.”<sup>26</sup> In part because of this complexity, many eligible people do not claim the EITC. For instance, in California alone, lower-income people fail to claim more than \$2 billion per year in federal and state EITC payments. Non-profit organizations like CalEITC4Me have therefore sprung up to educate people on navigating tax policy in order to claim the credit.<sup>27</sup> Moreover, the complexity of the (federal and state) EITC programs has benefitted the private sector, as H&R Block and other commercial firms have captured the market for EITC recipients. In 2010, for instance, a majority of low-income tax filers used a paid preparer; only a tiny percentage relied on IRS help or volunteer income tax assistance programs.<sup>28</sup>

<sup>25</sup> John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 *Denv. U. L. Rev.* 785 (2009).

<sup>26</sup> I.R.C. Section 32.

<sup>27</sup> CalEITC4Me, *About Us*, [caleitc4me.org/about-us/](http://caleitc4me.org/about-us/) (accessed May 3, 2020).

<sup>28</sup> Tax Policy Center, *Why Do Low-Income Families Use Tax Preparers?* [www.taxpolicycenter.org/briefing-book/why-do-low-income-families-use-tax-preparers](http://www.taxpolicycenter.org/briefing-book/why-do-low-income-families-use-tax-preparers)



The irony, then, is that program complexity can undermine equitable access while enriching the private sector – and thereby creating a constituency that favors complexity. In California, Intuit (the large company that markets TurboTax) and H&R Block, among others, lobbied against and helped defeat a government initiative that would have provided free, already-prepared tax returns to Californians.<sup>29</sup> Intuit and other private tax preparers agreed to offer free filing for low-income taxpayers – but then proceeded to hide the free programs and upsell customers to paid options.<sup>30</sup>

Tax-based policies for savings (including individual retirement accounts, 401(k) programs, 529 college accounts, and health savings accounts) also illustrate how complex rules can undermine equity. One commentator puts it well, “Instead of making retirement benefits more generous, or college cheaper, or health care universal, we’ve created accounts upon accounts, each of which you have to have enough money to contribute to, remember to pay into, and jump through all sorts of other hoops to maintain.”<sup>31</sup> Those who have the ability to jump through these hoops are more likely to be wealthy and more educated.

And program complexity can provide cover for other inequitable features. These tax-based savings subsidies, for instance, appear to provide an equal benefit to everyone: any taxpayer who makes a qualifying contribution can take a tax deduction. That sounds fair, unless you know (as experts and the rich do) that tax deductions are worth more to people in the highest tax brackets. The result is an upside down subsidy: a rich taxpayer in the 37 percent tax bracket receives a public subsidy of 37 cents for every dollar she or he contributes, while a lower-earning taxpayer in the 10 percent bracket receives a subsidy of only 10 cents. For these reasons, keeping public options simple should be a guiding principle for design.

### 3.5 CHALLENGE 5: PUBLIC OR ONLY PARTLY PUBLIC?

One of the recurring design questions for public options is how much needs to be public? For example, US health-care debates over a public option are fundamentally about public health *insurance*. That is, even the broadest public option, Medicare for All, would leave in place an insurance system that reimburses private hospitals, doctors, and nurses. By contrast, in some countries (and even through the US Veterans Administration), health care itself is publicly provided.

Similarly, public options for housing finance, like those run through FHA, leave in place a private lending and housing system, but some localities also offer public housing. Public options can also outsource some of their functions to the private

<sup>29</sup> Alex Mayyasi and Stacey Vanek Smith, Episode 760: Tax Hero, Planet Money, NPR, March 22, 2017, [www.npr.org/sections/money/2017/03/22/521132960/episode-760-tax-hero](http://www.npr.org/sections/money/2017/03/22/521132960/episode-760-tax-hero)

<sup>30</sup> Justin Elliott and Paul Kiel, The TurboTax Trap, ProPublica, October 17, 2019, [www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free](http://www.propublica.org/article/inside-turbotax-20-year-fight-to-stop-americans-from-filing-their-taxes-for-free)

<sup>31</sup> Jack Meserve, Keep it Simple and Take Credit, Democracy J., February 3, 2017.

sector. The short-lived Pony Express, for example, operated under a contract with the postal service.<sup>32</sup> When designing an equitable public option, it can be critical to decide which goods or services should be considered a public option and when outsourcing to a private actor is appropriate.

The best design will depend on the particular good or service being offered. But policymakers need to take seriously that retaining a private role (or outsourcing to the private sector) can undermine the public option's ability to expand equality. The central reason is that private actors have an interest in maximizing their own profits, rather than providing their service at an affordable price. This means that privatization can compromise affordability, in particular for the people who need the public option the most.

Professor K. Sabeel Rahman has argued that these dynamics have been a feature of water utility privatization. In some cases, cities seeking to push the cost of water utilities off their books privatized provision – ultimately leading to higher prices for users. In other cases, attempts to finance improvements to the water system have pushed cities to partner with financiers, with similarly disastrous results. Bayonne, New Jersey, Rahman reports, partnered with private equity firm Kohlberg Kravis Roberts to improve its water system. The result, however, was a 28 percent hike in prices, and when many households couldn't pay these higher bills, liens tripled.<sup>33</sup>

The example of private tax preparers, briefly discussed in the previous section, provides another cautionary tale about private outsourcing. Policymakers have become concerned that low-income tax filers were paying large fees (often, hundreds of dollars) to private tax preparers, even though their returns were often quite simple (by expert standards). Alarmed by the possible loss of business, Intuit and other commercial tax preparers struck a deal with the IRS: The IRS would not offer a public option for free tax preparation, and in return the commercial companies themselves would offer a free product to lower-earning filers.

The privatized tax filing program, called FreeFile, might have seemed to be a win for government and consumers. The private companies already have the software needed to prepare and file tax returns, and so FreeFile saved the IRS the expense of having to reinvent the wheel. But, driven by the profit motive, commercial taxpayers have undermined FreeFile with complexity and upselling tactics. Taxpayers searching for FreeFile may find it difficult even to locate the free product; according to reports Turbotax, deliberately hid FreeFile from Google searches. In the meantime, Turbotax launched its own, purportedly free filing program that often upsells customers to a paid option, sometimes by playing on consumers' fear and uncertainty about taxes.<sup>34</sup>

<sup>32</sup> US Postal Service, *The Pony Express*, <https://about.usps.com/who-we-are/postal-history/pony-express.pdf> (accessed May 3, 2020).

<sup>33</sup> K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion through the Governance of Basic Necessities*, 118 *Colum. L. Rev.* 2447, 2478 (2018).

<sup>34</sup> Elliott and Kiel.

## 3.6 CHALLENGE 6: FRACTURED PROVISION

Another challenge for designing equitable public options is the US system of federalism, which can often lead to fractured provision of public options – with detrimental consequences for equity.

A glaring example is the funding and quality of public education. Public schools are funded largely through local property taxes, leading to a system of urban development, housing policy, and zoning that have been tied to racial exclusion. White flight to the suburbs after desegregation orders for schools, coupled with zoning laws that prohibited density, ensured de facto segregation – now enforced through facially neutral zoning laws and housing costs rather than overtly racist Jim Crow laws. The fracturing of school financing and operations means a lack of equity within and across states.

Fractured provision of public options also takes place at the national level, with equally problematic consequences. After the Supreme Court allowed states to choose whether to expand Medicaid under the Affordable Care Act,<sup>35</sup> many states refused to expand that health insurance program. The result was that millions of lower-income people were denied access to health insurance. Fractured provision of Medicaid can also create policy feedback loops that further shape that program and even others. As Professor Jamila Michener has argued, different experiences with Medicaid state-by-state can lead participants to draw different conclusions about the value of political participation.<sup>36</sup>

Unemployment insurance provides another example of how federalism can undermine equity. The program is a joint program of the federal government and the states, but the states have vast authority to set the terms of unemployment benefits. Some states, like Florida, have spent years deliberately dismantling the unemployment system. When the COVID-19 pandemic hit and unemployment skyrocketed, Floridians who lost their jobs were significantly disadvantaged, compared to those in other states.<sup>37</sup>

Indeed, the strategy of devolution to the states has frequently undermined equitable efforts. Since 1996, the major (non-tax) welfare program for families, Temporary Assistance for Needy Families (TANF), has taken the form of a block grant to states, with states granted enormous leeway to set the terms of eligibility. Over time, states have set such onerous conditions and such meager benefits that TANF has all but fallen into disuse. In the 1980s, the predecessor welfare program (AFDC, or Aid to Families with Dependent Children) had a participation rate of about 80 percent, meaning that 80 percent of eligible families claimed and received

<sup>35</sup> *Nat'l Fed. Ind. Bus. v. Sebelius*, 567 U.S. 519 (2012).

<sup>36</sup> Jamila Michener, *Fragmented Democracy: Medicaid, Federalism, and Unequal Politics* (2018).

<sup>37</sup> Patricia Mazzei & Sabrina Tavernise, *Florida is a Terrible Place to be an Unemployed Person*, N.Y. Times, April 23, 2020.

benefits. As of 2016, the figure for TANF is under 30 percent.<sup>38</sup> Fractured provision – through states and local governments – can thus undermine the ability of a public option to enhance equity, even when the purpose of the program is to do just that.

The problem of fractured provision does not mean that all public options have to be operated at the federal level. But federal and state policymakers cannot assume that federalism or local control will always be beneficial; they need to consider whether fracturing public options will have negative consequences for equity and inclusion.

### 3.7 CONCLUSION: DESIGNING INCLUSIVE PUBLIC OPTIONS

The six challenges we have outlined may seem daunting: How can public options succeed in promoting equity when there are so many ways that they can fail? But the history of public options also contains hopeful lessons about the power of inclusive design.

Perhaps the clearest lesson is to design public options for universal access, not only to ensure equity itself but also to build a coalition that will sustain the public option. Social Security, for instance, began as a tiny program that paid low benefits and excluded many black workers. But over time, the mission and coverage of the program expanded, and today it covers 97 percent of US workers.<sup>39</sup> The advent and growth of Social Security created a novel but durable coalition of older people, which uses its considerable political power to monitor and protect Social Security benefits.

The Americans with Disabilities Act provides another example of inclusive policy dynamics. Among its other features, the Act required buildings, transportation, and other architectural features to be accessible. One of the consequences was the widespread adoption of elevators and ramps throughout public buildings and services. The subway system in New York, for example, now has ramps and elevators. This kind of inclusive design of the public option turns out to benefit more than those in wheelchairs. Parents with strollers, elderly people who walk but are worried about falling, people carrying luggage, all benefit from the inclusive design of this public transportation option.<sup>40</sup> And, together, they represent a larger constituency that can protest when these features are permitted to decay.

A second common strategy for addressing racism in public options has been legal enforcement through the courts. But as Professor Olatunde Johnson has argued, both private and public enforcement have severe limitations.<sup>41</sup> Johnson shows that both “neutral” judicial decisions that shape access to the courts and decisions on the

<sup>38</sup> Linda Giannarelli, *What Was the TANF Participation Rate in 2016?*, Urban Institute, July 2019, [www.urban.org/sites/default/files/publication/100521/what\\_was\\_the\\_tanf\\_participation\\_rate\\_in\\_2016\\_2.pdf](http://www.urban.org/sites/default/files/publication/100521/what_was_the_tanf_participation_rate_in_2016_2.pdf)

<sup>39</sup> Social Security, *Never Beneficiaries, Aged 60-89*, 2015, [www.ssa.gov/policy/docs/population-profiles/never-beneficiaries.html](http://www.ssa.gov/policy/docs/population-profiles/never-beneficiaries.html) (last visited Jan. 1, 2021)

<sup>40</sup> Joseph Shapiro, *In Helping those with Disabilities, the ADA Improves Access for All*, NPR, July 24, 2015.

<sup>41</sup> Olatunde C. A. Johnson, *Beyond the Private Attorney General: Equality Directives in American Law*, 87 *N.Y.U. L. Rev.* 1339 (2012).

substantive standards for evaluating racist laws can make private lawsuits more difficult for plaintiffs to bring and to win. Administrative agencies also often fall short in public enforcement.

But judicial enforcement is not the only way for public agencies to advance equity. A complementary approach, Johnson argues, involves “equality directives,” regulatory regimes that require agencies to push actors to pursue equality goals. For example, Title VIII of the Fair Housing Act and VI of the Civil Rights Act require federal agencies to advance anti-discrimination goals in housing and public spending.<sup>42</sup> These laws, she argues, use “administrative, programmatic, and regulatory power to promote civil rights.”<sup>43</sup> Of course, whether these powers will themselves be enforced depends on the degree to which the administration in power has anti-racist commitments.

Moving beyond design choices, administrative power, and judicial enforcement, Professor K. Sabeel Rahman argues that equitable program design also requires oversight and accountability, and that bodies designed with those goals in mind should be more representative and participatory.<sup>44</sup> He describes these strategies as critical for “inclusionary administration of public goods,” not only because they ensure that public programs achieve their equity goals but also because they build inclusion into the process itself. Incorporating participation and representation values into the design of oversight mechanisms helps make sure that a wide range of people – especially including those closest to the program – can shape its future.

Getting inclusive design right is not easy. No single public option can, for instance, magically erase the racist policies that have undermined equity in education, employment, and housing. But it would be unduly pessimistic to suppose that public options are doomed to be inequitable. With due attention to policy design, public options can contribute to expanding equity and opportunity.

<sup>42</sup> Fair Housing Act, 42 U.S.C. § 3608(d); Civil Rights Act, 42 U.S.C. § 2000d.

<sup>43</sup> Johnson, *Beyond the Private Attorney General*, at 1368.

<sup>44</sup> Rahman, *Constructing Citizenship*, at 2486.