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From the New Deal to the New Healthcare: A New Deal Perspective on *King v. Burwell* and the Crusade Against the Affordable Care Act

Sarah Helene Duggin[*]

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INTRODUCTION

Americans describe the new healthcare system established by the Patient Protection and Affordable Care Act ("ACA")[1] as both a blessing and a nightmare.[2] For millions of low- and middle-income Americans, the ACA offers access to health insurance they could not otherwise

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[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended primarily in scattered sections of 42 U.S.C.).

[2] *See, e.g.*, Barbara Anderson, *In Valley, Affordable Care Act Called a Blessing or a Nightmare*, FRESNO BEE (Dec. 6, 2014), *available at* http://www.fresnobee.com/2014/12/06/4273305/valley-residents-have-mixed-emotions.html; Abby Goodnough, *In New Healthcare Era, Blessings and Hurdles,* N.Y. TIMES, Mar. 31, 2014, at A1; J.D. Harrison, *Obamacare: A Blessing for Some Small Businesses, and a Nightmare for Others*, WASH. POST (Nov. 17, 2014), http://www.washingtonpost.com/business/on-small-business/obamacare-a-blessing-for-some-small-businesses-and-a-nightmare-for-others/2014/11/14/6237952e-6aa7-11e4-9fb4-a622dae742a2_story.html.

afford.[3] The ACA's opponents, however, view the new healthcare system as a threat to economic prosperity, an intrusion on personal liberty and a violation of the principles of federalism at the heart of our system of government.[4] These same kinds of arguments were made more than eighty years ago in response to President Franklin Delano Roosevelt's New Deal.[5] In the 1930s, the United States embraced far-reaching economic and social reforms including the National Industrial Recovery Act,[6] the Agricultural Adjustment Act,[7] the National Labor Relations Act ("NLRA"),[8] the Social Security Act,[9] and a host of other federal initiatives.[10] Many Americans welcomed these laws as a response to the economic devastation of the Great Depression and the human suffering it engendered.[11] Others, however, viewed New Deal reforms as misguided, or even malevolent, missteps that undermined the free enterprise system, sapped individual initiative, and gave the federal government far too much control over businesses and individuals.[12]

More than half a century later, the debate over the wisdom of the New Deal continues, but there is no doubt that the economic and social reforms introduced in the 1930s changed the shape of our society. Collective bargaining rights affirmed by the NLRA,[13] the national minimum wage established by the Fair Labor Standards Act ("FLSA"),[14]

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[3] *See infra* note 151–155 and accompanying text.

[4] *See, e.g.,* notes 118–121 and accompanying text.

[5] *See, e.g.,* Part I.B. and accompanying text.

[6] National Industrial Recovery Act, Pub. L. No 73-67, 48 Stat. 195 (1933) (codified at 15 U.S.C. §§ 703–710), *invalidated by* A.L.A. Schechter Poultry v. U.S., 295 U.S. 495 (1935) (repealed 2002).

[7] Agricultural Adjustment Act of 1938, Pub. L. No. 75-430 52 Stat. 31 (1938) (codified as amended 7 U.S.C. §§ 1281–1407).

[8] National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

[9] Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397 (2012)).

[10] *See e.g.,* Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (1933) (codified at 16 U.S.C. §§ 831–831ee (2012)); Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.); Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

[11] ARTHUR M. SCHLESINGER, JR., THE COMING OF THE NEW DEAL: THE AGE OF ROOSEVELT 3 (1988) [hereinafter SCHLESINGER, JR., COMING OF THE NEW DEAL]; *see* William E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 1–3 (1963) [hereinafter LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL].

[12] SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 471 & 474.

[13] 29 U.S.C. § 158 (2012).

[14] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2012)); National Labor Relations

and the creation of economic safety nets for the elderly and the unemployed through the Social Security Act[15] are among the New Deal's most enduring legacies. But the New Deal left out one critical card: a national healthcare system. It would take nearly eight decades for that card to be played.[16]

President Barack Obama signed the Patient Protection and Affordable Care Act ("Obamacare") into law on March 23, 2010.[17] The new healthcare, like the New Deal economic and social reforms enacted during the 1930s, has engendered both ardent support and fierce opposition. *King v. Burwell,*[18] argued in the United States Supreme Court on March 4, 2015, is the third major challenge to the ACA to come before the Court in four years.[19] The case involves a dispute over the construction of an ACA provision pertaining to the tax credits critical to making health insurance accessible to low-income individuals and families.[20] The stakes are extraordinarily high. One of the think tank lawyers who launched the litigation estimates that a victory for the *King* plaintiffs could impact more than fifty-seven million Americans[21]; others contend that a decision adverse to the government could gut the system established by the ACA.[22] The new healthcare is embodied in a single statute rather than a series of new laws, but the crusade against "Obamacare" is similar in many ways to the war on the New Deal.

(Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

[15] Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397 (2012)).

[16] Efforts on the part of Presidents Harry Truman, Richard Nixon and Bill Clinton to create national healthcare systems all failed to get off the ground. *See* Elisabeth Goodridge and Sarah Arnquist, *A History of Overhauling Healthcare: Nearly 100 Years of Legislative Milestones and Defeats*, N.Y. TIMES, http://www.nytimes.com/interactive/2009/07/19/us/politics/20090717_HEALTH_TIMELINE.htmlt (last visited Apr. 8, 2015).

[17] President Barack Obama, President Obama Signs Health Reform into Law (Mar. 23, 2010) (video *available at* http://www.whitehouse.gov/photos-and-video/video/president-obama-signs-health-reform-law); Sheryl Gay Stolberg & Robert Pear, *A Stroke of a Pen, Make That 20, and It's Official*, N.Y. TIMES, Mar. 24, 2010, at A19.

[18] King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S.Ct. 475 (2014).

[19] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012); Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014).

[20] *King*, 759 F.3d at 364-65.

[21] Michael F. Cannon, *King v. Burwell Would Free More Than 57 Million Americans From the ACA's Individual & Employer Mandates*, FORBES, http://www.forbes.com/sites/michaelcannon/2014/07/21/halbig-v-burwell-would-free-more-than-57-million-americans-from-the-acas-individual-employer-mandates/ (last updated Jan. 22, 2015).

[22] *See, e.g., The Phony Legal Attack on Health Care*, N.Y. TIMES, Feb. 28, 2015, at SR8.

This essay considers *King v. Burwell* in light of the New Deal experience. It offers three principal observations. First, despite widespread popular support, the social reforms of the 1930s, like the new healthcare, encountered extreme, often deeply emotional, resistance rooted in fears about jeopardizing the free enterprise system and compromising personal freedom.[23] Second, in resolving the principal legal challenges to New Deal programs, the Supreme Court focused primarily on the same issues at the core of the public debate – the constitutional limits of federal power and the nature of individual liberty.[24] Third, *King v. Burwell* is qualitatively different from both the New Deal cases and the challenges to the ACA litigated in *N.F.I.B. v. Sebelius*[25] and *Burwell v. Hobby Lobby Stores, Inc.*[26] No matter how the Supreme Court rules in *King*, its decision will neither address the major issues of constitutional structure at the core of the public debate over the ACA, nor elucidate principles of individual liberty critical to the establishment of a national healthcare system.[27]

While the Supreme Court could well conclude that the *King* plaintiffs have a viable argument, it would be a shame to see the most sweeping social reform since the New Deal eviscerated by a technical ruling based on the niceties of statutory construction or administrative deference. For all of the criticism levied against the Supreme Court with respect to decisions overturning New Deal initiatives, the Court never chose to invalidate—or later uphold—New Deal legislation in this fashion. The ACA is one of the most important social initiatives ever enacted in the United States, and the tax-credit subsidies at issue in *King* already have allowed more than seven million Americans to purchase health insurance they otherwise could not afford.[28] This essay argues that the fate of the ACA—like that of the New Deal social reforms that preceded it—should hinge on equally weighty legal principles.

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[23] *See infra* Part I.

[24] *See infra* Part II.

[25] *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. 2566.

[26] *Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751; *see infra* Part III.

[27] Ironically, the only potential constitutional issue pertaining to King v. Burwell could be created by a ruling adverse to the government. *See infra* Part IV.

[28] While some estimate that 7.5 million Americans would lose ACA subsidies if the Court rules against the government, others estimate more than nine million Americans would lose subsidies. *Compare The Health Care Supreme Court Case: Who Would Be Affected?,* N.Y. TIMES, http://www.nytimes.com/interactive/2015/03/03/us/potential-impact-of-the-supreme-courts-decision-on-health-care-subsidies.html?_r=0 (last updated Mar. 12, 2015) *with* Brief of the Commonwealths of Virginia et al. as Amici Curiae in Support of Affirmance at 8, King v. Burwell, No. 14-114, 2015 WL 412333 (Jan. 28, 2015) [hereinafter Brief of the Commonwealths].

I. THE NEW DEAL AND ITS IMPACT

The New Deal encompassed innovative programs designed to address the economic crisis of the Great Depression and its devastating impacts on millions of Americans. The following sections offer a brief overview of New Deal initiatives and some of their key supporters and opponents.

A. New Deal Foundations of Social Reform

The New Deal began with an intensive period of legislative activity during President Franklin Roosevelt's first one hundred days in office.[29] At that time, millions of Americans were out of work; home and farm foreclosures were rampant; businesses were closing their doors; and many people teetered on the brink of starvation.[30] After FDR's inauguration on March 4, 1933, the Roosevelt administration immediately began proposing legislation in an effort to turn the tide of the Great Depression.[31] Early New Deal initiatives included the Banking Act,[32] the Securities Act,[33] the National Industrial Recovery Act,[34] and new programs, such as the Tennessee Valley Authority, designed to build infrastructure and create jobs.[35]

Toward the end of FDR's first term in office, the administration introduced another round of social and economic reforms often referred to as the "Second New Deal."[36] The legislative initiatives of the Second New Deal included both the National Labor Relations Act[37] and the

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29 *See* SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 20–21; LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 41–62.

30 ANTHONY J. BADGER, FDR: THE FIRST HUNDRED DAYS 3–4 (2008); LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 1–3, 18.

31 National Industrial Recovery Act, Pub. L. No 73-67, 48 Stat. 195 (1933) (codified at 15 U.S.C. §§ 703–710), *invalidated by* A.L.A. Schechter Poultry v. U.S., 295 U.S. 495 (1935) (repealed 2002).

32 Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.).

33 Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)).

34 National Industrial Recovery Act, Pub. L. No 73-67, 48 Stat. 195 (1933) (codified at 15 U.S.C. §§ 703–710), *invalidated by* A.L.A. Schechter Poultry v. U.S., 295 U.S. 495 (1935) (repealed 2002).

35 Tennessee Valley Authority Act of 1933, Pub. L. No. 73-17, 48 Stat. 58 (1933) (codified at 16 U.S.C. §§ 831–831ee (2012)).

36 Arthur M. Schlesinger Jr., *The 'Hundred Days' of F.D.R.*, N.Y. TIMES, Apr. 10, 1983, at F1.

37 National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169).

Social Security Act.[38] The NLRA provided protections for workers seeking to organize and engage in collective bargaining,[39] while the Social Security Act, perhaps the most important legacy of the New Deal, established the Social Security Administration and, over a five-year period, put in place a national system of pensions for the elderly, unemployment compensation, and benefits for dependent children who had lost a parent.[40]

In its early days, the New Deal was wildly popular,[41] but not everyone shared in the widespread public enthusiasm. In 1935, the first legal challenges to New Deal legislation reached the Supreme Court, and in 1935 and 1936, the Supreme Court struck down more federal laws than at any other time in history.[42] After a landslide win in the 1936 presidential election, FDR decided to take on the Supreme Court. He introduced a proposal to reorganize the federal courts—the famous "Court-packing plan"—that would have increased the number of Supreme Court justices to fifteen on the basis of a formula based on the ages of the current justices.[43] Unfortunately for the President, Congress—and the public—decisively rejected the Court-packing plan.[44]

During 1937, FDR briefly embraced fiscal conservatism, urging Congress to cut back on federal spending and balance the budget,[45] but this idea, too, proved unsuccessful. By the fall of 1937, the country was in the grip of a "new depression"; by early 1938, starvation once again threatened millions of Americans.[46] The President decided to return to a policy of deficit spending and embark on major new initiatives to address

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38 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397 (2012)).

39 National Labor Relations (Wagner) Act, Pub. L. No. 74-198, 49 Stat. 449.

40 Social Security Act, Pub. L. No. 74-271, 49 Stat. 620.

41 William E. Leuchtenburg, *Showdown on the Court*, SMITHSONIAN, May 2005, at 106 [hereinafter Leuchtenburg, *Showdown*] (describing parades and other public demonstrations of support for early New Deal programs).

42 *Id.* at 108; s*ee, e.g.*, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), *and* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down provisions of the National Industrial Recovery Act); United State v. Butler, 297 U.S. 1 (1936) (holding the Agricultural Adjustment Act unconstitutional); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating minimum-wage and maximum-hours provisions of the Bituminous Coal Conservation Act).

43 LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 232–33; GEORGE MCJIMSEY, THE PRESIDENCY OF FRANKLIN DELANO ROOSEVELT 172–73 (2000).

44 MCJIMSEY, *supra* note 43, at 173–74; LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 233–39; REXFORD G. TUGWELL, FDR: ARCHITECT OF AN ERA 166–67 (1967).

45 *See* ARTHUR M. SCHLESINGER, JR., THE POLITICS OF UPHEAVAL 211–14 (1960) [hereinafter SCHLESINGER, JR., POLITICS OF UPHEAVAL]; MCJIMSEY, *supra* note 43, at 178.

46 MCJIMSEY, *supra* note 43, 174–78; *see* LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 244–45.

the escalating economic problems. This time, the going was more difficult.

The Fair Labor Standards Act[47]—designed to establish a national minimum wage and to require "fair practices" in the workplace—was one of the key reforms the Roosevelt Administration introduced in 1938. However, the proposed legislation encountered significant resistance in Congress, and it took more than a year to make its way through the House and Senate.[48] The FLSA proved to be the last of the major New Deal reforms.[49] By 1939, the economy had grown stronger, opposition had solidified in Congress, and the specter of war overshadowed the focus on economic and social reform.[50] But the New Deal changed the nation. As a result of New Deal initiatives, the United States has a national minimum wage, workplace protections, and social safety nets for the elderly and those who lose their jobs.

Looking back on the New Deal, it is striking that its social reforms did not include healthcare. The Roosevelt Administration made a number of efforts to secure the support of the American Medical Association and other key constituencies for a national healthcare system, but they were unsuccessful.[51] Even the advent of World War II failed to galvanize support for a national healthcare system. In 1943, Senator Robert Wagner (sponsor of the NLRA or "Wagner Act"), along with Senator James Murray, proposed a payroll-based national healthcare system as part of the Wagner-Murray bill in the Senate, and Representative John Dingell proposed a similar plan in the House.[52] Both bills died in committee.[53] In his 1944 State of the Union address, FDR

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[47] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

[48] Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 22 (1978); LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 262–63, 347.

[49] *See* LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 347; *see generally* Grossman, *supra* note 48 (discussing New Deal legislation and detailing the drafting and politics of the FLSA).

[50] LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 346–48.

[51] The American Medical Association opposed a national health insurance program, even calling an emergency session of the AMA House of Delegates in February 1935, when it appeared possible that the president might include healthcare in the Social Security Act legislation he was about to propose. *See Social Security History*, SOCIAL SEC. ADMIN., http://www.ssa.gov/history/1930.html (last visited Apr. 9, 2015); *The Evolution of Medicare*, SOCIAL SEC. ADMIN., http://www.ssa.gov/history/corningchap3.html (last visited Apr. 9, 2015); SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 307.

[52] Wagner-Murray Bill, S. 1050, 79th Cong. (1945); Dingell Bill, H.R. 3293, 79th Cong. (1945).

[53] *The Evolution of Medicare*, *supra* note 51.

included a "right to adequate medical care and the opportunity to achieve and enjoy good health" in his call for a "Second Bill of Rights,"[54] but he died without accomplishing his goal.[55] Harry Truman, FDR's successor, identified universal healthcare insurance as an element of the "Fair Deal" he sought for all Americans,[56] but he, too, found a national healthcare system out of reach.

The New Deal did not create a national healthcare system, but the social reforms introduced during the 1930s altered the relationship between the federal government and the private sector and provided a foundation for subsequent healthcare initiatives. Thirty years later, in July 1965, amendments to the Social Security Act established the Medicare and Medicaid programs signed into law by President Lyndon Baines Johnson.[57] Although the ACA emerged independently of the Social Security Act and other New Deal programs, these social reforms also paved the way for enactment of the United States' first national healthcare initiative. When FDR signed the Social Security Act on August 14, 1935, he stated:

> We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.[58]

President Barack Obama echoed similar themes seventy-five years later when, on March 23, 2010, he signed the ACA: "[W]e have now just

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[54] President Franklin D. Roosevelt, State of the Union Address (Jan. 11, 1944) (transcript *available at* http://www.presidency.ucsb.edu/ws/?pid=16518); *see also* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 10 (2006).

[55] FDR died of a cerebral hemorrhage at White Springs, Georgia on April 12, 1945. *The Presidents: Franklin D. Roosevelt*, WHITE HOUSE, http://www.whitehouse.gov/1600/presidents/franklindroosevelt (last visited Apr. 9, 2015).

[56] President Truman later wrote that "the failure to defeat organized opposition to a national compulsory health insurance program" was the most troubling disappointment of his presidency. Wendy R. Liebowitz, *Harry and Health Care*, TRUMAN SCHOLARS ASS'N (Apr. 13, 2010), http://trumanscholars.org/for-scholars/harry-and-health-care/ (citing MONTE M. POEN, STRICTLY PERSONAL AND CONFIDENTIAL: THE LETTERS HARRY TRUMAN NEVER MAILED (1982)).

[57] *Medicare Is Signed Into Law*, SOCIAL SEC. ADMIN., http://www.ssa.gov/history/lbjsm.html (last visited Apr. 9, 2015). President Johnson signed the Medicare and Medicaid legislation in Independence, Missouri with former President Truman sitting beside him. *Id.*

[58] President Franklin Delano Roosevelt, Statement on Signing the Social Security Act (Aug. 14, 1935) (transcript *available at* http://www.presidency.ucsb.edu/ws/?pid=14916).

enshrined . . . the core principle that everybody should have some basic security when it comes to their health care."[59]

B. Friends and Foes of New Deal Reforms

FDR connected directly with voters more effectively than any president in history. His overwhelming victory in the 1936 presidential election—with more than sixty percent of the popular vote, a margin of 523 to 8 in the electoral college, and victories in 46 of the 48 states[60]—reflected the degree of public support for the New Deal. The New Deal concept of collective responsibility for the plight of the poor and the vulnerable also resonated with many people of faith,[61] including Roman Catholics, Jews and liberal Protestants.[62] While more conservative Protestants were less inclined to support the New Deal, the Federal Council of Churches enthusiastically endorsed its social reforms.[63] To many liberal Protestants, the New Deal was the incarnation of the Social Gospel.[64] To Roman Catholics, perhaps FDR's most important religious constituency,[65] the New Deal embodied Catholic social teaching.[66]

People throughout the United States responded to FDR's inaugural declaration that "the only thing we have to fear is fear itself,"[67] but the New Deal itself created fears for some Americans. Some argued that the Roosevelt Administration's initiatives did not go far enough in addressing the plight of those whose lives were devastated by the Great

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[59] Remarks by the President and Vice President, President Obama Signs Health Reform into Law (Mar. 23, 2010) (video *available at* http://www.whitehouse.gov/photos-and-video/video/president-obama-signs-health-reform-law).

[60] *1936 Presidential Election Results*, http://uselectionatlas.org/RESULTS/national.php?year=1936 (last visited Apr. 9, 2015).

[61] KEVIN M. KRUSE, ONE NATION UNDER GOD 5 (2015) ("When Roosevelt launched the New Deal, an array of politically liberal clergymen championed his proposal for a vast welfare state as simply 'the Christian thing to do.'"); Harold Meyerson, *God and the New Deal*, AM. PROSPECT (Nov. 21, 2004), http://prospect.org/article/god-and-new-deal ("There was, in fact, a clear religious component to the New Deal."); *see* GEORGE Q. FLYNN, AMERICAN CATHOLICS & THE ROOSEVELT PRESIDENCY 36 (1968).

[62] DAVID EDWIN HARRELL, JR. ET AL., UNTO A GOOD LAND: A HISTORY OF THE AMERICAN PEOPLE 934 (2005); A. JAMES REICHLEY, FAITH IN POLITICS 222 (2002); Jill Quadagno & Dean Roblinger, *The Religious Factor in U.S. State Welfare Politics in* RELIGION, CLASS COALITIONS, AND WELFARE STATES 241 (KEES VAN KERSBERGEN & PHILIP MANOW eds. 2009).

[63] Quadagno & Roblinger, *supra* note 63, at 241.

[64] *Id.*; HARRELL ET AL., *supra* note 62, at 934.

[65] Meyerson, *supra* note 61; FLYNN, *supra* note 61, at 36–37.

[66] FLYNN, *supra* note 61, at 36–37.

[67] President Franklin D. Roosevelt, Inaugural Address (Mar. 4, 1933) (transcript *available at* http://www. presidency.ucsb.edu/ws/?pid=14473).

Depression.[68] The most vocal criticism, however, came from the business sector as it became increasingly clear that the New Deal was radically changing the relationship between the federal government and the private sector. Business leaders and those who believed in unfettered free enterprise voiced the same kinds of criticisms against New Deal Social Reforms later raised against the ACA and the new healthcare.

Many business leaders reacted positively to the New Deal when FDR became president in 1933. Desperate economic conditions, the level of uncertainty within the business community itself, and FDR's desire to work with business leaders created a unique opportunity for an alliance between government and business.[69] This confluence of interests quickly led to the enactment of the National Industrial Recovery Act ("NIRA") and the creation of the National Recovery Administration ("NRA").[70] The NRA instituted cooperative efforts, including suspension of federal antitrust laws, designed to moderate cutthroat competition and promote fair practices on the basis of voluntary codes pertaining to wages, hours, and pricing.[71.] Participating businesses displayed NRA blue eagle labels; politicians praised the eagle; and parades celebrated the famous symbol.[72] Even the Schechter brothers, whose indictment on charges of violating NIRA codes led to the famous Supreme Court case,[73] supported the NRA in its early days.[74]

As the economy improved and the administration began to enforce the new laws, criticism from the business sector grew more pointed and more public. While some business leaders continued to support the New Deal,[75] as one historian notes, "New Deal national intervention exceeded all previous parameters for national action, [and] only the most prescient

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68 *See* LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 64–65.

69 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 423–26.

70 National Industrial Recovery Act, Pub. L. No 73-67, 48 Stat. 195 (1933) (codified at 15 U.S.C. §§ 703–710), *invalidated by* A.L.A. Schechter Poultry v. U.S., 295 U.S. 495 (1935) (repealed 2002).

71 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 100–01; LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 65–66.

72 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 114–15 at 114–15; LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 65–66. The Blue Eagle emblem in the window of a business proclaimed, "We operate under an approved code and display the Blue Eagle as a [symbol] of our cooperation." GRAPHIC OF NRA BLUE EAGLE, CA. 1933, NAT'L RECOVERY ADMIN., NAT'L ARCHIVES RECORDS GRP. 9 (NWDNS-9-X), *available at* http://www.archives.gov/historical-docs/todays-doc/?dod-date=616.

73 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 114–15; *see infra* Part II.

74 JAMES F. SIMON, FDR AND CHIEF JUSTICE HUGHES 259 (2012).

75 LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 189–90; SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 494.

and politically astute businessmen were not frightened into some form of opposition."[76] Wall Street, in particular, grew increasingly antagonistic as investigations of the financial community quickly led to enactment of the Securities Act of 1933[77] and, a year later, to the Securities Exchange Act in 1934.[78] Business leaders contended that government intervention was interfering with, not encouraging, economic recovery.[79] At the same time, union organizing campaigns and a number of contentious strikes led to growing concerns about the nature of New Deal reforms.[80] Prominent business leaders began to use terms such as *communist* and even *fascist* to characterize the Roosevelt administration and the New Deal.[81] In the view of many businessmen, the New Deal was becoming a means of creating "an all-powerful central government . . . undertak[ing] to control and direct the lives and destinies of all."[82]

Little more than a year after its inception, criticism of the New Deal from the private sector increasingly began to take on a deeply emotional tenor. President Herbert Hoover described the New Deal as a "stupendous invasion of the whole spirit of liberty,"[83] and many businessmen agreed that the New Deal was threatening the American way of life, undermining individual responsibility, and obliterating the role of the states.[84] As historian Arthur Schlesinger points out, businessmen came to believe that they "were fighting for civilization itself."[85] In response to these beliefs, in 1934, a handful of prominent industrialists banded together with conservative Democrats who

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76 BRIAN WADDELL, THE WAR AGAINST THE NEW DEAL 36 (2001).

77 Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa (2012)); *see* SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 456–57.

78 Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2012)); *see* SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 434–42.

79 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 478–80; WADDELL, *supra* note 77, at 33–34.

80 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 471–72.

81 *Id.* at 473, 477 & 479.

82 *Id.* at 472–73 (quoting Ogden Mills).

83 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 473 (quoting President Herbert Hoover).

84 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 475; *see also* SCHLESINGER, JR., POLITICS OF UPHEAVAL, *supra* note 45, at 618–25 (observing that Madison Avenue "began to charge the later stages of the Republican campaign with a pseudo-apocalytic quality" and describing comments from businessmen and other opponents of FDR suggesting that key presidential supporters were Communists, that FDR himself was seeking to establish a dictatorship, and that Moscow was supporting FDR); MCJIMSEY, *supra* note 43, at 136 (noting that in a two-year period the League "issued 177 [anti-New Deal] titles and distributed 5 million copies").

85 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 479.

disapproved of FDR's agenda to form the American Liberty League to oppose the New Deal.[86] League spokesmen later assailed the New Deal as an invasion of all that Americans held sacred, characterizing New Deal policies as "a trend toward Fascist control of agriculture"[87] and the Social Security Act as "the end of democracy."[88]

Opposition from the business sector increased in response to the Second New Deal initiatives. Senator Robert Wagner's introduction of the legislation that would become the NLRA created a sense of outrage as business leaders and associations, such as the National Association of Manufacturers and the U. S. Chamber of Commerce (a supporter of early New Deal measures[89]), vigorously opposed federal statutory protections for labor.[90] Like the NLRA, the Social Security Act encountered significant ongoing resistance.[91] FDR signed the Social Security Act on August 14, 1935.[92] One year later, during the final months of the 1936 presidential election campaign, the implementation of the first Social Security payroll taxes scheduled for January 1, 1937, loomed large.[93] Business groups created anti-Social Security posters intended to dissuade workers from voting to reelect FDR with statements such as: "You're sentenced to a weekly pay reduction for all your working life. You'll have to serve the sentence unless you help reverse it November 3."[94] Many businesses included similar messages in workers' pay envelopes.[95] In October, steel magnate Ernest Weir, wrote a piece for *Fortune* magazine declaring that the President was opposed "almost unanimously by the business and professional men of the country."[96] These efforts did not prevent FDR's overwhelming victory, but they reveal that many business people perceived the New Deal as antithetical to their interests, contrary to our constitutional system, and an assault on the American way of life.

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86 *Id.* at 486.

87 SCHLESINGER, JR., POLITICS OF UPHEAVAL, *supra* note 45, at 518.

88 *Id.*

89 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 97–98 & 166; U.S. Chamber of Commerce Timeline, https://www.uschamber.com/timeline/ (last visited Apr. 10, 2015).

90 SCHLESINGER, JR., COMING OF THE NEW DEAL, *supra* note 11, at 405; LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 147; *U.S. Chamber of Commerce Timeline*, *supra* note 91.

91 *See* SCHLESINGER, JR., POLITICS OF UPHEAVAL, *supra* note 45, at 211.

92 *Social Security History*, *supra* note 51.

93 SCHLESINGER, JR., POLITICS OF UPHEAVAL, *supra* note 45, at 635.

94 *Id.*

95 *Id.*

96 *Id.* at 638.

As the 1930s drew to a close, the sense of crisis had abated, opposition was mounting, and Congress began to dismantle a number of New Deal programs.[97] It is impossible to say what might have happened if the country had continued on a peacetime basis, because momentous events intervened. On December 7, 1941, Japanese forces bombed Pearl Harbor, and the United States immediately declared war on Japan.[98] Within a few months, the nation was at war in Europe as well.[99] FDR died before the war ended, and, despite repeated efforts to revive it, the idea of a national healthcare system remained moribund for decades. But Social Security and other New Deal reforms became part of the fabric of our society, and the changes in the economic and social role of the federal government wrought by the New Deal created a foundation for later social reforms, including the new healthcare.

II. THE NEW DEAL IN THE SUPREME COURT

The first lawsuits challenging New Deal laws came before the Supreme Court in 1935 during the mid-1930s.[100] Two cases decided in May 1935—*A.L.A. Schechter Poultry Corp. v. United States*[101] and *United States v. Butler*[102]—toppled pillars of the New Deal. *Schechter Poultry* held the NIRA unconstitutional,[103] while *Butler* struck down the Agricultural Adjustment Act of 1933.[104] That same year, in *Railroad Retirement Board v. Alton Railroad Co.*,[105] the Court struck down the compulsory retirement and pension system established by the Railroad Retirement Act of 1934.[106] In May 1936, in *Carter v. Carter Coal Company*,[107] the Court invalidated the Bituminous Coal Conservation Act of 1935 and the maximum-hour and minimum-wage regulations it established for coal miners.[108]

In 1937, however, in the first constitutional challenge to New Deal legislation after Justice Owen Roberts joined the majority in holding a

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97 TUGWELL, *supra* note 44, at 184–89; LEUCHTENBURG, ROOSEVELT AND THE NEW DEAL, *supra* note 11, at 273–74; MCJIMSEY, s*upra* note 43, at 148–49.
98 Frank L. Kluckhohn, *United in Congress: Only One Negative Vote As President Calls to War and Victory,* N.Y. TIMES, Dec. 9, 1941, at 1.
99 Frank L. Kluckhohn, *War Opened on US*, N.Y. TIMES, Dec. 12, 1941, at 1.
100 Leuchtenburg, *Showdown*, *supra* note 41, at 108.
101 A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
102 United States v. Butler, 297 U.S. 1 (1935).
103 *Schechter Poultry*, 295 U.S. at 550.
104 *Butler*, 297 U.S. at 78.
105 R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330 (1935).
106 *Id.* at 374.
107 Carter v. Carter Coal Co., 298 U.S. 238 (1936).
108 *Id.* at 313–16.

state minimum-wage law constitutional in *West Coast Hotel v. Parrish*,[109] the Supreme Court upheld the National Labor Relations Act in *NLRB v. Jones & Laughlin Steel Corp.*[110] Shortly thereafter, the Court upheld the Social Security Act in *Helvering v. Davis*[111] and the Social Security payroll tax in *Steward Machine Company v. Davis*.[112] In 1941, the Court upheld the Fair Labor Standards Act in *United States v. Darby*.[113]

Scholars disagree as to whether the latter cases upholding New Deal laws constituted a radical break from prior decisions striking down early New Deal programs,[114] but one point is clear: All of the cases involved major constitutional principles, and the Court's rulings turned on analyses of constitutional questions that included the scope of the Commerce Power and the Taxing and Spending Power, the reach of the Fifth and Tenth Amendments, and separation-of-powers principles. The magnitude of the legal issues at stake in these cases was on par with the stakes of the litigation. The litigants—individuals and companies prosecuted for violating New Deal laws and employers seeking relief from new taxes and federal regulations governing the terms on which they operated—had very real stakes in the cases they brought. It is hard to overstate the importance of these landmark rulings—both those that invalidated New Deal laws and those that upheld them. Although the pre-1937 Court repeatedly ruled against New Deal initiatives and the post-1937 Court consistently upheld New Deal laws, the cases all undertook to answer constitutional questions of far-reaching significance. While the underlying legal reasoning was grounded in antithetical perspectives on the limits of the power of the federal government, they addressed critical questions of constitutional law in keeping with the magnitude of the stakes of the litigation.

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[109] West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For discussion of Justice Roberts' decision to abandon the Court's conservative "Four Horsemen" and vote in favor of the state minimum-wage law challenged in Parrish—the famous "switch in time that saved nine"—and then vote in favor of the NLRA, *see* Leuchtenburg, *Showdown supr*a note 41, at 111-13; BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 3–5 (1998).

[110] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[111] Helvering v. Davis, 301 U.S. 619 (1937)

[112] Chas C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[113] United States v. Darby, 312 U.S. 100 (1941).

[114] *See, e.g.,* CUSHMAN, *supra* note 109, at 3–5.

III. *KING V. BURWELL* IN CONTEXT

The debate over the ACA strikes a number of chords similar to those raised in response to New Deal initiatives. The following paragraphs highlight a few key points of comparison.

A. Reactions to the ACA: Echoes of the New Deal

President Obama began pursuing the goal of universal healthcare coverage shortly after he took office in 2009. From the very beginning, the initiative sparked vigorous debate in Congress and throughout the nation. After close votes in both the House and Senate, the ACA became law on March 23, 2010,[115] but intense opposition to healthcare reform continued. The first lawsuits were filed the day the President signed the ACA[116] amid continuing criticism of the new healthcare law. Like the opponents of the New Deal, the new healthcare's adversaries have expressed concern that the ACA could raise costs and cut jobs, as well as a sense of moral outrage over the new healthcare law as "an [u]nconstitutional [v]iolation of [p]ersonal [l]iberty [that] [s]trikes at the [h]eart of American Federalism,"[117] threatens personal privacy,[118] and undermines marriage and civil society.[119] Although there are significant differences in context, these reactions arose out of political and philosophical viewpoints similar to those that characterized opposition to the New Deal.

Like the New Deal, the ACA inspired vehement antagonism in the business sector, including negative reactions from the National Association of Manufacturers and the U.S. Chamber of Commerce,

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[115] For key dates and voting results in the House and Senate, *see H.R. 3590 (111th): Patient Protection and Affordable Care Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/111/hr3590 (last visited Apr. 10, 2015); *see supra* note 17 and accompanying text.

[116] Stolberg & Pear, *supra* note 17, at A19; Rosalind S. Helderman, *Cuccinelli Sues Federal Government to Stop Health-Care Reform Law*, WASH. POST (Mar. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/23/AR2010032304224.html.

[117] Robert E. Moffit, *Obamacare and the Individual Mandate: Violating Personal Liberty and Federalism, in The Case Against Obamacare: A Healthcare Policy Series for the 112th Congress*, No. 3103, HERITAGE FOUND. (Jan. 18, 2011), *available at* http://www.heritage.org/research/projects/the-case-against-obamacare.

[118] Chris Jacobs, *How Obamacare Threatens Privacy in America*, No. 4032, Heritage Found. (Sept. 3, 2013), *available at* http://www.heritage.org/research/reports/2013/09/obamacare-s-threat-to-americans-privacy-of-health-and-financial-data.

[119] Collette Caprara, *Obamacare's Threat to Marriage and America's Civil Society*, DAILY SIGNAL (Oct. 21, 2013), http://dailysignal.com/2013/10/21/obamacares-threat-to-marriage-and-americas-civil-society/.

organizations that actively opposed New Deal initiatives in the 1930s.[120] Many businesses and business associations contended that the ACA would raise costs and destroy jobs,[121] and it was a business association that became the named plaintiff in *National Federation of Independent Businesses v. Sebelius*,[122] the first ACA case decided by the Supreme Court.

In the *N.F.I.B.* case, the association, a number of individual plaintiffs, and twenty-six states raised a Commerce Clause challenge to the ACA's Individual Mandate requiring Americans either to purchase healthcare insurance or make a shared responsibility payment.[123] The states also contested the Medicaid Expansion provisions withdrawing all Medicaid funds from non-participating states as an unconstitutionally coercive use of the Spending Power in violation of the Tenth Amendment and principles of federalism.[124] The Court ultimately ruled five to four against the government on the Commerce Clause issue,[125] but it upheld the Individual Mandate as a proper exercise of the Taxing Power.[126] By a seven to two margin, the Court held the Medicaid expansion provision unduly coercive but allowed the program to stand with an opt-out that permitted non-participating states to retain existing federal Medicaid funds.[127]

As the deadline for implementation of expanded employer insurance coverage provisions approached, some businesses responded to the ACA by cutting full-time staff to avoid the requirements.[128] Others apparently concluded that implementation of the ACA has been less costly than they

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[120] *See, e.g.,* Letter from Jay Timmons, Exec. Vice President, Nat'l Ass'n of Mfrs., to U.S. Senate (Dec. 19, 2009), *available at* http://www.nam.org/Advocacy/Key-Manufacturing-Votes/111th-Congress/Senate/NAM-Key-Vote-Letter-on-the-Patient-Protection-and-Affordable-Care-Act/; Letter from R. Bruce Josten, Exec. Vice President Gov't Affairs, Chamber of Commerce of the United States of Am., to the Members of the U.S. House of Representatives (Mar. 12, 2010), *available at* https://www.uschamber.com/sites/default/files/legacy/issues/health/files/100312hr3590patientprotection affordablecarehouse.pdf.

[121] *See, e.g*., Letter from Jay Timmons, *supra* note 121; Letter from R. Bruce Josten, *supra* note 121.

[122] *Nat'l Fed'n of Indep. Bus.*, 132 S.Ct. 2566.

[123] *Id.* at 2577.

[124] *Id.* at 2582.

[125] *Id.* at 2593.

[126] *Id*. at 2600.

[127] *Id.* at 2607.

[128] Sandhya Somashekhar, *As Health-Care Law's Employer Mandate Nears, Firms Cut Worker Hours, Struggle with Logistics*, WASH. POST (June 23, 2014), http://www.washingtonpost.com/national/health-science/as-health-care-laws-employer-mandate-nears-firms-cut-worker-hours-struggle-with-logistics/2014/06/23/720e197c-f249-11e3-914c-1fbd0614e2d4_story.html.

feared, and some organizations that originally sought repeal of the ACA began to urge Congress to fix the statute rather than repeal it.[129] A number of companies in the healthcare field discovered that the ACA offers a host of new business opportunities.[130]

Overall, resistance to the new healthcare appears to be diminishing in the business sector. Big business has been remarkably quiet of late with respect to the ACA.[131] It is particularly striking that the U.S. Chamber of Commerce, a frequent amicus curiae in the Supreme Court when business interests are at stake, did not file an amicus curiae brief in *King v. Burwell*. Other organizations did, however. HCA, Inc. (the nation's largest healthcare corporation), a small business association, and a health insurance association filed briefs in support of the government.[132]

The response of the religious community also echoes earlier reactions to New Deal programs, but unique aspects of the ACA have injected new issues into the mix. Like the old-age pensions and unemployment compensation system established by the Social Security Act, access to the medical care necessary to ensure a healthy life fits with the teachings of many religious traditions.[133] However, Department of Health and Human Services ("HHS") regulations promulgated pursuant to the ACA that require employer coverage of all FDA-approved contraceptives, including four drugs deemed to be abortifacients,[134] created issues that never arose with respect to New Deal reforms.

The use of contraceptives contradicts the teachings of the Roman Catholic Church and, to varying degrees, the tenets of other religious traditions.[135] Consequently, the ACA's contraceptive coverage

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[129] Sarah Ferris, *Chamber of Commerce Didn't Back ObamaCare Repeal Bill*, THE HILL (Feb. 2, 2015, 11:16 AM), http://thehill.com/policy/healthcare/231989-chamber-of-commerces-stance-on-obamacare-repeal-shows-conservative-divide.

[130] *See, e.g.,* Robert Pear, *Health Care Law Recasts Insurers as Obama Allies*, N.Y. TIMES, Nov. 18, 2014, at A1.

[131] Stephanie Mencimer, *America's Largest Health Care Company Tells Supreme Court That Anti-Obamacare Argument Is "Absurd"*, MOTHER JONES (Feb. 9, 2015, 8:22 PM) (discussing HCA, Inc. brief filed in *King* and silence of the U.S. Chamber of Commerce), http://www.motherjones.com/politics/2015/02/hca-king-burwell-supreme-court-obamacare-amicus-brief.

[132] *See* Docket No. 14-114, U.S. SUP. CT., www.supremecourt.gov (briefs of HCA, Inc.; Small Business Majority Foundation, Inc.; and America's Health Insurance Plans).

[133] *See, e.g.,* Brief of the Catholic Health Ass'n of the U.S. & Catholic Charities USA as *Amici Curiae* in Support of Respondents, King v. Burwell, No. 14-114, 2015 WL 365000 (Jan. 28, 2015); Brief of *Amici Curiae* Jewish Alliance for Law & Social Action (JALSA) et al. in Support of Respondents, King v. Burwell, No. 14-114, 2015 WL 350366 (Jan. 26, 2015) [hereinafter Brief of the Catholic Health Ass'n].

[134] *Hobby Lobby Stores, Inc.*, 134 S.Ct. at 2762–63 (2014).

[135] *See* Open Letter from The Most Rev. William E. Lori, Archbishop of Baltimore et al., to All Americans (Standing Together for Religious Freedom) (July 2, 2013),

requirement sparked a great deal of concern over potential conflicts between faith and legal obligations. In *Burwell v. Hobby Lobby Stores, Inc.,*[136] the Supreme Court ruled five to four in favor of the petitioners in a challenge to the HHS contraceptive coverage regulations brought by Evangelical Christian and Mennonite business owners pursuant to the Religious Freedom Restoration Act.[137] While the case turned on whether the companies were entitled to invoke the Act's protection, the underlying questions whether for-profit business corporations are capable of asserting a right to the free exercise of religion and whether the HHS regulations substantially burdened that right have significant constitutional overtones.

The controversy over contraceptive coverage has abated to some extent following *Hobby Lobby*, but the decision did not resolve all potential religious liberty issues with respect to the ACA.[138] The wounds created by the contraceptive controversy run deep; concern about the ACA and reproductive issues is one of the principal reasons a number of people of faith have turned against the ACA in its entirety.[139] Others, however, while continuing to oppose any form of contraceptive coverage, support the ACA insofar as it provides access to medical care to those who could not otherwise afford healthcare insurance. Many religious groups have been instrumental in encouraging individuals and families to obtain insurance through the exchanges and assisting them to do so.[140] The Catholic Health Association of the United States, a Catholic healthcare delivery system, and the Jewish Alliance for Social Action all filed briefs in support of the government in *King v. Burwell*.[141] The Catholic Health Association expressed its mission-based view of the dispute as follows: "[A] just society requires taking care of vulnerable

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available at http://www.usccb.org/issues-and-action/religious-liberty/upload/standing-together-for-religious-freedom.pdf.

[136] *Hobby Lobby*, 134 S.Ct. 2751.

[137] *Id.* at 2759 & 2775.

[138] *See, e.g.*, Davis Masci, *The Hobby Lobby Impact: A Q&A*, PEW RESEARCH CTR. (July 2, 2014), http://www.pewresearch.org/fact-tank/2014/07/02/the-hobby-lobby-impact-a-qa/.

[139] *See, e.g.,* Jeffrey T. Kuhner, *Christians Must Oppose Obamacare*, WASH. TIMES (Oct. 3 2013), http://www.washingtontimes.com/news/2013/oct/3/kuhner-christians-must-oppose-obamacare/.

[140] Adelle M. Banks, *Religious Groups Play Key Role in Obamacare Insurance Sign-up*, WASH. POST (Mar. 20, 2014), http://www.washingtonpost.com/national/religion/religious-groups-play-key-role-in-obamacare-insurance-sign-up/2014/03/20/9158842a-b063-11e3-b8b3-44b1d1cd4c1f_story.html.

[141] *See supra* note 133 and accompanying text.

and marginalized populations, such as those who lack health care coverage."[142]

B. King and the Crusade Against Obamacare

Like the New Deal lawsuits and *N.F.I.B. v. Sebelius*,[143] *King v. Burwell* has the potential to eviscerate a sweeping social reform. Unlike those cases, however, *King* does not involve significant constitutional questions or even statutory issues with the kinds of constitutional ramifications at stake in *Hobby Lobby*. In this respect, the principal decisions of the Supreme Court on New Deal programs and the current Court's rulings in *N.F.I.B.* and *Hobby Lobby* had a great deal in common, because they addressed questions central to our constitutional system. *King v. Burwell* threatens to dismember the ACA on far more prosaic grounds.

The Supreme Court granted certiorari following the Fourth Circuit's decision in favor of the government[144] not to decide important questions of constitutional law but to determine "whether the Internal Revenue Service ("IRS") may permissibly promulgate regulations to extend tax-credit subsidies to coverage purchased through Exchanges established by the federal government under section 1321 of the ACA."[145] It is surprising that the Supreme Court chose to review the case at all. A split among the federal circuit courts had yet to materialize—although a divided panel of the D.C. Circuit ruled against the government in a similar case, the circuit court had vacated that ruling in preparation for rehearing *en banc*[146]—and there are significant questions as to the plaintiffs' standing.[147] The stakes in the litigation are vastly disproportionate. At most, the plaintiffs could be required to pay relatively small amounts for heavily subsidized healthcare insurance or

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142 Brief of the Catholic Health Ass'n at 2 & 20–21, *supra* note 133.

143 Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S.Ct. 2566 (2012).

144 King v. Burwell, 759 F.3d 358 (4th Cir. 2014), *cert. granted*, 135 S.Ct. 475 (2014).

145 Questions Presented, King v. Burwell, U.S. Supreme Court, Docket no. 14-114 (Nov. 7, 2014), *available at* http://www.supremecourt.gov/qp/14-00114qp.pdf.

146 Halbig v. Burwell, 758 F.3d 390, 412 (2014), *vacated & rhg en banc granted*, No. 14-5018, 2014 WL 4627181 (D.C. Cir. Sept. 4, 2014). Following the Supreme Court's grant of certiorari in *King*, the D.C. Circuit ordered the *Halbig* litigation held in abeyance pending the Supreme Court ruling in *King v. Burwell*. Halbig v. Burwell, No. 14-5018, 2014 WL 7520425 (D.C. Cir. Nov. 12, 2014).

147 *See* Louise Radnofsky, *Questions Linger About Plaintiffs' Standing in Health-Law Case*, WALL ST. J. (Mar. 4, 2015, 8:55 PM), http://www.wsj.com/articles/questions-linger-about-plaintiffs-legal-standing-in-health-law-case-1425520520; Stephanie Mencimer, *The Supreme Court Is About to Hear the Case That Could Destroy Obamacare: Here Are the Unusual Plaintiffs Behind It*, MOTHER JONES (Feb. 9, 2015, 7:05 AM), http://www.motherjones.com/politics/2015/02/king-burwell-supreme-court-obamacare.

the statutory shared responsibility payment.[148] Conversely, more than seven million Americans could lose their healthcare insurance—and possibly their economic security—on the basis of a Supreme Court decision in favor of the plaintiffs.[149]

The *King* plaintiffs describe themselves as low-income residents of Virginia.[150] Virginia is one of thirty-four states that have elected a federally operated healthcare insurance exchange in lieu of setting up their own state-run exchanges.[151] Pursuant to the ACA, the Internal Revenue Service determined that each of the *King* plaintiffs was entitled to receive a tax credit to subsidize the purchase of health insurance through the Virginia exchange. Plaintiffs, however, contend that they are not entitled to the subsidies, and they do not want them.[152] They argue that without the subsidies they would be entitled to exemptions from the Act's Individual Mandate requiring individuals either to purchase health insurance or make a shared responsibility payment.[153] The ACA defines eligibility for subsidies in terms of "coverage months" determined by those months for which "the taxpayer . . . is covered by a qualified health plan . . . enrolled in through an Exchange established by the State under section 1311 of [the ACA]."[154] The plaintiffs claim that the IRS has no authority to extend the subsidies to individuals who reside in states in which the federal government operates the state's healthcare insurance exchange.[155] The government contends that the *King* plaintiffs' argument is based "on an acontextual misreading of a single phrase"[156] that would produce "[a]bsurd [r]esults" contrary to the ACA's structure and design,[157] and that, even if there is some ambiguity, the Treasury Department's interpretation is authoritative and entitled to judicial deference.[158]

The United States Court of Appeals for the Fourth Circuit suggested that the government had the better argument with respect to statutory construction, but concluded that the statutory language was not clear

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[148] Mencimer, *supra* note 147; Brief for Petitioners at 9, King v. Burwell, No. 14-114, 2014 WL 7386999 (Dec. 22, 2014).

[149] *See supra* note 21 and accompanying text.

[150] Brief for Petitioners at 9, King v. Burwell, No. 14-114, 2014 WL 7386999 (Dec. 22, 2014).

[151] Brief for the Respondents at 11, King v. Burwell, No. 14-114, 2015 WL 349885 (Jan. 21, 2015).

[152] Brief for Petitioners at 9, *supra* note 150.

[153] *Id.*

[154] 26 U.S.C. § 36B(c)(2)(A)(i) (2012).

[155] Brief for the Petitioners at 18–20, *supra* note 150.

[156] Brief for the Respondents at 12, *supra* note 151.

[157] *Id.* at 16–17.

[158] *Id.* at 17.

enough to resolve the issue.[159] Invoking *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[160] the circuit court held that the IRS rule was a permissible reading of the statute.[161] The *King* plaintiffs contend that the Fourth Circuit erred in ignoring the plain language of the provision, and they deny that *Chevron* deference is even relevant in light of that language.[162] The government argues that the Fourth Circuit correctly determined "that the Affordable Care Act authorizes Treasury to make premium tax credits available on an equal basis to Americans in every State, as one would expect in a statute designed to provide 'Affordable Coverage Choices for *All* Americans.'"[163]

The legal issues are neither complex nor of great significance in and of themselves, but a decision in favor of the plaintiffs would wreak havoc with the statutory scheme. Unlike cases such as *Schechter, Butler, Carter Coal, Jones & Laughlin Steel, Helvering* and *Steward Machine, King* does not pose issues that go to the heart of our constitutional system. The case had its genesis in a conservative think tank decision to pick up and run with an employment lawyer's observation that the challenged phrase made the ACA vulnerable to an argument that subsidies are not available in states that have opted to have exchanges run by the federal government.[164] While its origins do not undermine the legitimacy of the lawsuit, they do buttress the conclusion that the lawsuit is not so much an effort to resolve legal issues of major importance with respect to the ACA as an attempt to eviscerate the new healthcare in any possible way, whatever the cost. [165]

Although unlikely, it is possible that the Supreme Court could decide that the *King* plaintiffs' action is barred on standing grounds—an argument rejected by the Fourth Circuit[166] but raised by Justice Ginsburg

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159 *King*, 759 F.3d at 372.
160 Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
161 *King*, 759 F.3d at 375–76.
162 Brief for Petitioners at 51, *supra* note 151.
163 Brief for the Respondents at 12, *supra* note 152 (emphasis in original).
164 *See* Adam Liptak, *Lawyer Put Health Act in Peril by Pointing Out 4 Little Words*, N.Y. TIMES, Mar. 3, 2015, at A1.
165 As noted journalist and Supreme Court observer Linda Greenhouse pointed out in an August 2014 column, the case is the direct result of the kind of views expressed by the Chairman of the Conservative Enterprise Institute, a think tank that has been instrumental in the litigation: "This bastard has to be killed as a matter of political hygiene. I do not care how this is done . . . .I don't care who does it, whether it's some court some place, or the United States Congress." Linda Greenhouse, *By Any Means Necessary*, N.Y. TIMES (Aug. 20, 2014), http://www.nytimes.com/2014/08/21/opinion/linda-greenhouse-by-any-means-necessary.html (quoting Michael S. Greve, an A.E.I. scholar and Chairman of the Competitive Enterprise Institute).
166 *King*, 759 F.3d at 366.

during oral argument.[167] Assuming, as is likely, that the Court reaches the merits, the decision almost certainly will turn on the justices' views of either statutory construction principles or the deference due administrative interpretations of statutes imposing rule-making requirements. Ironically, the only constitutional wrinkles with respect to the merits of the case would result from a ruling adverse to the government, a point raised by Justice Kennedy during oral argument.[168] As twenty-three states argued in an amicus brief, an adverse decision could force states with federally operated exchanges to choose between creating their own exchanges and losing healthcare insurance subsidies for their residents in a manner that could well be unduly coercive in violation of the Tenth Amendment and principles of federalism.[169] The states further contend that taking away subsidies without prior notice is contrary to Supreme Court precedents holding that conditions on federal grants to states must be clearly stated.[170] The Court can avoid these constitutional questions only by ruling in favor of the government.

More than seven million Americans already have utilized ACA tax-credit subsidies to purchase health insurance on state exchanges.[171] An adverse decision in *King* could cost these low- and middle-income individuals and families their health care insurance and fatally undermine the system set up by the ACA.[172] Given the current political climate, the Court is in the unenviable position of finding itself equipped to eviscerate the ACA knowing that Congress probably will not be able to repair such serious wounds before they become fatal.[173]

Most significantly from the perspective of this essay, a Supreme Court decision against the government in *King* would be a significant departure from the principal New Deal decisions, as well as *N.F.I.B.* and *Hobby Lobby*. As noted earlier, those decisions addressed critical

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[167] Transcript of Oral Argument at 6–7, King v. Burwell, 135 S.Ct. 475 (Mar. 4, 2015) (No. 14-114).

[168] *Id.* at 16-19.

[169] Brief of the Commonwealths at 42, *supra* note 28.

[170] *Id.* at 12.

[171] *See supra* note 28 and accompanying text.

[172] *See* Brief of the Commonwealths at 3–11, *supra* note 28.

[173] *See, e.g.,* Robert F. Graboyes, *What If Obamacare Loses: Avoiding a Death Spiral Would Require Politically and Economically Difficult Fixes*, U.S. NEWS & WORLD REP. (Mar. 9, 2015, 4:20 PM), http://www.usnews.com/opinion/economic-intelligence/2015/03/09/an-anti-obamacare-ruling-in-king-v-burwell-could-trigger-death-spirals; Tom Caiazza, *Release: Congress Would Be Unable to Act to Prevent the Disastrous Consequences of the Wrong Ruling in King v. Burwell, Ctr. for Am. Progress (Jan. 29, 2015),* https://www.americanprogress.org/press/release/2015/01/29/105513/release-congress-would-be-unable-to-act-to-prevent-the-disastrous-consequences-of-the-wrong-ruling-in-king-v-burwell/.

constitutional questions pertaining to the nature of our constitutional system and the individual liberties it is intended to protect—the same questions that infused the debate over both the New Deal and the new healthcare. While all of these decisions had their critics, whether it upheld or stuck down the contested social reform legislation, the Supreme Court addressed major constitutional questions that only the judiciary could resolve. That is not the case in *King*.

There is an alternative. If the Court rules in favor of the government, Congress will still have the ability to repeal or amend the ACA through the normal political processes. In recent years, the Court has lauded the virtues of political accountability in cases such as *New York v. United States*[174] and *Printz v. United States*.[175] The best way to ensure political accountability with respect to the ACA is to permit the political process to take its course in Congress.

CONCLUSION

The members of the Supreme Court have a critical choice to make in *King v. Burwell.* If they elect to rule against the government, the ACA will be gravely, perhaps fatally, impaired. The future of the most significant social reform of the last several decades should not depend on analyses that will neither engage the critical questions of federalism and individual liberty at the heart of the healthcare debate nor shed light on the constitutional limits of federal power.

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[174] New York v. United States, 505 U.S. 144, 168-69 (1992).
[175] Printz v. United States, 521 U.S. 898, 920-21 (1997).