

# The Subsidy Question in *King v. Burwell*— A Federalist Response to Crony Capitalism

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On the surface, *King v. Burwell* appears to be a simple case about statutory interpretation. In the Affordable Care Act (widely known as Obamacare),<sup>1</sup> when Congress referred to the “State,” in the provision triggering federal subsidies to insurance consumers for purchases made from federally-authorized insurance providers selling federally-authorized insurance products, should the “State” be understood to refer to the federal market (i.e., exchanges) as well as “State” markets.<sup>2</sup> Simple tools of statutory construction—namely, that Congress knew full well how to refer to a “federal” exchange and failed to do so—would seem to be sufficient to supply a result.<sup>3</sup>

It would also seem to be a stretch to rely on legislative history to overturn this conclusion. Some, such as Steven Brill, who has recently delivered an otherwise masterful account of the origins of Obamacare,<sup>4</sup> might describe the critical language in this case as a “drafting error” committed when Senate Legislative Counsel, at the last minute, needed to revise the Senate bill that ultimately became law for a purely partisan final vote and without significant debate. But even Brill acknowledges that “drafting errors” of this kind would ordinarily have been corrected by “routine” procedures to make technical amendments, and that such

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<sup>1</sup> Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended at 42 U.S.C. § 18031).

<sup>2</sup> *Id.* at § 1311(b, d).

<sup>3</sup> See generally ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56-58, 107-111 (2012) (discussing the textual supremacy and negative implication canons).

<sup>4</sup> See STEVEN BRILL, *AMERICA’S BITTER PILL: MONEY, POLITICS, BACKROOM DEALS, AND THE FIGHT TO FIX OUR BROKEN HEALTHCARE SYSTEM* 194 (2015) [hereinafter *AMERICA’S BITTER PILL*].

“technical” corrections were never made.<sup>5</sup> It turns out that, as Brill himself concedes, it was Senate staffers responsible for the bill—although, notably, no named Senators—who “always intended” that the federal exchange would serve as a backup to the states “that could not or would not mount their own exchanges so that people in those states could get the full benefit of Obamacare,” presumably including the subsidies available to consumers on the “State” Exchanges.<sup>6</sup> Yet, as Brill recognizes, the Senate bill that became the basis for the final law was proposed only two months before final enactment; and it was the Senate bill that, for the first time, changed the proposal to provide for insurance exchanges in each of the states, superseding the House’s proposal for a single, federal exchange.<sup>7</sup> In short, the late-in-the-day shift to a statutory scheme employing a primarily state-managed programs at the very least diminishes the significance of what congressional staff, and perhaps even members of Congress, “always” intended. Finally, for reasons made clear in an amicus brief I joined, co-authored by my colleagues Bob Destro and Marshall Breger, the overall statutory scheme, in the context of background considerations of tax and administrative law, commands an interpretation that accords with the plain language of the statute.<sup>8</sup> Congress created a system that would support State-created Exchanges rather than a scheme that would lead ineluctably to a primarily federal system.

But here I want to take the opportunity to argue that text and its context supply only a part of the answer the Court must give in *King v. Burwell*. Federalism principles that serve as postulates in our constitutional structure and traditions are also implicated, and even more so in a legislative scheme authored by the Senate, which continues to serve as the primary guarantor in the federal portion of our government of state authority and autonomy. Substantively, U.S. federalism principles require a different approach to health care than simply following the nominally more efficient models, usually single-payer systems employed in the rest of the industrialized world; and, if

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* (“[S]omeone had mistakenly cut and pasted language from a provision in an earlier draft that referred only to state exchanges and used it in one place, though not elsewhere, as a boilerplate reference to the exchanges in one of the clauses describing how the subsidies would work.”).

<sup>7</sup> *Id.* at 174. For convoluted reasons that go well beyond the scope of this essay, Senator Reid’s proposal became the legislative vehicle that in time became Obamacare. For the connection between this legislative process and the crony capitalism that characterized the enactment and implementation of the bill, see *infra* text accompanying notes 36-51.

<sup>8</sup> See generally Brief for Administrative & Constitutional Law Professors as Amici Curiae Supporting Petitioners, *King v. Burwell*, 759 F.3d 358 (2014) (No. 14-114).

Obamacare's federal exchange becomes the vehicle for the ultimate realization of federal supremacy, and perhaps eventually a European-style, single-payer model—thereby marginalizing the states and private sector—Obamacare will achieve a radical change in the federal-state balance without the consensual process our political system has always required.

In brief, we need to accept that our national political system, unlike those found elsewhere, may never be as efficient, and certainly not as centralized, as the proponents of harmonization with the rest of the world would hope. Rather than adopt the single-goal, universal vehicle of a federal solution, the values that underlay American federalism force us to compromise and balance, at least to some extent, multiple values; our federalism serves not only efficiency but also liberty (through transparency and democratic accountability) and pluralism (through allowing divergent local communities to fashion policies that reflect their different interests). In fact, federalism's decentralizing and democracy-reinforcing legacy to the U.S. is precisely the cure for the diseases in our political system that produced a legislative process infected with the crony capitalism Steven Brill so richly describes and may in due course produce even more efficient results. Thus, in the broader context of our constitutional structure and traditions, the Court should read the text to enable the states and the people to be the primary agents for finishing the job of reforming health care in the United States. Only state and citizen participation in a consensual process that is transparent, deliberative and accountable can correct the crony capitalism that birthed this legislative monstrosity.

This essay briefly outlines the federalism postulates that necessarily inform the Supreme Court's task in *King v. Burwell*. It then explains how multi-value federalism's insights should inform the Court's understanding of how Obamacare was enacted, how it should be interpreted and why the Supreme Court's decision matters, not only for the construction of a better and more sustainable national consensus on health care but also for preventing the decay of our political system into a kleptocracy serving the needs of elites and insiders rather than the common good.

#### THE MANY FACES OF U.S. FEDERALISM

Any discussion of American federalism needs to begin with James Madison, who in *Federalist No. 51* observed:

In a single republic, all the power surrendered by the people is submitted to the administration of a single

government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among the distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.<sup>9</sup>

This “double security” reinforces the central Madisonian idea that “ambition must be made to counteract ambition.”<sup>10</sup> Madison’s appreciation of human nature entailed the view that, for man, “[a]s long as the connection subsists between his reason and his self-love, his opinions and his passions will have reciprocal influence on each other; and the former will be the object to which the latter will attach themselves.”<sup>11</sup> It would follow, in other words, even assuming the purist of motives, that “passions,” including a passion for apparent altruism, that will infect our reason can deceive us to believe that our self-interest is altruistic. Madison’s theory of political psychology is as relevant today as it was at the Founding.

Yet, in Madison’s day, the greatest threat to liberty in the United States was the potential for local tyranny in the states, where “factions” could capture political processes and divert public resources from the common good to private benefit—thus, his strategy of “enlarging” the sphere of public action to reduce the incidence of capture by majority factions.<sup>12</sup> In his warning against the danger of the capture of government by elite groups preserving and expanding their monopoly privileges through clandestine means, Madison reflected the experience of legislative tyrannies in the pre-Constitutional governments of the States.<sup>13</sup> More importantly, he reflected the universal sentiment in the Colonies that political “corruption” in Parliament had resulted in policies

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<sup>9</sup> THE FEDERALIST, NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) [THE FEDERALIST].

<sup>10</sup> *Id.* at 319.

<sup>11</sup> THE FEDERALIST, NO. 10, at 73 (James Madison).

<sup>12</sup> *See id.* at 75.

<sup>13</sup> *See generally* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-87 (1969) (describing the initial tendency of states in the 1780s in order to prevent executive tyranny to adopt constitutions providing for legislative supremacy, the factional and sometimes tyrannical legislatively-dominated state governments that followed, and the consequent increasing popular support throughout the states for separation and balancing of powers as a preferred mode of constitutional design).

that deprived the colonists of their rights as members of the British Empire.<sup>14</sup> But, unlike in Madison's time, it now appears the greater danger of political corruption may have shifted from the states to the federation, with Congress serving as a new "Parliament" where elites can capture the benefits of monopoly power. Where better than Washington, as interest groups decide where to allocate their scarce lobbying resources, to capture public resources and divert them to private benefit? In sum, while Madison's conception of federalism was rooted in his underlying theory of political psychology, grounded in unchanging characteristics of human nature, he applied that theory to the primary threat to liberty in his day, a particular set of dangers of his time and place in history. This insight should inform how we apply Madison's intuitions to practical politics today.

But Madison's is not the last word on federalism. A constitutional basis for the permanent existence of the states as separate political communities is, of course, rooted in the constitutional text.<sup>15</sup> But with time, U.S. federalism has also been theorized in terms of values that transcend the Madisonian conception, some relating to the intrinsic value of pluralism and others to the instrumental benefits of pluralism in furthering democracy and increasing efficiency.<sup>16</sup> While Madison's conception primarily protects liberty, it rests on an underlying respect for pluralism. While Madison took it as a given that there were essential differences among communities that reflected their differing geographies, demographics and economies, these differences can also be viewed as valuable in their own right.<sup>17</sup> Admittedly, the notion of state sovereignty as reflecting cultural distinctiveness suffered irretrievable harm after the Civil War and the century-long struggle to dismantle American apartheid in the South. Today, however, it is possible to see the emergence of so-called "Red" and "Blue" states in partisan politics as reflecting legitimate economic, social and cultural differences that form the underlying sources of political commitment. These differences today become worthy of protection in themselves.

But differences are also worth protecting for instrumental reasons as well, relating to democracy and efficiency. If states are not empowered

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<sup>14</sup> See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLIC TRADITION* 530-36 (1975).

<sup>15</sup> See, e.g., U.S. CONST., art. IV, § 3 (prohibiting changing state boundaries without state consent); *Id.* at art. V (prohibiting the denial of equal state suffrage in the U.S. Senate without state consent); *id.* at amend. 10 (confirming the existence of "reserved" powers in the states).

<sup>16</sup> See generally SAM H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993).

<sup>17</sup> *Id.* at 179-80 (calling this an "argument from community").

to attend to these regional differences, then they will be unable to construct the governance alternatives that best fit their own people's needs. In addition, as the capacity of states to diverge from national standards diminishes, state citizens' disaffection and exit from local political processes will increase, thereby reducing citizen engagement in community life and the education in self-government that local participation in self-government facilitates.<sup>18</sup> Also, much like the need for biological diversity in an ecosystem, diversity in state approaches to complex governance problems, such as health care, can provide precisely the information necessary to determine how to respond to changing social and technological conditions at precisely the moment when the only certainties are change and the need to adapt to change.

This last thought suggests why the pluralist rationale for federalism can merge into a utilitarian rationale. One side of efficiency is dynamic, a capacity to adapt to changing circumstances. Indeed, the famous Brandeis/Stone paean to federalism takes exactly this view: "It is one of the happy incidents of the deferral 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."<sup>19</sup> We make precisely the argument in the amicus brief that Obamacare, properly construed, enables the states to serve as the laboratories for experimentation in the development of exchanges that take into account the practical differences among the states that underlay their differing political commitments.<sup>20</sup> This dynamic understanding of efficiency—one that builds into efficiency analysis the production of more information about real-world effects and also explores whether a set of preliminary institutions can provide workable vehicles for adaptation to changing circumstances—thus overlaps with arguments based on liberty and community.

But federalism as an efficiency value can also be static, meaning at any given moment whether an issue should be resolved at a state or federal level depends only on the net utility of the choice. Understood as a form of social engineering from a top-down perspective, efficiency in governmental programs will not respect the permanent boundaries of the states, much less their liberties and their differences from each other, when considerations of economic efficiency alone hold otherwise.<sup>21</sup> Thus, its exclusive focus on economic efficiency and market failure theory may explain why the approach is sometimes called "fiscal

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<sup>18</sup> See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed., 1969) (1835).

<sup>19</sup> See *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (Brandeis, dissenting).

<sup>20</sup> See Burwell Amicus Brief, *supra* note 8, at 20.

<sup>21</sup> See BEER, *supra* note 16, at 294.

federalism.”<sup>22</sup> Viewed this way, federalism is not unlike the European Union’s conception of *subsidiarity*,<sup>23</sup> which was adopted nominally as a check on the centralizing and harmonizing tendencies of the emerging EU, in light of concerns that the EU was being given increased governance responsibilities over issues extending beyond the formation of a common market alone. But in the EU constitutional context, *subsidiarity* was understood, not as a structural principle allocating authority over governance between the EU and its Member States, but rather as merely “a political principle, a rule of reason.”<sup>24</sup> In short, *subsidiarity*’s focus on the “objectives of the proposed action” and “reasons of scale or effects” reduces the political significance of *subsidiarity* to a utilitarian analysis, akin to the static conception of federalism as fiscal federalism in the American context. If this is what federalism means to the proponents of reading the Affordable Care Act to facilitate supplanting the State Exchanges with the single, universal federal exchange, then it would be natural for them to turn to European solutions that would subordinate federalism’s commitment to liberty (through transparent deliberation and democratic accountability) and pluralism (through accommodation of local differences) to its role in improving the efficiency and effectiveness the government.

However, the most recent jurisprudence of the Supreme Court has rejected a proposed European turn in U.S. constitutional law. In *U.S. v. Printz*, the Court considered the constitutionality of a federal attempt to require states to expend their own fiscal resources on background checks for gun purchasers required by federal law as a condition for purchase. In dissent, Justice Breyer analogized to European constitutional concepts, including the European Union “Directives” to EU Member States that require the Member States to enact legislation conforming to EU

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<sup>22</sup> See, e.g., ROBERT MUSGRAVE, *THE THEORY OF PUBLIC FINANCE: A STUDY IN POLITICAL ECONOMY* 61-89 (1958); BEER, *supra* note 16, at 181.

<sup>23</sup> Subsidiarity was initially established in EU law in 1992 by the Treaty of Maastricht. See generally *Subsidiarity*, WIKIPEDIA (Mar. 6, 2015, 7:45 PM), <http://en.wikipedia.org/wiki/Subsidiarity>. In the most recent formulation as EU law, Article 5(3) of the Treaty of Lisbon, entering into force in 2009, it provides:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

See Consolidated Version of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 5 (as in effect 2010).

<sup>24</sup> See Koen Laenarts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 *FORDHAM INT’L L.J.* 846, 893 (1994).

standards.<sup>25</sup> But Justice Scalia's opinion for the majority insisted that U.S. federalism had different origins from European constitutionalism and that the Framers had specifically rejected European constitution models available to them, choosing instead to mark out a uniquely American understanding of federalism.<sup>26</sup> In short, as Justice Kennedy observed in his decisive concurring opinion in *U.S. Term Limits v. Thornton*:

Federalism was our nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.<sup>27</sup>

Thus, under Justice Kennedy's neo-Madisonian synthesis, the "double security" remains a vehicle for recognizing and protecting state pluralism by acknowledging the dual "political capacities" of our people and simultaneously ensuring their "rights and obligations." U.S. federalism does not completely ignore efficiency, but it prioritizes pluralism and liberty.

Yet, this means that U.S. federalism comes at a cost, and some have found that cost too high. As Frances Fukuyama recently observed, the United States is unique among even liberal-democratic states in developing democratic accountability and rule of law before it developed

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<sup>25</sup> *U.S. v. Printz*, 521 U.S. 898, 976-977 (1997) (Breyer, J., dissenting). Actually, Breyer's analogy to the EU "Constitution" was actually directed against precedent the *Printz* majority relied on to ban federal "commandeering" of state executives for federal purposes; that precedent was the Court's holding of *New York v. United States*, 505 U.S. 144 (1992), which had declared unconstitutional so-called "legislative commandeering."

<sup>26</sup> *See Printz*, 521 U.S. at 921 n.11.

<sup>27</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Indeed, it was not surprising that Justice Kennedy in the oral argument, Transcript of Oral Argument at 16, *King v. Burwell*, No. 14-114 (U.S. Mar. 4, 2015) (Kennedy, J.), drew attention to underlying federalism issues in the Court's statutory interpretation analysis, but the trajectory of his thought on this issue should ultimately lead him to the conclusion that a federal solution undermining state choices not to establish exchanges will undercut competitive democratic political process through which states are held accountable for their decisions.



a strong state.<sup>28</sup> In other liberal democracies and even more so elsewhere, strong states emerged before strong commitments to rule of law or democratic accountability could develop. In many cases, such as the People's Republic of China (the "PRC"), the price paid was that rule of law and democratic accountability remain to be constructed in regimes where the central state remains too strong.<sup>29</sup> Fukuyama bemoans the consequences of America's historical trajectory culminating in what he calls a "vetocracy" dominated by courts and parties coupled with as relatively weak and even incompetent bureaucracy<sup>30</sup>; and he fears that the European Union, as it becomes more like the United States, will experience a diminution in the quality and efficiency of its governance.<sup>31</sup> That said, others have seen the European Union's "democracy deficit," which purchased rule of law and a strong state at the price of democratic accountability, as an even greater challenge to European economic, social and political integration.<sup>32</sup>

At this point, it is fair to acknowledge that reasonable comparative constitutionalists could disagree whether the EU's single-value, entirely efficiency-driven understanding of *subsidiarity* is preferable to the U.S.'s multi-value federalism. Indeed, if Fukuyama is correct, how the United States resolves its simultaneous failure to control healthcare costs and meet the needs of all its people for quality healthcare may well be a test case for the ability of our political system to meet the challenges it faces. But perhaps the need for efficiency can be understood in a way that does take into account the need for liberty and community. In their famous "laboratories of democracy" dissent, Justices Brandeis and Stone added:

The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project

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<sup>28</sup> See FRANCES FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 472 (2014).

<sup>29</sup> *Id.* at 335-37.

<sup>30</sup> *Id.* at 488-489.

<sup>31</sup> *Id.* at 501-502.

<sup>32</sup> For the *locus classicus* of this concern, see Joseph Weiler, *Eurocracy and Distrust*, 61 WASH. L. REV. 1103 (1986).

would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.<sup>33</sup>

In short, the “laboratory” is not just a scientific laboratory of trial-and-error in the pursuit of some universal truth; rather, it embodies recognition of the limits of human reason and of even the best-intentioned politician’s capacity to understand the dangers of overreaching. If one wanted, for those who insist, to put this cautionary message in economic terms, one might analogize to the premature standardization phenomenon, most famously illustrated by the adoption of the QWERTY keyboard when other, more rational keyboard arrangements would soon be available.<sup>34</sup> Along these lines, even if a national approach were ultimately necessary, the argument that “Obamacare” was only the nationalization of Massachusetts’ “Romneycare” could be viewed as a textbook example of the premature adoption of a “standard” before enough data are in to make an informed judgment whether that standard really is the best one available. And, if Fukuyama is right, an effort to implement so massive a project at the federal level is doomed to failure given the current weaknesses in the administrative capacity of the American state to perform even its most basic functions. Political prudence and the economic theory about the development of institutions would both warrant self-restraint in federal policymaking. Federalism’s virtues would then serve as a salubrious tonic for the symptoms Madison foresaw as inevitable consequences of faction,<sup>35</sup> which sometimes even appear as ambition’s tendency to cloak its intentions in a veneer of altruism.

#### A FEDERALIST SOLUTION TO CRONY HEALTHCARE CAPITALISM

As Brill’s book reveals, the process that resulted in the adoption of Obamacare can only charitably be described as crony capitalism. Efforts at cost containment were subordinated to political expediency. For example, lawyers’ lobbies blocked tort reform<sup>36</sup>; labor unions blocked decoupling the provision of insurance from employment (thereby preventing increased American business competitive and increased labor mobility for workers no longer tied as serfs to bad jobs for good

<sup>33</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310 (1932).

<sup>34</sup> See generally S. J. Liebowitz & Stephen E. Margolis, *The Fable of the Keys*, 33 J.L. & ECON. 1 (1990).

<sup>35</sup> See THE FEDERALIST No. 51, at 119-20 (James Madison) (Leslie B. Adams ed., 1983).

<sup>36</sup> See AMERICA’S BITTER PILL, *supra* note 4, at 158.

healthcare insurance)<sup>37</sup>; big pharmaceutical companies obtained further rights to monopoly protection for so-called “biologics” that were not previously patentable<sup>38</sup>; big pharmaceutical companies also blocked parallel trade reform that might have made at least some Canadian-produced, low-cost drugs available for import,<sup>39</sup> thus failing to seize an opportunity to initiate a rational national conversation concerning the tradeoff between current consumption and incentives for future production and exacerbating the risk of the emergence of black markets with accompanying reduced respect for law; hospitals, benefiting from a wave of mergers that increased their market power, managed to nix efforts to increase antitrust enforcement to restore a more competitive market.<sup>40</sup> Further, the federal government forewent an opportunity to use its market power as a buyer of Medicare health services to drive down prices.<sup>41</sup>

Meanwhile, as Brill argues, the insurance companies—the only players in the system with an incentive to encourage cost control, and whose profit rates were well below those of the pharmaceutical companies and hospitals, including the so-called “nonprofit” hospitals<sup>42</sup>—were vilified by politicians seeking scapegoats for the ills that required health care reform.<sup>43</sup> Finally, the legislation ignored the effects on doctors, whose share of healthcare revenues have declined year-by-year, and who may be soon in undersupply for many consumers as doctors exit the profession or transform their business models to serve elites in so-called “concierge” practices.<sup>44</sup> Thus, as Brill’s masterful

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<sup>37</sup> *Id.* at 30-31 (discussing potential labor union opposition to taxation of employer-provided insurance as a possible element of “Romneycare” in Massachusetts); *id.* at 113 (same opposition in Obamacare).

<sup>38</sup> *Id.* at 132-34.

<sup>39</sup> *Id.* at 97, 125-27.

<sup>40</sup> *Id.* at 138-39.

<sup>41</sup> *Id.* at 97.

<sup>42</sup> *Id.* at 101-03.

<sup>43</sup> *Id.* at 107-109 (detailing the challenges the insurance industry faced in making all the projections necessary to determine the premium levels that could match anticipated costs under the range of new proposals); *id.* at 142-44 (describing the politically-opportunistic “targeting” of the insurance industry to win support for reform).

<sup>44</sup> *Id.* at 154-55 (describing the relative weakness of the doctors’ lobbying influence in the legislative process); *id.* at 411 (describing the relatively small gains of doctors compared to those of hospital administrators from the proceeds from Obamacare’s expansion of health care outlays); *Concierge Medicine*, WIKIPEDIA (Dec. 21, 2014, 10:23 PM), [http://en.wikipedia.org/wiki/Conceirge\\_medicine](http://en.wikipedia.org/wiki/Conceirge_medicine) (“The 22% increase in office visits, the shortage of doctors and the increased paperwork requirements will increase the demand for concierge medicine. Patients want guaranteed service and doctors do not want to deal with the overwhelming paperwork of insurance paid medicine.”) (citing William Martinez, MD, MS & Thomas H. Gallagher, MD, *Ethical Concierge Medicine?*, 15 VISUAL MENTOR 576 (2013)).

account reveals, everybody with an interest in a *status quo* of little or no cost control got paid off in the legislative process; with pork that defies description, Harry Reid bought every Senator in the Democratic majority, because, rather than explore consensus-building options, he needed every Democrat to win a party-line vote.<sup>45</sup> Something as big as health care will necessarily result in efficiency losses, backroom deals that pay off stakeholders and smack of the Parliamentary corruption against which the Founders rebelled. But, notwithstanding Brill's own opinion that these payoffs were worth it,<sup>46</sup> his factual account makes clear these losses were simply so grotesque that the average American, in the words of Senator Olympia Snowe, would be "disgusted."<sup>47</sup>

And Brill's story gets worse. Describing Obamacare's implementation, Brill reports a process that predictably devolved into a deadly combination of arrogance and ignorance. Regulators, deferring to political signals, delayed implementing the provisions that imposed the apparent costs of Obamacare until after elections, to permit politicians to avoid the discipline their factions would in due course suffer in the political marketplace of ideas.<sup>48</sup> Federal administrators began to design the federal exchange incompetently, when they could have learned from states that were developing alternative procedures that turned out to be workable and consumer-friendly.<sup>49</sup> Indeed, if federal regulators had followed the market-savvy insights of our Brandeisian "laboratories of democracy," they could have reduced the loss of public trust that followed the incompetent initiation of the federal exchange's website,<sup>50</sup> not to mention the loss of public trust when insurance policies were eliminated—under restrictive rules issued by federal regulators without regard to local variation in circumstances—when President Obama had promised they would remain in effect.<sup>51</sup>

It should now be apparent why federalism, as a structural feature of American exceptionalism, must provide the foundational premise for the Court's reasoning in *King v. Burwell*. In its proposal, the Senate recognized that our constitutional and political traditions do not admit an approach that focuses only on uniformity and efficiency in the national

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<sup>45</sup> *Id.* at 174-79 (describing the "Cornhusker Kickback" and the "Louisiana Purchase," among other legislative payoffs deemed necessary to secure a party-line vote in favor of Obamacare).

<sup>46</sup> *Id.* at 411-12.

<sup>47</sup> *Id.* at 178.

<sup>48</sup> *See id.* at 241.

<sup>49</sup> *See id.* at 266-69.

<sup>50</sup> *See generally id.* at 325-42.

<sup>51</sup> *See id.* at 126, 206-07 (citing President Barack Obama, Remarks by the President at the Annual Conference of the American Medical Association (June 15, 2009)).

healthcare economy. Most obviously, to try to do so would entail trying to achieve the impossible. Our basic inability to make the super-value judgments that the economic efficiency criterion requires counsels caution in identifying one-size-fits-all solutions at the federal level. Just consider the inter-temporal transfers between generations in light of competing views of family structure that are implicit in Medicare reform; the marginal utility gains for the poor and middle class relative to the smaller marginal utility losses for the more wealthy implicit in Medicaid reform; and the libertarian and paternalist conflict in configuring consumer participation on whether to use mandates or rely instead on behavioral economic analysis to construct opt-out regulations. Finally, welfare analyses that focus only on efficiency in a pecuniary sense do not account for the non-quantifiable values that must be addressed by democratic accountability through electoral processes and rule of law compliance by courts and administrative procedures. And they certainly don't account for regional variation. Interpreting the Affordable Care Act to facilitate a single federal solution to all these questions ignores our history and traditions.

But perhaps more important, surely for a deliberative democracy in a federal system, how we get to “yes” in healthcare reform is at least as important as whether we succeed.<sup>52</sup> Indeed, as Edmund Burke believed, “knowledge is not held individually but collectively—in institutions, customs, and even shared prejudices. Maintaining a population’s allegiance to and trust in such institutions is a more important goal than promoting efficiency or rationality.”<sup>53</sup> Accordingly, the failure of thirty-five states to create exchanges compels the conclusion that when the federation asked a question, the states answered in the negative, at least for now. Like the compulsory expansion of Medicaid the Court rightly ruled constitutionally coercive in *NFIB v. Sebelius*,<sup>54</sup> the extension of the subsidy to the federal exchange would, in effect, constitute an expansion of federal power that is inconsistent with the replacement of the single-federal exchange contemplated by the House bill with the state-based approach of the Senate bill.<sup>55</sup> The statutory subsidy for only State Exchanges, rather than also for the federal exchange, is precisely

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<sup>52</sup> Cf. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981) (providing a roadmap for principled negotiating strategies that maintain the relationship between parties to a bargain).

<sup>53</sup> Iain Hampsher-Monk, *How to Think Like Edmund Burke: Debating the Philosopher’s Complex Legacy* 94 FOREIGN AFF. 1 (2015), available at <http://www.foreignaffairs.com/articles/142487/iain-hampsher-monk/how-to-think-like-edmund-burke> (reviewing DAVID BROMWICH, *HOW TO THINK LIKE EDMUND BURKE* (2014)).

<sup>54</sup> See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2601-08 (2012).

<sup>55</sup> See *supra* text accompanying notes 4–7.

the kind of carrot for state participation that preserves the proper relationship between the federation and the states. But if federal exchanges were exact counterparts of State Exchanges with equal federal support through subsidies to consumers, the states would be compelled to create their own exchanges or cede control of the policy space now occupied by the Federal healthcare exchange. The Senate's vision of a consensual and decentralized scheme could in due course be replaced by a wholly federalized system that could in turn morph into a European-style single-payer system. Thus, if the federal option supplanted the states, it would distort the operation of federalism at precisely the moment when federalism's simultaneous promotion of diversity, efficiency and democracy would best serve the nation, enabling the political system to give more refined consideration to the range of Pandora's Box issues that the enactment of Obamacare opened.

Healthcare federalism, ideally, would promote liberty-enhancing recognition of regional diversity, the welfare-enhancing promotion of learning from the benefits of state diversity and the democracy-reinforcing effect of encouraging the peoples of the states and the federation to learn, reconsider and debate the important choices buried in the Affordable Care Act. Surely, in the spirit of Justices Brandeis' and Stone's humility, much can be learned from the crony-capitalist path by which Obamacare was enacted; and, in the aftermath of a decision by the Supreme Court empowering the states, much will be learned from the different options that will emerge as the Federal Government considers whether to re-tool its exchange and, as evidence becomes available from the experience of other states, the states themselves reconsider their earlier decisions not to establish exchanges. Indeed, citizen consumers, now without subsidies for their participation in the federal exchange, may even pressure some of the state governments to reconsider their initial decisions not to establish exchanges—thus fulfilling the federalist design of a properly interpreted Affordable Care Act. But, most important, regardless of whether states reconsider their initial decisions, as Brandeis and Stone understood, federalism is a check against hubris. And if the Supreme Court doesn't respect the words Congress enacted as law, and thereby hold the federal political system to account for the careless, secretive and even corrupt processes that yielded the Affordable Case Act, then we should not be surprised to continue to see federal crony capitalism running riot.