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Federalism by Waiver After the Health Care Case

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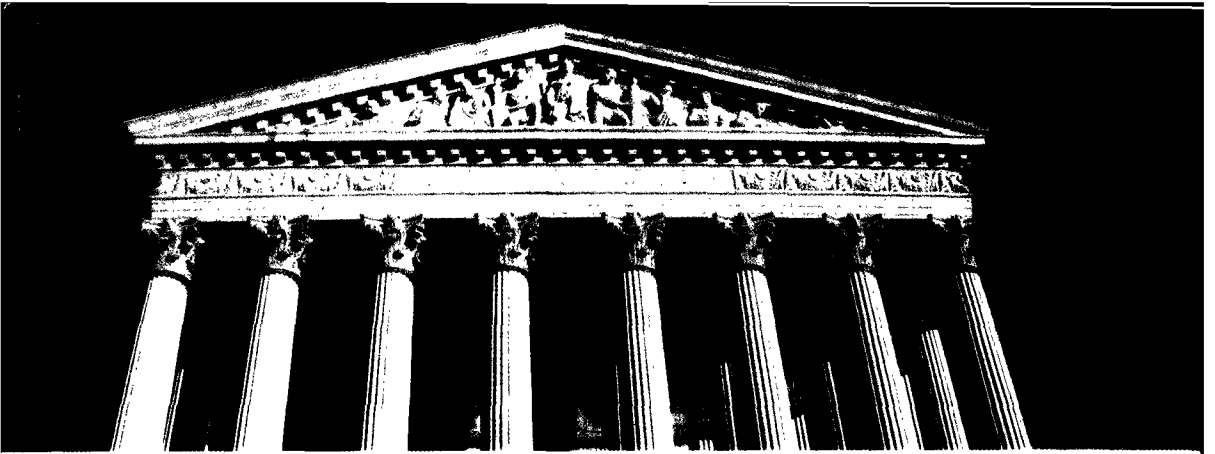


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Edited by Nathaniel Persily, Gillian E. Metzger,
& Trevor W. Morrison

The Health Care Case

*The Supreme Court's
Decision and Its Implications*

CHAPTER 14

FEDERALISM BY WAIVER AFTER THE *HEALTH CARE CASE*



Samuel R. Bagenstos

The Supreme Court's Spending Clause holding in *National Federation of Independent Businesses v. Sebelius* (*NFIB*) is likely to be consequential for many reasons. It will have a direct effect on the implementation of the Affordable Care Act (ACA), which relied on the expansion of Medicaid—now made voluntary by the Court—to obtain health care coverage for more than fifteen million previously uninsured people. At this writing, it remains unclear how many states will participate in the expansion. The Congressional Budget Office recently estimated that, as a result of the Court's decision, three million fewer people will obtain new Medicaid coverage under the law than it had originally predicted.¹

But the Court's Spending Clause ruling will have potentially an even more far-reaching effect on the constitutionality of other federal statutes enacted pursuant to Congress's spending power, as states will be prompted to challenge other conditional spending laws in the education, social welfare, environmental, and civil rights areas as unconstitutionally coercive. The ultimate legal effect of *NFIB*'s Spending Clause holding on these laws is unlikely to be determined without years of litigation.

In this chapter, I focus on another likely effect of *NFIB*'s Spending Clause holding—the case's effect on the day-to-day bargaining between states and the federal agencies that administer cooperative spending programs.² I argue that *NFIB* gives states important new leverage in these negotiations. This new leverage is likely to accelerate the trend toward “federalism by waiver,” in which important questions about the federal-state relationship are resolved by the federal executive branch granting tailored, conditional exemptions from the broad, general spending conditions adopted by Congress. And I will argue that this is not necessarily a bad thing.³

1. The Rise of Federalism by Waiver

As far as I can tell, Professor Hugh Heclo was the first academic to use the term “federalism by waiver.”⁴ The term refers to a pattern in the administration of cooperative state-federal spending statutes in which the federal executive branch has taken an increasingly large role. Federal conditional spending statutes typically impose detailed and prescriptive obligations on states. These obligations come directly from the statutory language adopted by Congress. But Congress has recognized that the detailed statutes it adopts cannot take account of all local conditions, and it has also recognized a value in giving states space to experiment with new means of achieving the goals of those statutes. Accordingly, at least since the 1960s, Congress has included provisions in its major conditional spending statutes that empower the federal agency that administers a given spending program to grant waivers of the statutes’ requirements in various circumstances.⁵

Waivers like this might play a distinctly marginal and interstitial role. They might simply address particular circumstances that Congress did not anticipate. Or they might provide for narrowly drawn and carefully evaluated demonstration projects designed to build policy knowledge that Congress could take into account in subsequent reauthorizations of the statute. And, indeed, those seem to have been the occasions in which Congress anticipated that states would seek, and the federal executive branch would grant, waivers from the basic obligations imposed by conditional spending programs.⁶

But beginning in the 1980s, states and the federal executive branch cooperated to transform the use of waivers in cooperative spending programs. The transformation began during the Reagan administration, as the executive branch encouraged widespread use of waivers in the Medicaid program to promote home- and community-based services, and in the Aid to Families with Dependent Children (AFDC) program to jump-start a process of welfare reform.⁷ These efforts carried out one of the original purposes of the waiver authority—to promote policy experimentation—but they occurred on such a wide scale that waivers were no longer a marginal or interstitial tool.

The George H. W. Bush administration was, in general, less interested in using waivers of conditional spending legislation as a policy tool. Indeed, the administration denied the most prominent request for such a waiver during its time in office—the waiver encompassing Oregon’s ambitious effort to reform its Medicaid system.⁸ As his reelection campaign picked up in 1992, however, President Bush did grant some notable waivers in the welfare area.⁹

Broad use of the waiver tool really took off during the Clinton administration.¹⁰ President Clinton had been an innovative governor himself, and he came to the presidency determined to use waiver authorities aggressively to enable other governors to innovate as well. While his own welfare reform legislation stalled

in Congress during the first few years of his administration, President Clinton sought to burnish his record as a welfare reformer by approving a number of states' requests for significant and far-reaching waivers of various requirements imposed by the AFDC program. And especially after the defeat of his health care plan in 1994, President Clinton used Medicaid waivers to promote health reform—and particularly to encourage states to move to more comprehensive coverage and cost controls imposed by managed care—on a state-by-state basis. By the end of the Clinton administration, federalism by waiver had become a key means for both the federal executive branch and the states to escape the detailed strictures of conditional spending statutes.

Notably, the Clinton administration was relatively ecumenical in the waivers it would approve. Prior to the enactment of comprehensive welfare reform legislation in 1996, the Clinton administration approved AFDC waivers that embraced a variety of different—and even conflicting—visions of the appropriate way to reform welfare.¹¹ A similar pattern was evident in the Medicaid area after the collapse of Clintoncare in 1994.¹²

The George W. Bush administration consolidated the rise of federalism by waiver. In 2002, it even sought from Congress the authority to issue “super waivers”—waivers that could dispense with the requirements of a range of different federal spending programs, often administered by different cabinet departments, in a single administrative act. The general “super waiver” legislation passed the House but died in the Senate.¹³ (Congress did, however, grant the Secretary of Homeland Security a form of “super waiver” authority in connection with the construction of a border fence.)¹⁴

But the Bush administration also sought, much more aggressively than had the Clinton administration, to use waivers as a tool to achieve the President's substantive policy goals. Where the Clinton administration had seen flexibility and devolution as important ends in themselves, the Bush administration saw the waiver process largely in terms of the substantive results it could achieve. In the Medicaid area, the administration's Health Insurance Flexibility and Accountability (HIFA) initiative “encourage[d] states to finance expansions of coverage of the uninsured population through cuts in the optional services they currently provide[d].”¹⁵ To many critics, HIFA appeared to reflect a backdoor effort by the Bush administration to implement its preferred block grant model for the program, in which Medicaid would no longer be an entitlement.¹⁶ And in the education area, the administration's Department of Education took a hard line against waiver requests that would have provided relief from the strictures of President Bush's signature No Child Left Behind legislation.¹⁷

The Obama administration has also aggressively used waivers of conditional spending statutes as a policy tool. In doing so, it has adopted elements of both the Clinton administration's and the George W. Bush administration's approaches.

The Obama administration has used its Medicaid waiver authority to grant broad flexibility to the states in providing health care to indigent and disabled persons. Unlike in the second Bush administration, these waivers have not followed a particular substantive pattern. As in the Clinton administration, flexibility itself seems to have been the Obama administration's immediate goal. Part of the explanation for this may lie in the background of President Obama's Secretary of Health and Human Services, Kathleen Sebelius. As a former governor and state insurance commissioner, Sebelius had an appreciation for the importance of local conditions and state innovation in health care provision. But a more significant part of the explanation, I think, was the overriding importance President Obama placed on obtaining support for—and blunting the constitutional challenges to—the ACA, his signature measure. The ACA required state cooperation in its Medicaid expansion and in its system of health insurance exchanges. With the statute already a target of vigorous political attack, Obama administration officials felt an acute need not to unnecessarily alienate the state officials on whom they would rely for its implementation. And with the Medicaid expansion specifically under attack in the courts for being burdensome on and coercive of the states, administration officials were keen to limit the burdens imposed by Medicaid to the extent that they could do so. The administration (in a process implemented by the Department of Health and Human Services [HHS], but encouraged, if not driven, by the White House) thus adopted a relatively general policy of flexibility toward states' efforts to carry out their obligations under the ACA.¹⁸

In the education area, the Obama administration has been much more open to granting waivers than had the George W. Bush administration. But like the Bush administration, it has used its waiver authority to push its own substantive vision of education policy. Amid widespread discontent with the strictures imposed by the No Child Left Behind Act (NCLB), and a deadlock in Congress regarding how to change the statute, the Obama administration has offered to waive many of the statute's requirements for states that adopt the core elements of the administration's own preferred NCLB revision.¹⁹ Some commentators have decried this offer as working an end run around Congress. But even some critics see the Obama administration's approach as a responsible, if not ideal, response to the legislative gridlock that has prevented Congress from updating an unpopular and perhaps impractical statute.²⁰

Throughout his administration, President Obama's openness to waivers of the requirements of cooperative spending (and other) statutes has drawn criticism from right-wing critics.²¹ These criticisms tended to lie at the margins of mainstream discourse until President Obama's HHS issued a letter, responding to requests made by a number of Republican governors, that expressed a willingness to entertain requests for waivers of certain of the work requirements of the 1996 welfare reform legislation.²² HHS made clear that any request for waiver of

those requirements would have to show how it would promote work by public assistance recipients, and it has not yet granted any such waiver. Nonetheless, Governor Romney's presidential campaign seized on the Obama administration's mere statement that it would *entertain* requests for waivers of 1996 legislation's work provisions and exploited that statement to argue (with some effect) that President Obama is gutting welfare reform.²³

2. WHY THE HEALTH CARE CASE SHOULD ACCELERATE THE TREND

Because the statutes that authorize waivers of federal funding conditions are phrased in highly discretionary terms, one might hypothesize that, all else equal, a presidential administration will use the waiver authority to achieve its more general policy goals. When an administration's policy preferences are well reflected in the rules adopted by Congress (as was the case for the Bush administration in education policy after the passage of NCLB), we can expect the administration to grant relatively few waivers. When, by contrast, an administration has been unable to get Congress to adopt its preferred policy (as has been the case for the Obama administration in education policy, as efforts to reauthorize and reform NCLB have stalled), we can expect the administration to grant more waivers, but to grant only those waivers that serve its substantive policy preferences. And when an administration has a general policy preference toward devolution (as was the case for the Clinton administration in the AFDC and Medicaid programs), we can expect the administration to grant more waivers across the board.

But the incumbent presidential administration's policy preferences are not the only crucial variable here. Each waiver of a federal spending condition results from an iterative, negotiated process, in which the states hold a number of important cards. The process may be initiated by the federal agency that administers a given cooperative spending program, which can (formally or informally) let states know that it will entertain requests for particular sorts of waivers. Or the process may be initiated by individual states, or groups of states, themselves. These states may simply submit applications for individual waivers, or (as they did when they triggered the recent controversy over Temporary Assistance to Needy Families [TANF] waivers) they may ask the administration for more general guidance about what sorts of waiver requests it will entertain.

Once this process begins, a state has a number of bargaining advantages. States can sometimes threaten to opt out of a federal spending program entirely if the administration refuses to waive rules they find particularly noxious. Where this threat is credible, as it will occasionally be (especially for programs in which

the amount of federal money at stake for any given state is low), the federal officials who administer the program will be strongly inclined to grant the waiver in order to salvage as much of the program as they can. For similar reasons, federal agencies virtually never cut off all funds to states that fail to comply with the terms of a given program, even though the relevant statute will often authorize such a sanction. Federal officials simply do not want to harm a program's beneficiaries by cutting off funds to a noncompliant state.²⁴

Even where the state lacks a credible opt-out option, the dynamics of the waiver negotiation process push toward approval of waiver requests. For one thing, the career officials who staff the federal agencies that administer cooperative spending programs have extensive day-to-day contacts with the state officials to whom they provide money—far more extensive contacts than they have with anyone else. They receive most of their information from those state officials. All of these interactions engender a felt affinity and association between the interests of state and federal officials working on cooperative programs.²⁵

This affinity and association is enhanced by the career paths of the officials who work in federal spending agencies. Those officials often move back and forth between state and federal government jobs. The typical federal office administering a cooperative program will contain a large number of staff who formerly worked—and/or expect to work in the future—for the state agencies receiving the office's money. They thus will readily be sympathetic to the state's perspective and its analysis of the possibilities and constraints available to those implementing federal policy on the ground.²⁶

The argument in the preceding two paragraphs is in some ways the flip side of the oft-expressed argument against "picket fence federalism."²⁷ As generally presented, that argument asserts the existence of an alliance between federal- and state-level subject-matter expert bureaucrats, who join together to overcome resistance to a federal program's goals from politicians and generalist agency officials at the state level. But the alliance can cut in both directions. Subject-matter experts in the federal bureaucracy, supporting their allies in state government, can work to overcome the resistance of generalist federal officials to state-level innovations. As Frank J. Thompson and Courtney Burke argue, the rise of federalism by waiver helps to deepen and problematize the standard argument against picket fence federalism.²⁸

And the congressional connection is especially important. Federal agencies are responsive to members of the House and Senate—particularly, but not exclusively, those on the agencies' authorizing committees or appropriations subcommittees. And those legislators are often extremely responsive to the desires of the governing administration in their home states. Agency officials' desire to please important constituencies in Congress thus will lead them to seek to please the governments of the states with whom they deal.²⁹ Steven Teles's

important study of welfare policy prior to the 1996 welfare reform legislation accordingly emphasized the role of states' congressional delegations in "act[ing] in concert to put pressure on the executive branch to expedite the processing of ... waiver proposal[s]."³⁰

To the extent that members of Congress see particular sorts of waiver requests through a policy rather than a casework lens, they may be more skeptical of those requests and work to undermine them or bar them by appropriations riders or statutory amendments. The recently proposed requests for waivers of TANF's work requirements may fall into this category.³¹ For the ordinary run of waiver requests, however, congressional delegations are likely to push in the same direction as their states' governors.

These dynamics do not ensure that the states will always get their way. To the contrary, the policy preferences of the incumbent presidential administration will also play a substantial role in determining which waiver requests will be granted. But, notwithstanding the broad discretion that the statutes authorizing waivers grant to the administration as a formal matter, the administration faces substantial constraints in exercising that discretion.

The Supreme Court's ruling in *NFIB* is likely to shift the waiver-bargaining dynamic—at least for a time—in an even more state-friendly direction.³² By holding, for what Justice Ginsburg emphasized was "*the first time ever*,"³³ that a federal spending condition had coerced the states, the Court in *NFIB* gave states a new tool to use in their negotiations with federal agencies. Despite the suggestions of scholars such as Gillian Metzger that "greater scrutiny appears warranted when waiver authority is sought by a state and the waiver denial significantly restricts state regulatory autonomy," the courts have generally reviewed waiver denials "quite deferentially."³⁴ On some occasions in the past, states that unsuccessfully sought administrative exemptions from certain conditions imposed on federal funding recipients turned to the courts to argue that the conditions were unconstitutionally coercive. But that litigation typically proved unavailing.³⁵ Now, a state that does not receive the waiver it requested can threaten—more credibly than before *NFIB*—to challenge the constitutionality of the underlying spending program if the administering agency refuses its requested waiver.

But it is not just the *fact* that the Court found a spending condition unconstitutionally coercive that enhances states' bargaining positions. The *language* and *reasoning* in the Chief Justice's pivotal Spending Clause opinion may prove especially helpful to states in threatening to sue if waivers are denied. In concluding that the ACA's Medicaid expansion provisions unconstitutionally coerced the states, Chief Justice Roberts found it crucial that the expansion did not, in his view, simply make changes to the existing Medicaid program. Rather, it required states that wished to continue participating in that program *also* to participate in what he regarded as a "new health care program"—one that had different federal

reimbursement rules and mandated a different benefits package that would apply to individuals who were eligible for preexpansion Medicaid.³⁶ That Congress sought to tie together what he thought were really separate and independent grants was key to the Chief Justice's conclusion. He argued that when federal funding conditions "take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."³⁷ And he agreed with the plaintiff-states that the threat to bar future access to *all* Medicaid funds to states that failed to participate in the (in his view separate) Medicaid expansion "serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act."³⁸

This language might be understood as holding that Congress may not tie together conceptually or budgetarily separate programs in a single offer of federal funds. If a state wishes to accept federal funds to participate in one program, what reason could Congress have for denying it those funds for refusal to participate in some *other* program—aside from "forc[ing] unwilling States to sign up for" that other program? This reasoning has obvious implications for waiver requests. Imagine that a state is willing to participate in the Elementary and Secondary Education Act (ESEA) Title I program but is not willing to provide Title I funds to students enrolled in private schools, as required by NCLB.³⁹ Although the statute by its terms requires participating states to provide Title I funds to eligible private school students, the state agrees to forgo the federal money that would go to those students if it can obtain a waiver of that requirement. After *NFIB*, the state can credibly threaten that, if the waiver is denied, it will challenge the tying together of private and public school populations as unconstitutionally coercive—the only reason to tie them together, the state might say, is to force unwilling states to provide public funds to private school students.

I argue elsewhere that this is too broad a reading of the Chief Justice's opinion.⁴⁰ In my view, that opinion is best read not simply as prohibiting the tying together of two analytically or budgetarily separable funding streams, but instead as prohibiting a particular kind of leveraging. The Chief Justice's opinion bars Congress from telling states that they can continue to participate in an entrenched and lucrative cooperative spending federal program only if they *also* agree to participate in a new and independent program. It thus should not prohibit Congress from bundling together various separable funding streams from the start. The Chief Justice's opinion does not treat *every* analytically or budgetarily separable funding stream as reflecting an independent program in any event. Rather, the Chief Justice accepted that the many changes Congress had made to Medicaid itself through the years, including adding new mandatorily covered populations and new required services, merely "altered" the existing Medicaid program; it was only the very large expansion demanded by the ACA that sought

to tie that existing program to an independent program. Finally, the Chief Justice limited his coercion analysis to those instances in which the amount of money a state stood to lose was so great as to deny states a real choice “not merely in theory but in fact.”⁴¹

A federal agency that is sued for unconstitutional coercion after denying a waiver *ought* therefore to have three possible defenses against such a suit: first (if this is true), that the condition the agency refused to waive was not a new condition but existed from the time Congress created the program; second, that the condition the agency refused to waive was not independent from the conditions that the state had agreed to accept; and third, that the amount of money at stake is not so great as to deny the state a realistic choice. But it will take some time for the courts to settle on a reading of *NFIB*’s Spending Clause holding—particularly if agencies seek to avoid litigation of these issues.

In the interim, agencies faced with waiver requests must engage in risk management. They must decide how willing they are to risk a holding that the statutes they administer are unconstitutionally coercive. Given the great harm to those agencies if that risk eventuates—harm in unsettling expectations and in keeping the agencies from providing the services that they are set up to provide—they can be expected in many circumstances to be unwilling to take the risk. This is particularly likely to be true because what constitutes an “independent” program remains quite uncertain after the *NFIB* decision—and Chief Justice Roberts expressly overrode Congress’s determination that the ACA’s Medicaid expansion merely added to the existing Medicaid program without creating a separate program. By contrast, if the agency grants a questionable waiver request, it is unlikely even to be held to account by the courts. The erosion of private rights of action to enforce spending statutes, the difficulty in finding a plaintiff with standing, and the generally deferential posture of courts toward waiver grants will make granting the request the path of least resistance for the agency.⁴²

The uncertainty created by *NFIB*’s Spending Clause holding is thus likely to embolden states to seek more and more extensive waivers of federal spending conditions. And it is likely, at least at the margins, to encourage federal agencies to grant those waivers more frequently. The *NFIB* case is therefore likely to accelerate the trend toward federalism by waiver.

3. An Initial Normative Assessment

Is the trend toward federalism by waiver, which the *NFIB* decision is likely to accelerate, something to be welcomed? Or to be greeted warily? Federalism by waiver—and the connected though broader phenomenon that has been labeled “government by waiver”⁴³—has drawn substantial criticism from both liberals

and conservatives. These critics charge that increasing use of the waiver authority undermines both the goals set by Congress for particular statutes and, ultimately, the rule of law itself.

Although there is an essential similarity between the liberal and conservative criticisms of federalism by waiver, the criticisms sound in different registers. Liberal critics express a concern for statutory erosion. They contend that waivers have been used to undermine hard-won statutory requirements that would otherwise bind states to provide important services to less privileged and less empowered individuals and communities. States may also use waivers as a vehicle to cut costs during recessions—the worst possible time, from a programmatic perspective, to cut aid to poor people.⁴⁴ At their worst, waivers may enable states to reprogram redirect money that had been designated for poor people and people with disabilities and divert it to less needy groups.⁴⁵

For conservatives, the criticisms of federalism by waiver form part of a larger rule-of-law argument against the exercise of executive discretion in the administration of complex federal programs. The argument runs that constraints on discretion are necessary to avoid arbitrary, favoritistic, and rent-seeking uses of executive power, and to ensure that parties that operate in a space with extensive federal involvement can plan and order their affairs. Although quite common in early conservative challenges to the rise of the New Deal administrative state, these rule-of-law arguments had migrated to a narrow fringe view until the Obama administration's domestic policy efforts engendered Tea Party opposition and brought them back into the mainstream of conservative legal thought.⁴⁶

I have a more optimistic view of federalism by waiver. The concerns regarding statutory erosion are real, but they must be considered in the light of the realistic alternatives to waivers. These alternatives, in turn, are likely to depend on the nature of the spending condition that a state is asking the federal government to waive. Where the spending condition forms a relatively minor part of a complex scheme, a state that could not obtain a waiver might simply refuse to comply and expect to get away with it. Federal agencies are unlikely to terminate funding for relatively minor violations of the rules governing a spending program.⁴⁷ And the avenues for third-party private enforcement of those rules have been increasingly closed off by the Supreme Court's restrictive private-right-of-action jurisprudence.⁴⁸

The alternative to a waiver regime in these cases is thus likely to be a regime of *de facto* waivers determined by ability of the incumbent administration to detect violations and its willingness to threaten fund cutoffs over them—a willingness that will necessarily depend on the administration's enforcement priorities, but that will often occur out of public view and accountability. An overt waiver regime provides a mechanism for federal agencies to engage states before they depart from the strict requirements of funding statutes; to negotiate for

provisions that preserve the key goals, according to the administration, of the statutes at issue; and to do so in a context that preserves a measure of public accountability. And where states pass up an opportunity to obtain waivers and instead simply violate the law in the hope that they will not get caught, the disregard of the waiver process will justify enforcement actions that might not be triggered by the state's violation in and of itself.

Federal agencies have often undertaken to give states and interested parties advance public notice of the criteria they will apply to waiver requests. Programs in which the Obama administration has undertaken to provide such advance notice include Medicaid (in which the Centers for Medicare and Medicaid Services have published detailed criteria for assessing home- and community-based services waiver requests)⁴⁹ and NCLB.⁵⁰ Indeed, the attacks on the Obama administration for "gutting" TANF's work requirement arose, not after HHS granted a waiver of that requirement (as of this writing, it still has not granted any such waiver), but after the Department published a notice informing states of the criteria it would apply in *considering* such a request.⁵¹ Whatever one thinks of the merits of the very public political and legal dispute that ensued, the prominence of that dispute highlights a way in which executive branch waivers of statutory spending conditions can enhance public accountability.

Where the spending condition at issue is a more central requirement of the statute at issue—as is the case in many of the large Medicaid waivers and waivers of NCLB—the calculus is different. If waivers are not available in these cases, states that find themselves unable or unwilling to comply with the conditions may choose simply to opt out of the spending program entirely⁵²—or to lobby in Congress for fundamental changes to the program that can have nationwide effects. Allowing waivers of such central requirements does take away some of the leverage that Congress presumably sought to employ to impel states to agree to those requirements. But if the alternative is a state opting out of the statute entirely—or a state prompting statutory changes that undermine these requirements in all states—the availability of a waiver provides a second-best option. In this way, as Professors Thompson and Burke have shown, a waiver regime can provide a safety valve that preserves conditional spending programs at the same time that it relieves states of some of the obligations these programs impose.⁵³ As Theodore Ruger argues in his contribution to this volume, waivers can be used to accommodate state concerns with particular implementation rules while firmly entrenching the cooperative spending programs that authorize them.⁵⁴ The executive branch, in exercising its waiver authority, can say yes only in those cases in which executive officials believe that the state will opt out of the program entirely if the waiver is denied, and it can otherwise exercise its leverage in the waiver process to negotiate waiver terms that promote its understanding of the statutory goals to the extent possible.

For the conservative rule-of-law critics, this degree of executive discretion is itself the problem. But their argument ultimately rests on a rejection of delegation—a rejection that would call into question huge swaths of the modern administrative state.⁵⁵ To be sure, one might accept the delegation inherent in the modern administrative state—if only as an accommodation to the reality that it will not be rolled back any time soon—but still argue that extensive reliance on executive waivers goes too far.⁵⁶ But this would be perverse. As David Barron and Todd Rakoff argue, the delegation inherent in waiver authority seems on balance to be *less* problematic from the perspective of accountability and congressional control than are more traditional delegations.⁵⁷ The most plausible justification for drawing a line of permissible delegation that forbids extensive use of waivers would be to raise the costs to Congress of imposing extensive and detailed conditions on federal spending.⁵⁸ An antiwaiver (or anti-too-extensive-reliance-on-waiver) principle could thus be understood as what Ernest Young has called a “resistance norm”: a norm that “makes it harder—but still not impossible—for Congress to write statutes that intrude into areas of constitutional sensitivity.”⁵⁹ For those who are grudging at best about the New Deal Settlement and its instantiation in the federalism arrangements of Great Society programs, limitations on federalism by waiver will no doubt be attractive. But for those of us who are comfortable with those basic federalism arrangements, limiting the use of waivers will lead to suboptimal policy outcomes without sufficient countervailing benefits.

The critics, in my view, fail to account for the positive contributions of a robust waiver regime to good policy and governance. A robust waiver regime can serve as a tool to negotiate the proper boundary between national standards and local variation, but with lower stakes, and at a lower temperature, than a regime that imposes strict statutory standards on states and provokes them to challenge those standards on constitutional grounds. Reliance on the waiver mechanism helps to realize many of the benefits of decentralization—notably the benefits of experimentation and accounting for local variation—within the context of a national program. In the Medicaid program, for example, the executive branch employed waiver-based demonstration projects to develop models for providing community-based services to older people and people with disabilities. These included the Long-Term Care Channeling Demonstration in twelve states in the early 1980s,⁶⁰ which laid the groundwork for the Home- and Community-Based Waiver program, and the Cash-and-Counseling Demonstration in three states in the 2000s.⁶¹ Policymakers in both federal and state governments have learned substantial lessons from demonstrations like these; those lessons have helped them provide more effective—and more cost-effective—community-based services.⁶²

A robust waiver regime can also provide a means of updating or revising statutory regimes that prove impractical or ill-conceived in the face of experience, but

that, because of veto points in Congress, cannot be comprehensively revised.⁶³ The Obama administration's extensive use of waivers in the education area provides the best example here. Vanishingly few state or federal officials are happy with NCLB as it stands, but it has proven impossible to date to assemble a legislative coalition to reauthorize and amend that law. The Obama administration has offered states a way out of NCLB's unpopular strictures, but only on the condition that those states adopt policies that fit the administration's own preferred policy in the area. This waiver regime helps to bring the statute up to date, but it also focuses attention—and accountability—on the executive branch's own clearly expressed policy preferences.⁶⁴ There may be substantial reasons to object to the Obama administration's approach on its *policy* merits.⁶⁵ But the administration's use of the waiver tool has ensured that its policy decisions are made in full view of the public and that the states and Congress can push back if they are so disposed.⁶⁶

A regime that relies heavily on executive branch waivers certainly has its dangers. The critics are right that waivers can be used by an administration that is hostile to a conditional spending statute as a tool to undermine that law. So, too, can waivers be used to facilitate rent-seeking or other arbitrary or venal conduct. As a practical matter, however, a hostile or venal administration has ample opportunity to undermine the requirements of a conditional spending statute simply by failing to enforce its terms against noncompliant states. Given the erosion of private rights of action and the extremely limited (at best) judicial review of an agency's failure to take enforcement action, there is likely to be no effective *legal* check on an agency that is bound and determined to resist the requirements Congress has imposed on states that receive federal funds. The most effective checks are likely to be political. And a waiver regime, honestly engaged, can provide the opportunity for political debate, contestation, and accountability.

I have argued that the Spending Clause ruling in *NFIB v. Sebelius* is likely to have a significant impact that goes beyond the Medicaid expansion provisions of the ACA. That ruling will affect the entire range of day-to-day bargaining between states and the federal executive branch in the administration of cooperative spending programs. Because *NFIB* marked the first time the Supreme Court invalidated a spending condition as coercing the states—and because of the structure and ambiguities of Chief Justice Roberts's pivotal opinion on the question—the case is likely, at least in the short term, to accelerate the trend toward federalism by waiver.

And, I have argued, that may not be such a bad thing. A robust waiver regime can achieve many of the goals of decentralization—experimentation and accounting for differences among the states—within the context of a program that serves

objectives set by Congress and policed by the federal executive branch. A robust waiver regime provides a means of updating and harmonizing outdated or conflicting statutes—or statutes with provisions that have proven impractical in the light of experience—in the face of congressional gridlock. And a robust waiver regime can channel departures from the rules set by Congress through a process that promotes political accountability and deliberation. *NFIB's* Spending Clause ruling might be criticized along many dimensions,⁶⁷ but the ruling's effects in promoting federalism by waiver are likely to be salutary.

Notes

1. See CONGRESSIONAL BUDGET OFFICE, ESTIMATES FOR THE INSURANCE COVERAGE PROVISIONS OF THE AFFORDABLE CARE ACT UPDATED FOR THE RECENT SUPREME COURT DECISION 11 (2012).
2. This chapter thus has substantial affinities to Professor Ruger's contribution to this volume, which emphasizes the way in which *NFIB* "invites complex and ongoing strategic interaction between the states and the federal executive on multiple dimensions of health policy going forward." Theodore W. Ruger, Health Policy Devolution and the Institutional Hydraulics of the Affordable Care Act, in this volume. For an outstanding catalog of the various ways in which states and federal agencies bargain over federalism on a day-to-day basis, only a subset of which I treat in this chapter, see Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011). Another notable recent discussion of the phenomenon is Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009).
3. For another defense of administrative waiver, which shares broad similarities with my account, see David J. Barron & Todd D. Rakoff, In Defense of Big Waiver (unpublished manuscript, on file with author).
4. Hugh Hecl, *Poverty Politics*, in CONFRONTING POVERTY: PRESCRIPTIONS FOR CHANGE 396, 415 (Sheldon H. Danziger, Gary D. Sandefur & Daniel H. Weinberg eds., 1994).
5. See, e.g., 20 U.S.C. § 7861 (2011) (granting the Secretary of Education authority to waive various requirements of the Elementary and Secondary Education Act (ESEA)); 42 U.S.C. § 1315 (2010) (granting the Secretary of Health and Human Services general authority to issue waivers for "any experimental, pilot, or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of" various provisions of the Social Security Act, in which the Medicaid and Temporary Assistance to Needy Families (TANF) programs are embedded).
6. See Ryan, *supra* note 2, at 63 ("The Medicaid demonstration waiver programs were to function as the hallowed federalism laboratory of ideas would intend: the goal was to allow a limited degree of flexibility so that each state could experiment in a way that would yield learning benefits to the overall program").
7. Medicaid waivers to support home- and community-based services were initially issued under the Secretary's general demonstration waiver authority, see Bruce C. Vladeck, *Medicaid 1115 Demonstrations: Progress Through Partnership*, 14 HEALTH AFFAIRS 217, 218 (1995), but Congress in 1981 adopted a special provision authorizing home- and community-based services waivers, 42 U.S.C. § 1396n(c). On the Reagan administration's use of waivers to jump-start welfare reform, see STEVEN M. TELES, WHOSE WELFARE? AFDC AND ELITE POLITICS 124–130 (1996).
8. See *ADA Analyses of the Oregon Health Care Plan*, 9 ISSUES L. & MED. 397, 410 (1994).
9. See Thomas Gais & James Fossett, *Federalism and the Executive Branch*, in THE EXECUTIVE BRANCH 486, 508 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

10. For a good summary of the use of waivers by the Clinton administration in welfare, Medicaid, and education programs, see Gais & Fossett, *supra* note 9, at 508–510. Professor Ruger provides an outstanding discussion of the Clinton administration’s approach to Medicaid waivers in Ruger, *supra* note 2.
11. See TELES, *supra* note 7, at 136–141.
12. See Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. HEALTH POL. POL’Y & L. 971, 975–976 (2007).
13. See H.R. 4, 108th Cong., tit. VI (2d Sess. 2002).
14. See Office of the Secretary, Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended, 73 Fed. Reg. 19,077 (Apr. 8, 2008) (exercising this authority).
15. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 60 (2004).
16. See, e.g., Jonathan R. Bolton, *The Case of the Disappearing Statute: A Legal and Policy Critique of the Use of Section 1115 Waivers to Restructure the Medicaid Program*, 37 COLUM. J.L. & SOC. PROBS. 91 (2003).
17. See Martha Derthick & Andy Rotherham, *Obama’s NCLB Waivers: Are They Necessary or Illegal?* EDUC. NEXT, Spring 2012, at 56, 58 (discussing “the deeply intrusive, get-tough, and grant-no-waivers initial approach adopted by Congress and the Bush administration in 2001–02”).
18. For a treatment of some of the dynamics discussed in this paragraph, see Timothy J. Conlan & Paul L. Posner, *Inflection Point? Federalism and the Obama Administration*, 41 PUBLIUS 421, 438–439, 442 (2011).
19. See, e.g., Gillian E. Metzger, *The Supreme Court, 2011 Term—Comment: To Tax, To Spend, To Regulate*, 126 HARV. L. REV. 83 (2012) (discussing the Obama Administration’s NCLB waivers).
20. For a good treatment of this controversy, see Derthick & Rotherham, *supra* note 17.
21. See, e.g., Richard A. Epstein, *Government By Waiver*, NAT’L AFFAIRS, Spring 2011, at 39.
22. See OFFICE OF FAMILY ASSISTANCE, ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT. OF HEALTH & HUMAN SERVS., TO STATES ADMINISTERING THE TANF PROGRAM AND OTHER INTERESTED PARTIES: GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115 (July 12, 2012), available at <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203>.
23. See, e.g., Josh Barro, *Romney’s Thin Welfare-Reform Attack*, BLOOMBERG VIEW (Aug. 8, 2012), <http://www.bloomberg.com/news/2012-08-08/romney-s-thin-welfare-reform-attack.html>.
24. Professors Tomlinson and Mashaw noted this phenomenon four decades ago, and nothing essential has changed since then. See Edward A. Tomlinson & Jerry L. Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 620 (1972); see also STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 294–295 (1995) (noting reluctance of administrations of both political parties to cut off funds); Roderick M. Hills Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1227–1228 (1999) (“[T]he sanction of withdrawing federal funds from noncomplying state or local officials is usually too drastic for the federal government to use with any frequency: withdrawal of funds will injure the very clients that the federal government wishes to serve”).
25. See, e.g., Abbe R. Gluck, *Interstatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 570 (2011) (“[M]any federalism scholars have argued that state and federal specialist agencies share more connections with and loyalties to one another than they do with their particular level of government”).
26. For the classic description of this “professional bureaucratic complex,” see Samuel H. Beer, *Federalism, Nationalism, and Democracy in America*, 72 AM. POL. SCI. REV. 9, 17–18 (1978).

27. For a good statement of the argument against picket fence federalism, see Roderick M. Hills Jr., *The Eleventh Amendment as a Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1236–1246 (2001).
28. See Frank J. Thompson & Courtney Burke, *Federalism by Waiver: Medicaid and the Transformation of Long-Term Care*, 39 PUBLIUS 22, 38–40 (2009). For a similar point, see Bulman-Pozen & Gerken, *supra* note 2, at 1301 n.148.
29. See Frank J. Thompson & Courtney Burke, *Executive Federalism and Medicaid Demonstration Waivers: Implications for Policy and Democratic Process*, 32 J. HEALTH POL. POL'Y & L. 971, 995–998 (2007).
30. TELES, *supra* note 7, at 142.
31. See Rebecca Berg, *Shift in Welfare Policy Draws GOP Protests*, N.Y. TIMES, July 18, 2012, at A17.
32. Much of the analysis that follows draws on a far more extensive discussion in Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. (forthcoming 2013). Please update the reference.
33. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2630 (2012) (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
34. Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2107 (2008).
35. See, e.g., *California v. United States*, 104 F.3d 1086, 1092 (9th Cir.), *cert. denied*, 522 U.S. 806 (1997) (rejecting claim that the Medicaid Act was coercive to the extent that it required them to provide coverage to unauthorized aliens as a condition of receiving Medicaid funds); *Padavan v. United States*, 82 F.3d 23, 29 (2d Cir. 1996) (same); *but cf.* *Virginia Dept. of Educ. v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*) (upholding challenge, on notice grounds, to federal threat “to withhold Virginia’s entire \$60 million annual [Individuals with Disabilities Education Act] grant for fiscal years 1994 and 1995 unless Virginia amended its policies to provide private educational services to each of the State’s 126 disabled students who had been expelled for reasons wholly unrelated to their disabilities”).
36. *NFIB*, 132 S. Ct. at 2606.
37. *Id.* at 2603–2604.
38. *Id.* at 2603.
39. See 20 U.S.C. § 6320 (2011).
40. See Bagenstos, *supra* note 32.
41. *NFIB*, 132 S. Ct. at 2605 (internal quotation marks omitted).
42. On the tightening of private rights of action to enforce conditional spending statutes, see, e.g., Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 393–410 (2008). See also Stephen I. Vladeck, *Douglas and the Fate of Ex Parte Young*, 122 YALE L.J. ONLINE 13, 14 (2012) (arguing that “there may already be five votes to” hold “that injunctive relief would seldom be available to private plaintiffs under the Supremacy Clause to enjoin governmental officers from violating federal statutes that do not themselves provide a cause of action”). On courts’ deferential review of waiver grants, see Metzger, *supra* note 34, at 2107.
43. See Epstein, *supra* note 21.
44. Professor Huberfeld argues, with some justification, that Medicaid waivers have followed this precise pattern. See Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 483 (2011). I have argued elsewhere that the budget-cutting imperative imposes its most direct risk on those services, such as home- and community-based services, that the Medicaid Act does not require but merely permits to be provided pursuant to waivers. See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1 (2012). The difference is largely one of emphasis, however. States may first look to cut those services that the Medicaid Act does not require, but in times of serious budget retrenchment they will no doubt seek out the savings that can be realized by aggressive use of waivers.

45. See, e.g., Bolton, *supra* note 16 (discussing use of waivers in Medicaid); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 588–590 (2008) (discussing use of waivers in welfare programs).
46. For expressions of this conservative critique during the Obama administration, see Epstein, *supra* note 21; Todd Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 HARV. J.L. & PUB. POL'Y 195 (2012).
47. See sources cited *supra* note 24.
48. See sources cited *supra* note 42.
49. See Medicaid Program, State Plan Home- and Community-Based Services, 77 Fed. Reg. 26,362 (May 3, 2012) (to be codified at 42 C.F.R. pts. 430–447).
50. Extensive discussion of the criteria for NCLB waivers—including numerous guidance documents—can be found on the Education Department's "ESEA Flexibility" web page, <http://www.ed.gov/esea/flexibility>.
51. See GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY, *supra* note 22.
52. Although the justices who believed the ACA's Medicaid expansion provisions were unconstitutional in *NFIB* apparently found it unthinkable that any state would leave Medicaid, at least one state's governor had recently raised the possibility that his state would exit the program. See Corrie MacLaggan, *Is Texas Really Thinking of Opting Out of Medicaid?* AUSTIN AMERICAN-STATESMAN, Nov. 14, 2010, available at <http://www.statesman.com/news/news/state-regional-govt-politics/is-texas-really-thinking-of-opting-out-of-medicaid/nRSSF/>. And Medicaid is, by an order of magnitude, the largest federal grant-in-aid program to states. Even if it is unlikely that states will leave Medicaid, it is far more thinkable that they will leave other, smaller conditional-spending programs.
53. See Thompson & Burke, *supra* note 29.
54. See Ruger, *supra* note 2.
55. See Adrian Vermeule, *Same Old, Same Old*, NEW REPUBLIC, Feb. 22, 2012, available at <http://www.tnr.com/article/books/magazine/100987/richard-epstein-design-liberty-private-property-law#>.
56. Cf. Lawrence B. Solum, *The Legal Effects of NFIB v. Sebelius and the Constitutional Gestalt* (Georgetown Law Sch. Pub. Law Working Paper No. 12-152), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653 (discussing the "Frozen New Deal Settlement").
57. See Barron & Rakoff, *supra* note 3.
58. The notion that the law should give governments an all-or-nothing choice in order to raise the cost of regulation is a long-standing theme of Professor Epstein's work. See, e.g., Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988). It is also a theme of the joint dissent in *NFIB*, which suggested that the Court must preserve the "practical obstacle[s] that prevent[] Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (Scalia, Kennedy, Alito, Thomas, JJ., dissenting).
59. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000).
60. See William G. Weissert, *The National Channeling Demonstration: What We Knew, Know Now, and Still Need to Know*, 23 HEALTH SERVS. RES. 175 (1988).
61. See Bagenstos, *supra* note 15, at 78.
62. For a recent discussion, see Holly C. Felix, Glen P. Mays, M. Kathryn Stewart, Naomi Cottoms, & Mary Olson, *Medicaid Savings Resulted When Community Health Workers Matched Those With Needs to Home and Community Care*, 30 HEALTH AFFAIRS 1366, 1366–1367 (2011).
63. For a similar defense of this updating function, see Barron & Rakoff, *supra* note 3.
64. See Derthick & Rotherham, *supra* note 17.

65. For a powerful critique, see Diane Ravitch, *How, and How Not, to Improve the Schools*, N.Y. REV. OF BOOKS, Mar. 22, 2012, available at <http://www.nybooks.com/articles/archives/2012/mar/22/how-and-how-not-improve-schools/>.
66. Waivers enable policy updating to arise from the states as well as the federal government. Professors Bulman-Pozen and Gerken argue that various waivers granted in the AFDC program in the 1980s and 1990s enabled states to make the case for “for building a new kind of welfare system, one with a markedly different vision of welfare’s purposes.” Bulman-Pozen & Gerken, *supra* note 2, at 1275.
67. For a highly critical response to that ruling, see Nicole Huberfeld, Elizabeth Weeks Leonard, & Kevin Outterson, *Plunging into Endless Difficulties: Medicaid and Coercion in the Healthcare Cases*, B.U. L. REV. (forthcoming 2013).