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## Federalizing Education by Waiver?

Derek W. Black

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## ARTICLES

### Federalizing Education by Waiver?

*Derek W. Black\**

*In the fall of 2011, the U.S. Secretary of Education told states he would use his statutory power to waive violations of the No Child Left Behind Act (“NCLB”), but only on the condition that they adopt his new education policies—policies that had already failed to move forward in Congress. States had no choice but to agree because eighty percent of their schools were faced with serious statutory sanctions. As a result, the Secretary was able to unilaterally dictate core education policies for the nation’s public schools. For the first time, the content of school curriculum and the means by which schools would evaluate teachers came under the direct influence of a federal official. This Article demonstrates that this exercise of power was beyond the scope of the Secretary’s statutory or constitutional authority.*

*To be clear, Congress can confer to agencies the power to impose policies through waiver conditions, but Congress must do so clearly and place limits on the scope of the conditions. NCLB contained no notice that states might face waiver conditions when they first agreed to participate in NCLB, much less notice of the substance of those conditions. Spending Clause doctrine requires*

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\* Professor of Law, University of South Carolina School of Law. I would like to thank Dean Robert Wilcox for his support of my scholarship; Benjamin Means, Joseph Seiner, and Ned Snow for their comments on earlier drafts; Inge Lewis for her proofreading; Nicholas Cherry for his research; and the editors and staff of *Vanderbilt Law Review* for their extremely careful thinking, proofreading, and research. I would also like to thank Avni Gupta-Kagan for pressing me to think further about distinctions between standards, curriculum, and pedagogy.

*both. Moreover, states' inability to say no to these conditions raises serious questions of unconstitutional coercion.*

*The Secretary also exercised the equivalent of lawmaking power when he imposed wide-reaching conditions with no statutory guidance from Congress. To avoid the difficult separation of powers issues this raises, however, a reviewing court might narrowly construe the statutory authority conferred to the Secretary. The statutory analysis is easy. The Secretary lacks explicit authority to condition waivers. At best, NCLB implies authority to condition waivers, but implied conditions would be limited to the scope of NCLB itself. The waiver conditions the Secretary imposed go well beyond the scope of NCLB. For instance, the text of NCLB specifically prohibits the Secretary from requiring "specific instructional content, academic achievement standards and assessments, [or] curriculum." In short, NCLB waivers are void on multiple grounds.*

*This unilateral imposition of policy through waiver conditions is remarkable not only for its transformation of key aspects of education but also for the entire federal administrative state. It opens the door to the spread of a more expansive administrative power than ever seen before. Current scholarship and precedent provide almost no direction for this spread. This Article does, calling into doubt the constitutionality and efficacy of the power to remake law through waiver.*

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## I. INTRODUCTION

Two of the most significant events in the history of public education occurred over the course of the past five years. First, after two centuries of local control and variation, states adopted a national approach to “curriculum.”<sup>1</sup> Second, states changed the way they would

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1. Editorial, *Caution and the Common Core*, N.Y. TIMES, May 28, 2013, at A18, available at <http://www.nytimes.com/2013/05/28/opinion/caution-and-the-common-core-state-education-standards.html>, archived at <http://perma.cc/L5MM-N3DP> (indicating forty-five states had adopted

evaluate and retain teachers, significantly altering teachers' most revered right, tenure.<sup>2</sup> A significant number of states had previously

the curriculum). A lively debate persists over whether the Common Core is actually curriculum. The Common Core State Standards Initiative website states:

The Common Core is *not* a curriculum. It is a clear set of shared goals and expectations for what knowledge and skills will help our students succeed. Local teachers, principals, superintendents, and others will decide how the standards are to be met. Teachers will continue to devise lesson plans and tailor instruction to the individual needs of the students in their classrooms.

*Myths and Facts*, COMMON CORE STATE STANDARDS INITIATIVE, <http://www.corestandards.org/about-the-standards/myths-vs-facts/>, archived at <http://perma.cc/777V-LVG7> (last visited Jan. 15, 2015). This Article does not seek to settle the debate over whether the Common Core is a curriculum, as the debate seems driven largely by politics and defined by semantics. It suffices to say that, if by "curriculum" one means a list of books or facts that a student must learn, the Common Core is not a curriculum (although it will include core book lists from which districts and teachers should choose). If by "curriculum" one means what one teaches in general or the skills and competencies one expects students to learn, the Common Core is a curriculum, particularly given that it requires states to replace what states and localities formerly understood to be curriculum. What is undisputable is that the Common Core sets the standards to which states must conform their curricula. Thus, at best (for those who would defend the Secretary's actions), the Common Core is a set of curriculum standards, and a distinction between curriculum standards and curriculum—if there is a meaningful one—is not one that would save the Secretary's actions from the legal analysis contained herein.

For the purposes of this Article, I define or understand curriculum to pertain to those things that will and will not be taught in the classroom, but I also emphasize that various institutions and individuals play a role in what is taught. Collectively these actions and choices represent the curriculum. Broad decisions about the curriculum are made at the state level, and more precise decisions are made at the district level. Any gaps or discretion remaining after those actors exert their influence are left to principals and teachers. Understood this way, to argue that curriculum pertains solely to those things that teachers, schools, or districts choose for classroom instruction is untenable. One must acknowledge that those local actors can only choose within the universe that the state creates and leaves for them, and that the state need not leave any choice for them. That the state might leave options for inferior officers does not transform what would have otherwise been state curriculum into no more than academic standards.

This understanding of curriculum, moreover, is consistently reflected in courts' approach to resolving numerous disputes between teachers and school officials over what is taught in the classroom. See, e.g., *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988):

[S]chool-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.;

*Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 338 (6th Cir. 2010) (holding that teachers' right to free speech is not protected for in-class curricular speech made pursuant to their official duties); *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 370 (4th Cir. 1998) ("[S]chool administrative authorities had a legitimate pedagogical interest in the makeup of the curriculum of the school . . ."). Like these cases, the current battle is not really over what curriculum is but over who controls curriculum. Most telling may be the fact that the fight over the semantics of curriculum did not grow heated until the Common Core became a political battle, which was a few years after the process of creating it and adopting it had begun.

2. See, e.g., Bruce Baker et al., *The Legal Consequences of Mandating High Stakes Decisions Based on Low Quality Information: Teacher Evaluation in the Race-to-the-Top Era*, EDUC. POL'Y

taken some voluntary steps toward these ends, but in 2012, states lost the choice. Nearly all of the nation's schools were projected to be labeled as failing under the No Child Left Behind Act ("NCLB") that fall.<sup>3</sup> The Secretary of Education, Arne Duncan, had the power to waive states' failure, but he indicated he would only do so if states accepted new requirements that would move education in an entirely new direction.<sup>4</sup> Relying on what previously appeared to be a relatively narrow statutory waiver mechanism, the Secretary was able to impose his policy agenda for curriculum standards and teacher quality on almost all of the nation's schools.<sup>5</sup> As a practical matter, he federalized core aspects of education in just a few short months.<sup>6</sup>

This unilateral action is remarkable not only for education policy but also from a constitutional balance-of-power perspective. Some scholars and politicians have called for the expansion of conditional waivers in other areas of federal regulation.<sup>7</sup> Yet, as efficacious as unilateral action through statutory waiver might be, conditional waiver power is unconstitutional absent carefully crafted legislative authority. Secretary Duncan lacked that authority. Thus, the federalization of education through conditional waivers was momentous, but legally unfounded.

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ANALYSIS ARCHIVES, Jan. 28, 2013, at 1; Winnie Hu, *10 States Are Given Waivers from Education Law*, N.Y. TIMES, Feb. 10, 2012, at A13, available at <http://www.nytimes.com/2012/02/10/education/10-states-given-waivers-from-no-child-left-behind-law.html>, archived at <http://perma.cc/7B58-MHSQ>.

3. Sam Dillon, *Overriding a Key Education Law*, N.Y. TIMES, Aug. 8, 2011, at A12, available at <http://www.nytimes.com/2011/08/08/education/08educ.html?pagewanted=all>, archived at <http://perma.cc/CRN8-WEP6> (predicting that the number of failing schools would reach eighty thousand out of one-hundred thousand in 2011).

4. Hu, *supra* note 2.

5. See *ESEA Flexibility*, U.S. DEPT OF EDUC., <http://www.ed.gov/policy/elsec/guid/esea-flexibility/index.html>, archived at <http://perma.cc/Y5N2-UBWQ> (last modified Dec. 19, 2014) (indicating that forty-five states applied for waivers and the Department had granted forty-three).

6. A prepublication draft of this Article was released on August 24, 2014. In the months that followed, states increasingly began to push back against this federal exercise of power. Many did so for reasons having little to do with the arguments contained in this Article, but at least two explicitly relied upon this article in challenging the Department of Education's authority. See Letter from Governor Rick Scott to Sec'y Arne Duncan, Request to Designate Jurisdiction to the Office of Administrative Law Judges 5 (Oct. 17, 2014), available at <http://www.flgov.com/wp-content/uploads/2014/10/Florida-Request-to-Secretary-Arne-Duncan.pdf>, archived at <http://perma.cc/8VQM-3DJ5>; Letter from Sean D. Reyes, Attorney Gen., State of Utah, to Gary Herbert, Governor, Common Core Standards Legal Analysis 1 (Oct. 7, 2014), available at <http://schoolboard.utah.gov/wp-content/uploads/Common-Core-Report-FINAL-1.pdf>, archived at <http://perma.cc/SU86-9AD4>. Since then, the U.S. Department of Education has begun to retreat from its earlier hardline positions. See, e.g., Alyson Klein, *Added Waiver Leeway for Some States*, EDUC. WEEK, Jan. 7, 2015, at 20.

7. See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 292 (2013).

When Congress passed NCLB in 2002, the waiver condition terms that Secretary Duncan imposed were inconceivable. The key provisions of NCLB required states to move all students to academic proficiency by 2014 and ensure that all teachers of core subjects were highly qualified.<sup>8</sup> While setting these national goals, the Act left the substance of meeting these goals to states and school districts. States and districts retained control of the curriculum they would teach, the standards for that curriculum, the exams they would use to test students, the meaning of academic proficiency, and the certification and evaluation of teachers.<sup>9</sup> The federal role was to hold states accountable for meeting the standards that states themselves would set.<sup>10</sup> Scholars characterized NCLB as a model of cooperative federalism, through which states and the federal government shared responsibility.<sup>11</sup> To be clear, this was a new and significant federal role, but a limited one.

NCLB, however, was beset by numerous flaws. Many states manipulated their standards and tests in an effort to manufacture higher levels of “proficiency.”<sup>12</sup> The requirement that all students reach proficiency, however, was just too high. The same was true in regard to requirement for highly qualified teachers. By the summer of 2011, eighty percent of the nation’s school districts were a few months away from failure under the Act due to insufficient progress toward full proficiency, and the number of failing schools would only grow until the final deadline of 2014.<sup>13</sup> Failure under the Act would trigger stiff sanctions, including the restructuring of schools and districts and the potential loss of funds.<sup>14</sup>

Both Congress and the President anticipated this failure and its disastrous consequences for education coming well in advance. Amending NCLB had been a topic of national debate since at least

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8. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932–33 (2004).

9. *Id.* at 941–42.

10. *Id.*

11. See, e.g., Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 2 (2010) (noting that NCLB followed the classic paradigm of cooperative federalism); see also Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 292–93 (2013) (analyzing the cooperative federalism approach to education in recent decades).

12. Paul E. Peterson & Frederick M. Hess, *Few States Set World-Class Standards*, EDUC. NEXT, Summer 2008, at 70, 71–72 (finding that three-quarters of states had lowered their standards).

13. Dillon, *supra* note 3.

14. 20 U.S.C. § 6316(b)(7) (2012).

2008.<sup>15</sup> In 2010, President Obama issued an official blueprint for reforming the Act.<sup>16</sup> Bitter political division over health care and the economy, however, blocked almost all legislation in Congress, and NCLB reform became an indirect casualty. NCLB, fortunately, included an escape clause. It granted the Secretary of Education the power to waive noncompliance and its consequences for states.<sup>17</sup>

This waiver power, coupled with the impending failure of eighty percent of school districts, became the means through which the Obama Administration implemented its educational agenda outside of the legislative process. Rather than simply waive noncompliance and avert the disastrous consequences for districts until new legislation passed, the Secretary placed specific conditions on the waivers. To receive a waiver, states would have to meet an entirely new set of requirements pertaining to curriculum, student achievement data, and teacher evaluations.<sup>18</sup> Tellingly, these terms were identical to those the President had proposed to Congress in 2010,<sup>19</sup> and which Congress chose not to adopt—terms that the Administration had previously indicated would move education in an entirely different direction from NCLB.<sup>20</sup> Therein lies the key.

Without any specific legislative authority, the Secretary imposed new conditions on states that go beyond the scope of the underlying statute. States' impending failure, the consequences they would face, and the Secretary's power to waive noncompliance permitted the Secretary to coerce states into accepting terms of which they had no notice they would ever face when they first agreed to participate in NCLB. Until the circumstance presented itself, the Department had not even intimated that it had the power to impose policy through waivers. To the contrary, it had petitioned Congress for new legislation.<sup>21</sup> Moreover, given the scope of the policy changes the

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15. See, e.g., Maria Glod, *In Rush to White House, 'No Child' is Left Behind; Obama, McCain Reveal Little on Updates for Plan*, WASH. POST, Sept. 15, 2008, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/09/14/AR2008091402461.html>, archived at <http://perma.cc/2PLR-2RUA>

16. U.S. DEP'T OF EDUC., A BLUEPRINT FOR REFORM (2010), available at <http://www.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>, archived at <http://perma.cc/YH2Z-YN7W>.

17. 20 U.S.C. § 7861(a).

18. U.S. DEP'T OF EDUC., ESEA FLEXIBILITY 4 (June 7, 2012), available at <https://www.ed.gov/sites/default/files/esea-flexibility.doc>.

19. Compare *id.* (Secretary's requirements for waiver), with U.S. DEP'T OF EDUC., *supra* note 16 (terms proposed in 2010).

20. U.S. DEP'T OF EDUC., *supra* note 16, at 2.

21. See, e.g., Sec'y Arne Duncan, Remarks at the Monthly Stakeholders Meeting: Reauthorization of ESEA: Why We Can't Wait, (Sept. 24, 2009), available at



Administration sought, it is not clear that the changes could have been constitutionally achieved through waiver even had NCLB explicitly granted the Secretary power to condition waivers.

No doubt, NCLB reform was absolutely necessary, and the Administration's reforms may have been a step in the right direction. In the past, numerous leading scholars, including the author of this Article, have repeatedly advocated for the expansion of the federal role in education.<sup>22</sup> But scholars have predicated federal expansion in education on new legislative measures that Congress should take to increase its stake in funding and supporting education.<sup>23</sup> No one imagined that the federal government could substantively reform curriculum standards and teacher evaluations without new legislation, much less do it preemptively through administrative action. The waiver process happened so quickly and unilaterally that it was not until it was over that Congress, state officials, and scholars seriously considered whether the Secretary did, in fact, have the power he purported to exercise.<sup>24</sup> The extent of Congress's constitutional authority to

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<http://www2.ed.gov/news/speeches/2009/09/09242009.html>, archived at <http://perma.cc/N47U-MR5P> (highlighting the need for a new education law that promotes "well-rounded education").

22. See, e.g., Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 323 (2010) ("Congress . . . has the ability through funding, administrative structures, and legislation to exercise more expansive power."); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 554 (2006); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 404 (2006) ("[A]n approach that gives meaningful content to the national citizenship guarantee will entail a stronger role for the federal government."); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1514 (2007) (highlighting areas in which Congress should have an increased role); Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653, 1682, 1686 (2007) (describing a federal right to education).

23. Some go one step further and argue that the Fourteenth Amendment demands that Congress and courts increase their role in safeguarding education. See, e.g., Derek Black, *Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right*, 51 WM. & MARY L. REV. 1343 (2010) (advocating use of the Equal Protection Clause to challenge disparities in the quality of education); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 96–97 (2013); Liu, *supra* note 22, at 334.

24. See, e.g., Alyson Klein, *Waivers and ESEA Renewal Get Hard Look From Senators*, EDUC. WEEK, Feb. 7, 2013, [http://blogs.edweek.org/edweek/campaign-k-12/2013/02/senators\\_take\\_a\\_hard\\_look\\_at\\_w.html](http://blogs.edweek.org/edweek/campaign-k-12/2013/02/senators_take_a_hard_look_at_w.html), archived at <http://perma.cc/6YK6-4FC3> (describing multiple opinions about waivers); Benjamin Wood, *State School Board Divided on Extending No Child Left Behind Waiver*, DESERET NEWS, July 17, 2014, <http://www.deseretnews.com/article/865607128/State-School-Board-postpones-decision-on-NCLB-waiver.html?pg=all>, archived at <http://perma.cc/Q373-9EDB> (describing how state officials questioned the Department's authority one year after having received a waiver). The House Committee on Education and the Workforce had requested analysis from the Congressional Research Service on the Secretary's overall waiver power in 2010. See EMILY BARBOUR, ET. AL., CONG. RESEARCH SERV., 7-5700, SECRETARY OF

condition federal funds and delegate power to agencies controls the answer.

David Barron and Todd Rakoff's recent article, "In Defense of Big Waiver," offered the first thorough analysis of agency power to impose policy through statutory waivers.<sup>25</sup> That article, however, preceded the final evolution of the NCLB waiver process and did not fully contemplate the issues NCLB waivers have raised—issues that accentuate the balance of powers at stake between Congress and agencies, and the federalism tensions between the federal and state governments. In particular, the NCLB waiver process raises the issue of whether Congress must articulate a conditional waiver power and the extent to which Congress must set any limits on the conditions an agency can impose. As currently written, NCLB lacks explicit language pertaining to the scope of the waiver power, much less the power to impose conditions.<sup>26</sup> Neither scholarship nor judicial opinions directly address this fundamental problem of allocating conditional waiver authority between the executive and the legislature.

Against this dearth of literature, this Article reasons that imposing new conditions through waiver that go beyond the scope of an organic statute violates the Spending Clause, the nondelegation doctrine, and the organic statute itself. First, Spending Clause doctrine requires that Congress clearly articulate all conditions on federal funds in advance.<sup>27</sup> While there are distinctions between agency conditions and statutory conditions, post facto imposition of new conditions on federal funds through waiver violates the clear notice rule embodied in Spending Clause precedent. NCLB does not suggest, and indeed even contradicts, the conditions that the Department of Education ultimately imposed on states.<sup>28</sup> In other words, Spending Clause doctrine restricts agencies' ability to use conditional waiver power to change the rules of the game in unexpected ways—which is what Secretary Duncan did.

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EDUCATION'S WAIVER AUTHORITY WITH RESPECT TO TITLE I-A PROVISIONS INCLUDED IN THE ELEMENTARY AND SECONDARY EDUCATION ACT (2011), available at [http://edworkforce.house.gov/uploadedfiles/june\\_28\\_2011\\_crs\\_report.pdf](http://edworkforce.house.gov/uploadedfiles/june_28_2011_crs_report.pdf), archived at <http://perma.cc/QM92-C3PG>. The Congressional Research Service's analysis, however, was equivocal on many important issues.

25. Barron & Rakoff, *supra* note 7, at 277; see also BARBOUR ET AL., *supra* note 24 (offering short examination of Secretary's potential waiver authority).

26. 20 U.S.C. § 7861(a) (2012).

27. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

28. See, e.g., 20 U.S.C. § 7371 (stating that the Act does not authorize the Department to require "specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction").

Second, Spending Clause doctrine prohibits Congress from using federal funds to coerce states, to the point of compulsion, to adopt federal policies.<sup>29</sup> As Samuel Bagenstos explains, “when Congress takes an entrenched federal program that provides large sums to the states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program,” Congress unconstitutionally coerces states.<sup>30</sup> With waivers, an agency rather than Congress is coercing states, but the same principle applies insofar as the agency is exercising delegated authority. To continue receiving NCLB funds and remain compliant, the Secretary required states to adopt an entirely new set of conditions that fundamentally transformed the structure and substance of NCLB—one of the more entrenched federal programs in existence—into an independent program focused on a nationalized curriculum and teacher assessments.<sup>31</sup> The funds at stake with NCLB waivers were not as large as those in the *National Federation of Independent Business v. Sebelius*<sup>32</sup>—the only case in which the Court has found conditions unconstitutionally coercive—but NCLB funds and nonmonetary sanctions have an analogous impact on states and districts. As such, the Secretary’s conditions raise serious questions as to whether he may have unconstitutionally coerced states.

Third, the Constitution prohibits Congress from delegating its lawmaking function to agencies.<sup>33</sup> The Court has adopted a permissive standard to police congressional delegations, requiring only that Congress articulate an “intelligible principle” to guide agency action.<sup>34</sup> This Article argues that, because waivers occur in a much different context than traditional delegations and are one step further removed from congressional will, the Court should apply the intelligible principle standard more rigorously to conditional waivers. But even under the current liberal approach, a power to condition NCLB waivers as the Secretary might deem necessary raises constitutional concerns because

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29. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2601 (2012); *Dole*, 483 U.S. at 207.

30. Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 865 (2013).

31. See *Sebelius*, 132 S. Ct. at 2663 (plurality opinion) (noting that education spending was second only to Medicaid in terms of size). See generally Black, *supra* note 22, at 336–40 (discussing the fifty-year history of the Elementary and Secondary Education Act and its most recent iteration, NCLB).

32. 132 S. Ct. 2566. While upholding the constitutionality of the Affordable Care Act in general, seven Justices agreed that the Act’s mandatory Medicaid expansion was impermissibly coercive.

33. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); *Loving v. United States*, 517 U.S. 748, 771 (1996).

34. *Whitman*, 531 U.S. at 472.

such a power would permit the Secretary to impose terms that know no bounds. Given the nature of education, the Secretary would possess unilateral power to pursue almost any policy imaginable and eliminate the democratic processes at the local, state, and, more recently, federal levels that have always debated and decided these issues. As such, the delegation would be different in scope and nature than the delegations previously upheld by the Court.

A court, however, need not even reach the intelligible principle analysis because NCLB does not explicitly grant the Secretary power to condition waivers. Thus, the waivers also fail on statutory grounds. Even if a court inferred that Congress had implicitly granted the Secretary the authority to impose conditions on NCLB waivers, the power would not include the authority to condition waivers with terms that fundamentally alter the underlying legislative framework.<sup>35</sup> At most, waiver power implies an authority to condition waivers with terms designed to ensure substantial and continued compliance with the existing legislative framework. Waivers of that sort are more appropriately understood as partial waivers, not full waivers with new conditions attached. Moreover, the Supreme Court has increasingly construed statutes narrowly when the power asserted by an agency would otherwise push the constitutional bounds of permissible congressional delegation.<sup>36</sup>

In sum, the use of conditional waivers to impose new policies is a significant and powerful innovation.<sup>37</sup> Waivers are far more efficient than the legislative process. Secretary Duncan used them to effectively federalize major aspects of education and achieve goals that have previously eluded other federal actors. For that reason, their appeal is likely to grow in other areas of federal regulation.<sup>38</sup> This growth, however, must be tempered by constitutional principles that require that states receive advance notice of the power and its scope. The conditions recently imposed on our nation's schools transgress those principles.

Part II of this Article identifies the controlling constitutional precedent regarding congressional conditions on federal funds and delegations of authority to agencies. This Part also provides the statutory analysis necessary to apply those doctrines. Part III then

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35. See *id.* at 468 (explaining that Congress does not grant agencies vast power to alter core statutory premises in less-than-obvious language).

36. See Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2027 (2008).

37. See Barron & Rakoff, *supra* note 7, at 270–71.

38. See *id.*

applies that constitutional precedent and statutory analysis to conditional waivers, concluding that Congress cannot grant, and courts cannot reasonably infer, an open-ended authority to condition waivers that would permit an agency official to impose conditions beyond the scope of the underlying statute. To permit an agency to impose conditions that do anything more than ensure substantial compliance with the existing statutory framework, Congress must explicitly grant the authority to condition waivers and delineate the scope of permissible conditions. Part IV develops the relevant history that preceded the NCLB waivers, revealing that the waiver conditions had been part of the Administration's legislative policy reform agenda for three years and were not designed to further compliance with NCLB. To the contrary, they were designed to fundamentally alter education policy. Part V considers the constitutionality of these particular conditions in light of the underlying statutory text in NCLB, finding that states lacked sufficient notice of these conditions and an opportunity to reject them. In addition, the Secretary exceeded his statutory authority. The conditions were so broad that Congress may have been unable, within constitutional bounds, to extend the Secretary the necessary power, even had it wanted to. This Article concludes by considering the wider effects and implications the power to condition waivers will have on the various disputes currently proceeding through courts, Congress, and state legislatures.

## II. THE CONSTITUTIONAL LIMITS OF WAIVER CONDITIONS IN FEDERALLY FUNDED PROGRAMS

NCLB waivers implicate two major constitutional constraints: the limits on Congress's spending power and the limits on Congress's ability to delegate lawmaking authority to administrative agencies. Spending power limits are relevant because NCLB is a federal spending program that grants the Secretary of Education power to terminate federal funds and impose sanctions on those states and districts that are in violation of NCLB's requirements. The statute also grants the Secretary the option to waive those requirements. Congress, no doubt, can extend these powers to the Secretary without violating the Spending Clause, but when the Secretary imposes new conditions in exchange for waivers, the new conditions implicate Spending Clause limits that (a) require clear and advance notice of conditions and (b) prohibit coercive conditions that amount to compulsion.

Administrative and constitutional questions also arise as to whether the Secretary has been or can be granted the power to impose conditions in exchange for waivers. First, the Secretary can only

exercise those powers conveyed to him by Congress. Thus, the statutory text of NCLB must either explicitly grant the Secretary power to impose conditions or contain language that implies such a power. Otherwise, conditioning waivers would be beyond the scope of the Secretary's authority. Second, if the authority to condition does exist, the authority to condition is not open-ended. The scope of permissible conditions would be limited explicitly by statutory text or implicitly by the overall scope of the statute. Third, the Constitution prohibits Congress from implicitly or explicitly delegating certain powers to the executive, namely legislative powers. A waiver power that did not include precise limits on the Secretary's authority to condition waivers would reach the outer boundaries of Congress's delegation authority, if not cross over them. To avoid striking down broad delegations on constitutional grounds, the Court has increasingly narrowly construed statutory texts and found agencies' action beyond the scope of their authority. In other words, a delegation of questionable constitutionality makes it even more likely that a court would find that an agency has exercised power beyond the scope of the underlying statute. Under either of these approaches—spending or delegation—conditional NCLB waivers, as currently exercised, place an enormous amount of coercive power in the hands of the Secretary and upset the balance of power between the states and the federal government in a way not intended by Congress or permitted by the Constitution. The following sections address each of these doctrines in turn.

*A. Spending Clause Restraints: Unambiguous Conditions  
and Coercion*

The Court announced its five-pronged standard for assessing the constitutionality of conditions on federal funds in *South Dakota v. Dole*.<sup>39</sup> First, the Congressional spending must “provide for the . . . general Welfare.”<sup>40</sup> Second, if Congress intends to condition federal funds, “it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’ ”<sup>41</sup> Third, the conditions must be related “to the federal interest in particular national projects or programs.”<sup>42</sup> Fourth,

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39. 483 U.S. 203 (1987).

40. U.S. CONST. art. I, § 8, cl. 1.

41. *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

42. *Id.* at 207–08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

the conditions must not violate any other constitutional provision.<sup>43</sup> Fifth, while Congress is free to incentivize or coerce states to adopt policies that they might not otherwise adopt, Congress cannot use financial inducement and the conditions accompanying the funds to exert so much coercive pressure that it turns into “compulsion.”<sup>44</sup>

As a practical matter, the *Dole* standard has imposed almost no restraint on Congressional spending. The Court completely defers to Congress on the issue of whether expenditures are for the general welfare. The Court has been nearly as deferential on whether conditions on the funds are related to the federal interest. In *Dole*, the Court found that Congress could withhold federal highway funds from states that permitted individuals under the age of twenty-one to purchase alcohol.<sup>45</sup> The Court reasoned that this condition on federal funds was related to Congress’s interest in highway construction because drinking and driving creates a safety hazard on those highways.<sup>46</sup> The dissent argued that Congress’s interest was not in highway construction but in liquor sales and that, by the majority’s reasoning, Congress could require a state to move its capital next to the interstate because “transportation is facilitated by locating local governments in places easily accessible to interstate highways—or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital.”<sup>47</sup> In short, the relatedness prong has proven very permissive.

If *Dole* imposes any enforceable limitation, it is that the conditions, whatever they may be, must be unambiguous. For Congress, this requirement is no more than a legislative drafting guide: Congress may impose any related conditions it wishes, so long as it is clear when it does so. But for agencies and litigants, this principle prevents them from reading new or more stringent conditions into statutes. States may be bound by almost any condition that Congress might explicitly impose, but courts will overturn agency actions and reject private party claims when states had no notice of, nor could have reasonably anticipated, the underlying term or condition upon which the agency or litigant relies.

For instance, the Court in *Arlington Central School District Board of Education v. Murphy*<sup>48</sup> addressed whether prevailing

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43. *Id.* at 208.

44. *Id.* at 211 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

45. *Id.* at 208–09.

46. *Id.*

47. *Id.* at 215 (O’Connor, J., dissenting).

48. 548 U.S. 291 (2006).

plaintiffs could recover expert fees from schools under the Individuals with Disabilities Education Act (“IDEA”). The Court framed the question as whether, when it accepted federal funds, the state would have “clearly underst[oo]d” that expert fees fell within IDEA’s fee-shifting provision.<sup>49</sup> The Court found that, even if one could reasonably interpret expert fees to fall within the meaning of “fees,” the statute did not put states on clear notice of liability for expert fees.<sup>50</sup> Thus, reimbursing expert fees is not a condition of receiving federal funds under the IDEA. Congress remains free to explicitly include expert fees as a condition in the future, but neither agencies nor courts can do so of their own accord. This principle has come to be known simply as the “clear notice” rule,<sup>51</sup> and lower courts have further built upon it, indicating that Congress must put states on clear notice not only of the conditions but also of the consequences of breaching the conditions.<sup>52</sup>

The final *Dole* prong—coercion—provides a theoretical limit on congressional and agency action, but in practice it has been difficult to define and apply. States routinely claim federal spending programs are coercive, but until 2012 they had never succeeded on the merits.<sup>53</sup> Samuel Bagenstos reasons that the difficulty in applying the Court’s coercion doctrine is that there is no baseline against which to measure coercive action.<sup>54</sup> All spending legislation is coercive, and that is its point. Congress gives states money to do things they would not otherwise do. But because coercion is relative, there is no exact point at which coercion becomes impermissible compulsion. For instance, a state might claim it was forced to take on federal obligations it substantively objected to because it was in dire financial straits. The federal response would be that it offered a deal sufficiently enticing that it offset the state’s policy concerns. In other words, the state liked the money more than it disliked the policy. This does not amount to compulsion. One’s sense of which party is correct depends, in large part, on perception. Current doctrine has offered no analysis by which to objectify the competing claims of states and Congress.

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49. *Id.* at 296.

50. *Id.* at 300–04.

51. See generally Nicole Huberfeld, *Clear Notice for Conditions on Spending, Unclear Implications for States in Federal Healthcare Programs*, 86 N.C. L. REV. 441 (2008) (analyzing the evolution of the notice standards required in Spending Clause jurisprudence).

52. See, e.g., *West Virginia v. United States*, 289 F.3d 281, 292 (4th Cir. 2002); *Virginia Dep’t of Educ. v. Riley*, 106 F.3d 559, 579 (4th Cir. 1997) (en banc).

53. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2603–04 (2012) (plurality opinion).

54. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 372–84 (2008).



In 2012, in *National Federation of Independent Business v. Sebelius*, the Court for the first time struck down spending legislation as impermissibly coercive, but the decision failed to offer a straightforward analysis of when coercion becomes compulsion.<sup>55</sup> The most direct statement was that the Affordable Care Act's conditions on expanding Medicaid amounted to a "gun to the head."<sup>56</sup> This vivid characterization, however, is no more of an applicable doctrinal standard than the terms coercion and compulsion. Scholars have since parsed the determinative factors of the *Sebelius* analysis to provide some clarity. Bagenstos discerns what he terms an antileveraging principle in *Sebelius*: "[W]hen Congress takes an entrenched federal program that provides large sums to the states and tells states they can continue to participate in that program only if they *also* agree to participate in a separate and independent program, the condition is unconstitutionally coercive."<sup>57</sup>

He breaks the antileveraging principle into three analytical steps. First, the controlling opinion "draws a distinction between conditions that govern the use of the funding Congress offers and conditions that threaten to terminate other significant independent grants."<sup>58</sup> If Congress has not threatened an independent grant, the program passes constitutional muster. Second, if Congress threatens an independent program, the question becomes "whether the condition at issue leaves states a real choice, 'not merely in theory but in fact.'"<sup>59</sup> Here, the amount of money is crucial. When little money is at stake, states have a real choice.<sup>60</sup> Third, when a relatively large sum of money is a stake, the nature and history of the federal program is relevant. In *Sebelius*, the Court "found it significant that the new conditions were attached to continued participation in an entrenched and lucrative cooperative program."<sup>61</sup> The "independent program" in *Sebelius* was the newly amended version of Medicaid. There, the Court reasoned that the amended version was an independent program, rather than merely a continuation of the old program. According to Bagenstos, the Court came to this conclusion because the law

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55. 132 S. Ct. at 2601–08 (plurality opinion). The plurality section of the opinion is consistent with the position of the four dissenting justices. *See id.* at 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

56. *Id.* at 2604.

57. Bagenstos, *supra* note 30, at 865.

58. *Id.* at 870–71.

59. *Id.* at 871 (quoting *Sebelius*, 132 S. Ct. at 2604 (plurality opinion)).

60. *See, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987) (reasoning that the loss of five percent of highway grants was a "relatively mild encouragement").

61. Bagenstos, *supra* note 30, at 871.

changed—in what seemed to be a fundamental way—the terms by which states could continue to participate in the ongoing Medicaid program. The Chief Justice emphasized that Congress was not threatening to shut off the spigot for failure to comply with new obligations within the general scope of the preexisting Medicaid program. Rather, the new conditions effected a “shift in kind, not merely degree,” transforming Medicaid’s federal-state contract from “a program to care for the neediest among us” to “an element of a comprehensive national plan to provide universal health insurance coverage.”<sup>62</sup>

The Medicaid expansion was unconstitutionally coercive only because all three factors converged: (1) the Affordable Care Act was not simply an expansion of the existing Medicaid program but a distinct and independent program; (2) a huge amount of money was at stake; and (3) remaining eligible for the old entrenched Medicaid program required states to join the new one.

Eloise Pasachoff concurs in Bagenstos’s analysis, although she articulates a slightly differently worded framework.<sup>63</sup> Her framework hints at an important connection between coercion analysis and the unambiguous conditions standard. She correctly points out that the Court’s opinion in *Sebelius* emphasized that the lack of notice that the program would later transform into something different added to the coercion. From this, one might reason that all conditions must be clearly stated to pass the unambiguous conditions standard. And, to survive coercion analysis, the possibility that those conditions might be changed in the future must also be clearly stated in advance (if those changes threaten huge sums of money and work transformative changes to entrenched programs). Thus, the only hard rule in Spending Clause doctrine—unambiguous conditions—may now drive coercion doctrine as well. After all, had the states been on sufficient notice of the conditions, the states’ claim of coercion would have failed, regardless of the substance of the conditions.<sup>64</sup> As subsequent sections discuss in

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62. *Id.* at 881–82 (quoting *Sebelius*, 132 S. Ct. at 2605–06 (plurality opinion)).

63. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 583 (2013) (providing a three-step coercion analysis that starts with evaluating whether “the condition in question threaten[s] to take away funds for a program that is separate and independent from the program to which the condition in question is attached.”).

64. A lingering question is why the Court finally intervened on coercion grounds in this particular case. Nothing in prior Spending Clause doctrine would have suggested that the Affordable Care Act was unconstitutionally coercive. Professors Bagenstos and Pasachoff reason that this new coercion doctrine is motivated by Tenth Amendment concerns over the federal government commandeering states and upsetting traditional federalism boundaries, which, prior to *Sebelius*, had arisen solely in Commerce Clause and Fourteenth Amendment cases. Some scholars had urged the Court to import those analyses into the Spending Clause, but because states were voluntarily conceding to federal leadership through spending programs, Tenth Amendment concerns seemed inapplicable. The Court in *Sebelius* was careful not to hinge its holding on the Tenth Amendment but clearly wrapped its coercion analysis within a similar set of concerns. It reasoned that the need to respect states as “independent sovereigns in our federal

detail, Secretary Duncan's use of his waiver power implicates both the clear notice and coercion doctrines.

*B. Separation of Powers Restraints: Nondelegation and  
Statutory Authority*

When Congress leaves agencies to further define and interpret statutes, questions arise as to whether Congress has run afoul of the constitutional structure of separation of powers between the branches of government. In particular, the Constitution prohibits Congress from delegating its legislative power to the executive or changing the process by which legislation is enacted.<sup>65</sup> As a practical matter, however, the executive necessarily exercises judgment and discretion in carrying out legislation, and Congress often specifically directs agencies to use that judgment and discretion to fill in the gaps in legislative text. The line between permissible and impermissible delegations is whether Congress has articulated a meaningful principle by which an agency must act or has left the agency to act with complete discretion. As the Court stated in *Whitman v. American Trucking Associations*,<sup>66</sup> “[W]hen Congress confers decision making authority upon agencies Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’”<sup>67</sup> Moreover, an agency cannot “cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”<sup>68</sup>

The Court's nondelegation doctrine originates from two *Lochner* Era cases in which the Court struck down portions of the National Industrial Recovery Act. In *Panama Refining Co. v. Ryan*,<sup>69</sup> Congress had authorized the President to prohibit the interstate and foreign transportation of petroleum but had not articulated any standard or

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system” and to prevent the centralization of all power in the federal government justified its coercion analysis. *Sebelius*, 132 S. Ct. at 2602 (plurality opinion); *see also* at 2656–68 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (articulating a position consistent with the plurality opinion). Moreover, according to the Court, voters would “not understand which government officials—federal or state—to blame for a particular program” and political accountability would suffer unless the Court intervened. Pasachoff, *supra* note 63, at 592; *see also* *Printz v. United States*, 521 U.S. 898, 919–21 (1997) (discussing the merits of the federal system and emphasizing the importance of the accountability of the states to the citizenry); *New York v. United States*, 505 U.S. 144, 168–69 (1992) (discussing the problems of reduced political accountability when the citizenry are not sure which level of government to blame for a certain policy).

65. *See, e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001); *Clinton v. New York*, 524 U.S. 417 (1998).

66. 531 U.S. 457.

67. *Id.* at 472 (quoting *Hampton v. United States*, 276 U.S. 394, 409 (1928)).

68. *Id.*

69. 293 U.S. 388 (1935).

conditions under which the executive would decide to exercise this authority.<sup>70</sup> The Act effectively granted the executive a blank check to limit and punish petroleum transfers as it saw fit. The Court held that the absence of a standard to limit the executive's exercise of discretion was an impermissible delegation of legislative power.

In the other case, *A.L.A. Schechter Poultry Corp. v. United States*,<sup>71</sup> Congress had granted the President the power "to approve 'codes of fair competition' " for trades and industries.<sup>72</sup> The only substantive limitation on the codes was that they could not promote monopolies or oppress small enterprises.<sup>73</sup> The Court reasoned that the phrase "unfair methods of competition" lacks a precise or set definition.<sup>74</sup> Rather, the meaning of the phrase depends on the way in which competition is occurring in a given context and one's sense of what the public interest would be in that context.<sup>75</sup> By leaving these crucial issues to the judgment of trade associations and/or the President, the Court concluded that Congress had unconstitutionally delegated its lawmaking function. The Court explained that the Constitution allows Congress the necessary flexibility to lay down general policies and standards, within which others will make subordinate rules and adapt "legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly."<sup>76</sup> But it does not permit Congress "to abdicate or to transfer to others the essential legislative functions with which it is thus vested."<sup>77</sup>

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70. *Id.* at 415:

It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of state Legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis or extent of the state's limitation of production. Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

71. 295 U.S. 495 (1935).

72. *Id.* at 521–22 (quoting 15 U.S.C. § 703 (1933)).

73. *Id.* at 522–23.

74. *Id.*

75. *Id.* at 532–33.

76. *Id.* at 529–30.

77. *Id.* at 529.

Since *Panama* and *Schechter*, the Court has not struck down a single Congressional grant of power to the executive as violating the nondelegation doctrine.<sup>78</sup> This trend is significant given that Congressional grants of power to the executive have grown broader, not narrower, over the past eighty years.<sup>79</sup> The Court's recent decisions, however, show the interplay between nondelegation doctrine and statutory techniques for narrowing delegations, with the Court increasingly striking down agency actions on statutory grounds. In other words, the Court remains concerned with broad delegations but prefers to address them on statutory grounds.

In 2001, in *Whitman*, plaintiffs challenged the Environmental Protection Agency's power to set air quality standards to promote public health and the agency's decision to consider cost in setting those standards.<sup>80</sup> Plaintiffs charged that the statutory language directing the EPA to "establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air" violated the Court's intelligible principle doctrine.<sup>81</sup> Because public health operates across a spectrum and there is no point at which one can precisely say some level of air quality is requisite, the agency was given authority to adopt almost any standards it saw fit.<sup>82</sup> While plaintiffs' factual assertion about the spectrum of air quality is true, the Court reasoned that this fact did not rob the statute of an intelligible principle. The Court wrote that "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."<sup>83</sup> Congress directed the EPA to protect health and adopt standards with an "an adequate margin of safety."<sup>84</sup> That the agency would need to exercise its judgment in adopting the precise level did not mean Congress had abdicated its lawmaking function to the agency.

The Court's permissiveness on constitutional doctrine was balanced by its stricter statutory analysis of what the EPA could consider in adopting standards. The Court found that the EPA had exceeded the statutory discretion delegated to it when it considered

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78. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes . . .").

79. See generally Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000) (arguing that the Supreme Court's "New Delegation Doctrine" permits Congress to delegate broadly but requires agencies themselves to create standards limiting their own authority under those delegations).

80. See *Whitman*, 531 U.S. at 462–64.

81. *Id.* at 464, 473.

82. *Id.* at 474–76.

83. *Id.* at 475 (quoting *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted)).

84. 42 U.S.C. § 7409(b)(1) (2012).

economic costs in adopting standards. The relevant statute “instructs the EPA to set primary ambient air quality standards ‘the attainment and maintenance of which . . . are requisite to protect the public health’ with ‘an adequate margin of safety.’ . . . Nowhere are the costs of achieving such a standard made part of that initial calculation.”<sup>85</sup> The Court allowed that “the terms ‘adequate margin’ and ‘requisite’ [arguably] leave room to pad health effects with cost concerns,” but it is highly unlikely, if not implausible, that Congress would make such an important criteria for assessing public health effects so subtle.<sup>86</sup> “Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”<sup>87</sup> To claim a grant of crucial authority at the center of legislation, an agency must be able to point to a “clear” textual commitment of that authority.<sup>88</sup> Otherwise, the power is beyond the scope of agency authority.

The Court has increasingly taken similar approaches in other cases where the grant of authority an agency claims, if validated, might present serious nondelegation concerns.<sup>89</sup> These delegation and statutory scope decisions collectively reveal an extremely permissive application of the intelligible principle standard, making it hard to project circumstances under which a delegation would be so vague that the Court could not uphold it. But these cases also reveal the Court’s serious concern with broad delegations and a willingness to identify statutory bases to narrow and strike down agency authority.

Gillian Metzger finds that this narrowing is particularly prevalent in cases implicating federalism concerns. She writes, “[T]he Court has demonstrated an unwillingness to impose significant constitutional limits on the substantive scope of Congress’s regulatory powers,” but it has raised “federalism concerns about protecting the states’ independent regulatory role” and policed that balance through

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85. *Whitman*, 531 U.S. at 465 (quoting 42 U.S.C. § 7409(b)(1)).

86. *Id.* at 468.

87. *Id.*; *see, e.g.*, *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 159–60 (2000); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

88. *Whitman*, 531 U.S. at 468.

89. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion) (rejecting the Army Corps of Engineers’ broad definition of “navigable waters” under the Clean Water Act); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Controlled Substances Act, requiring registration with the Attorney General to dispense controlled substances, did not authorize the Attorney General to decide what constituted “legitimate medical practice” under the Act). *But see* *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (holding that the National Banking Act’s grant of powers incidental to banking, including conducting certain activities via operating subsidiaries, preempted state regulations that would otherwise apply to such subsidiaries).

statutory scope and administrative law.<sup>90</sup> When federal regulation has substantially impacted states, the Court has curbed Congressional delegations and agency interpretations by “requiring clear authorization for federal agency action.”<sup>91</sup> Thus, she concludes that strict statutory analysis and administrative law doctrines are “becoming the home of a new federalism.”<sup>92</sup> Many others also point out that restraining agencies in these cases is particularly important because, even if agencies are experts in their given substantive fields of environment, health or education,<sup>93</sup> they are not experts in constitutional values and governmental structures.<sup>94</sup> Moreover, agencies’ confidence in their substantive policies may make them the most likely of all to encroach on other branches’ powers.<sup>95</sup>

### C. Constitutional Dangers of Waiver Conditions

Case law addressing general statutory waivers is underdeveloped and nonexistent as to conditional waivers. In those few decisions analyzing waiver power, courts have refrained from addressing the key constitutional issues this Article raises. Instead, courts have focused on standing and whether the agency decision was even reviewable.<sup>96</sup> Waivers have generated little case law because those

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90. Metzger, *supra* note 36, at 2027.

91. *Id.* at 2047.

92. *Id.* at 2027.

93. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (noting that the “decision as to the meaning or reach of a statute” frequently requires “a full understanding of the force of the statutory policy in the given situation,” which “depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations” (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)); see also David F. Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1211–12 (“[T]he values [*Chevron*] promotes are straightforward and include deference to agency expertise, which is assumed to be greater than that of judges.”).

94. See, e.g., Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1922, 1948–84 (2008); Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 779–94 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 749–50 (2008). See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (emphasizing the need to assess institutional competence in comparative perspective).

95. See, e.g., Damien J. Marshall, Note, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 279 (1998) (discussing how *Chevron* deference may undermine the *Rice* presumption).

96. See, e.g., *Beno v. Shalala*, 30 F.3d 1057, 1064–67 (9th Cir. 1994); *Connecticut v. Spellings*, 453 F. Supp. 2d 459, 464–65 (D. Conn. 2006); *C.K. v. Shalala*, 883 F. Supp. 991, 1001–04 (D.N.J. 1995); *Complaint, Nat’l Ass’n of Cmty. Health Ctrs. v. Shalala*, No. 1:94-CV01238 (D.D.C. June 7, 1994); see also *Recent Case*, 108 HARV. L. REV. 1208 (1995) (discussing how judicial review of the

receiving them have little incentive to challenge them—even if they dislike the terms—and everyone else faces standing problems.<sup>97</sup> David Barron and Todd Rakoff offer the only thorough analysis of waivers. They distinguish between “little waiver” and “big waiver.”<sup>98</sup> “Little waiver” has existed for some time and is common.<sup>99</sup> Little waivers, however, were designed to deal with exceptional cases that Congress could not have foreseen or those where enforcing a statute might impede other congressional goals.<sup>100</sup> Big waiver is not the power to deal with the extraordinary case but the power to waive a major aspect of legislation for an entire class of regulated entities.<sup>101</sup> It is the power to “undo what Congress has done” and potentially remake the law through regulations or conditions on the waiver.<sup>102</sup>

Barron and Rakoff primarily resolve the question of whether Congress can extend agencies waiver power, including the power to condition the waiver. They persuasively demonstrate that Congress can give agencies waiver power and the authority to condition them, pointing out that (a) waiver power does not violate the Presentment Clause in the way that a presidential line-item veto does;<sup>103</sup> (b) waiver is more akin to nonenforcement of the law than a veto of law;<sup>104</sup> and (c) conditional waiver power that permits agencies to remake the law is no more of a delegation violation than broad congressional delegations that authorize agencies to interpret the law and pass regulations on the front end.<sup>105</sup>

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welfare waiver process safeguards the rights of welfare recipients by checking administrative agency authority and how *Beno* has increased public participation).

97. See *Spellings*, 453 F. Supp. 2d at 482–89; Anthony Consiglio, Comment, *Nervous Laughter and the High Cost of Equality: Renewing “No Child Left Behind” Will Safeguard a Vibrant Federalism and a Path Toward Educational Excellence*, 2009 B.Y.U. EDUC. & L.J. 365, 370; Second Amended Complaint at ¶¶ 104–06, 114, 117–26, 133–36, 143–59, *Connecticut v. Spellings*, 549 F. Supp. 2d 161 (D. Conn. 2008) (No. 3:05CV1330), 2005 WL 4748348. Even were standing not a problem, the Administrative Procedure Act precludes review of discretionary acts. 5 U.S.C. § 701(a)(2) (2012). Thus, the merits of the Secretary’s decision are generally beyond challenge. To make out a claim, a plaintiff would probably have to attack the process and show that the Secretary considered or excluded from consideration factors that the controlling statute mandated or excluded.

98. Barron & Rakoff, *supra* note 7, at 271.

99. See, e.g., Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) § 10001(c), Pub. L. No. 99–272, 100 Stat. 222, 223 (1986) (codified at I.R.C. § 162 (2012)).

100. See Barron & Rakoff, *supra* note 7, at 276–77.

101. See *id.* at 267–71, 277–90.

102. *Id.* at 267, 269–70.

103. See *id.* at 275, 313–14.

104. See *id.* at 272–74.

105. See *id.* at 266–69.



That Congress can constitutionally extend waiver and condition power to agencies, however, does not resolve the more complex question of what, if any, limits might exist on the scope of the power that Congress might delegate or agencies might exercise. Once an agency exercises conditional waiver power in its broadest form—which Barron and Rakoff assume an agency can—another set of key spending, delegation, and scope problems arise that Barron and Rakoff do not fully consider.

### 1. Insufficient Notice of Waiver Conditions

Big waiver power implicates both the notice and coercion prongs of *South Dakota v. Dole*. In general, Congress can always cure notice problems by stating its conditions unambiguously. A clearly stated waiver poses no problem because it puts states on notice. One might even argue that states need not have notice of waiver power under spending doctrine because a waiver is not a condition. Rather, waiver power gives the secretary authority to eliminate conditions that Congress previously imposed on the state. While that may be true, when an agency imposes new conditions on states through its waiver power, notice problems can rise to the fore. In the absence of statutory criteria governing the conditions that the secretary might place on waivers or where the secretary imposes a condition beyond the scope of the statutory criteria, states may be deprived of the notice required by *Dole*.

The predicate question, however, is whether the clear statement rule even applies to conditions on waivers. One might argue, along the following lines, that it does not. States only encounter additional conditions through waiver as a result of violating some statutory condition of which they were on full notice, or by asking for advance permission to develop a state-specific program that goes beyond the scope of the controlling statute. In either event, states are not entitled to a waiver and, thus, not entitled to advance notice either. Rather, states are asking for a statutory variance, which justifies variance of the conditions in exchange. Neither states nor Congress could have anticipated all of the circumstances that might necessitate a waiver, which is why Congress specifically included the provision and why the agency is not taking advantage of the state in a way that requires advance notice through the clear statement rule. At worst, the statute puts states on notice that, if they violate the statute, they may apply for a waiver, which is granted in the secretary's discretion and, by virtue of that discretion, may include new conditions.

This argument attempts to transform waiver “conditions” into “consequences” that occur at the point of a statutory violation, or an impending violation. But framing waiver conditions as consequences does not eliminate notice requirements. Courts have held that must Congress place states on notice of not only the conditions of accepting federal funds but also the consequences of violating those conditions.<sup>106</sup> A condition might be clearly spelled out, but if the state lacks knowledge of the specific consequences of breach, courts have enjoined those consequences.<sup>107</sup> Thus, a statute that clearly provides for waivers and the possibility of conditions on waivers but does not specify what those conditions might be or place limits on the conditions fails to give the state clear and unambiguous notice of the consequences it may suffer. It leaves the secretary free to impose the conditions as he sees fit, which deprives states of the clear notice required by *Dole* and its progeny.

In the alternative, one might defend waiver conditions by arguing that even if clear notice applies to waiver conditions, it ought not to apply in the same way that it does to statutory conditions because agencies do not preemptively impose new conditions through waivers. States only become subject to additional conditions when they apply for waivers. At that point, states receive notice of the new conditions and voluntarily accept them. Thus, in the context of the waiver process, states do receive clear notice of conditions before they become subject to them.<sup>108</sup> In other words, this notice is the functional equivalent of the notice a statute might provide and could be treated as such by the law.

The foregoing argument, however, disregards congressional notice, which is more important. When Congress gives an agency waiver power and the implicit or explicit authority to condition waivers, Congress is giving states notice that they will have no notice of the conditions. That type of notice is insufficient to meet the clear statement rule. Advance notice of future nonnotice is not equivalent to clear notice of unambiguous conditions at the time the state agreed to participate in a federal program. Advance notice of future nonnotice is the opposite of clear notice and the Court’s objectives in *Dole*. A statute would be telling states that the conditions of taking federal dollars are potentially limitless if circumstances change or compliance becomes infeasible or undesirable. Courts have held that statutory notices that

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106. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

107. See, e.g., Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1117 (2010).

108. See, e.g., *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288 (1998).

only give states the ability to vaguely anticipate future conditions are insufficient to meet the unambiguous conditions requirement.<sup>109</sup>

Big waivers that include broad conditions only accentuate the foregoing problems of insufficient or vague notice. Were waivers reserved only for the exceptional circumstance—i.e., for those few states that fail to meet statutory requirements for unique and legitimate reasons—and the conditions imposed were limited to the scope of initial statutory conditions, conditional waivers, even if not fully articulated in advance, might escape problems under the clear statement rule. Those waivers are exceptional and, thus, might warrant an exception to general notice requirements. But where Congress has enacted a detailed regulatory structure that later proves unworkable and requires mass waivers, it creates a legislative structure that affords an agency an open-ended license to rewrite the law through waiver conditions in ways that states could not have anticipated, much less have had unambiguous knowledge of.<sup>110</sup>

In sum, while one could make a plausible argument that conditional waivers fall in a grey area of clear notice requirements, the sound argument, based on precedent and the manner in which waivers function, is that the controlling statute must provide states with clear and unambiguous notice of the terms of the conditions and consequences. If conditions on waivers are treated as a condition on funding, states lack notice of those conditions when an agency is free to set them as it sees fit. If conditions on waivers are consequences of a violation, states still have no notice of those consequences. The only way to avoid notice problems is to reason that states are not entitled to notice because they are not entitled to waivers. But this line of reasoning misses the point. This reasoning is premised on the general rule that the substantive judgment of whether to grant a waiver is unreviewable because it involves a discretionary act,<sup>111</sup> but that the substantive decision falls within agency discretion is irrelevant to whether an agency followed the correct process or considered statutorily required factors. Spending Clause notice requirements speak to

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109. See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (“[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”); Bagenstos, *supra* note 30, at 887.

110. This problem does arise when agencies regulate pursuant to the Commerce Clause because states are not entering into a voluntary and contractual relationship with the federal government. Rather, they are subject to regulation by virtue of the federal government’s explicit and inherently unilateral authority over areas affecting interstate commerce. The question in those cases is one of agency authority to act, not notice. This distinction is crucial and not always fully accounted for because so many challenges to agency action arise in regard to Commerce Clause regulation.

111. 5 U.S.C. § 701(a)(2) (2012).

process, not substance. Likewise, that an agency exercised discretion in awarding waivers does not answer the question of whether the agency went beyond the scope of its discretionary power.<sup>112</sup> Conditional waivers that impose conditions beyond the scope of the organic statute, or conditions that fall within the scope of agency authority but which states cannot reasonably anticipate, do not satisfy Spending Clause notice requirements. The Spending Clause requires specific statutory language that places states on notice of the terms to which they will be subject.

## 2. Leverage and Surprise at the Point of Waiver

Waivers, particularly those negotiated in context of an imminent statutory violation, afford agencies significant leverage against a state—far more than an agency would have had when the state first agreed to participate in the program. This leverage offers the opportunity for an agency to impose conditions of which a state might have had no notice, raising the possibility of impermissible coercion. Not all waivers, however, raise serious coercion concerns. To breach *Sebelius*'s antileveraging approach, the waiver would need to jeopardize a large sum of money in an entrenched program—so that the state has no real choice but to accept the conditions—and the waiver would have to impose new obligations that effectively transform the underlying program into a separate and independent program.<sup>113</sup>

The average waiver is unlikely to be impermissibly coercive under *Sebelius* because the funds at stake are too small or, even if they are more significant, the conditions do not transform the original program into a new independent program. Bagenstos postulated that, under certain circumstances, the availability of waivers might work to the advantage of states.<sup>114</sup> Because *Sebelius* made claims of coercion viable, he suggested that states would be able to extract waivers from an administration wary of defending its more aggressive funding conditions, such as those in NCLB.<sup>115</sup> In other words, waiver provisions would allow states to coerce the federal government.

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112. See, e.g., *Beno v. Shalala*, 30 F.3d 1057, 1066 (9th Cir. 1994) (confirming the statute granted considerable discretion to the agency but still proceeding to review the use of that discretion).

113. Bagenstos, *supra* note 30, at 865; Pasachoff, *supra* note 63, at 594–95.

114. See Bagenstos, *supra* note 30, at 907–08 (discussing how the *Sebelius* decision may give states more power to pick and choose which conditions on federal funds to comply with); Samuel R. Bagenstos, *Federalism By Waiver After the Health Care Case*, in *THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS* 227 (Gillian Metzger et al. eds., 2013).

115. See Bagenstos, *supra* note 30, at 907–08, 911–12.

This reasoning, however, proceeds on two questionable assumptions: (1) that there were regulatory statutes for which a reasonable claim of coercion can be made and (2) that the Administration was more wary of courts than it was of inviting and granting an avalanche of waiver requests that would undermine its ability to enforce old policy or impose new policy through the administrative process. The dissent in *Sebelius* suggested that NCLB might be one of the closest analogs to the Affordable Care Act and, thus, might come under attack,<sup>116</sup> but Professor Pasachoff convincingly demonstrated shortly thereafter that NCLB, nonetheless, would pass the *Sebelius* coercion analysis.<sup>117</sup> If NCLB is not unconstitutionally coercive, it is unlikely many, if any, other statutory programs are. In short, the Affordable Care Act may have been a one-of-a-kind statute in terms of coercion.

Bagenstos may have been correct that the Administration was generally wary of constitutional challenges, but the notion that the cost of freely granting waivers greatly outweighs the relatively small risk of a state making a colorable coercion claim is incorrect. In any event, the risk could be confronted when it arose rather than preemptively.<sup>118</sup> The most effective strategy for warding off colorable claims may have been for the Administration to stand its ground, even in the face of strong claims. As Brigham Daniels explains, the “administrative nuke” of fund termination only works if a state believes the agency will use it.<sup>119</sup> If the state perceives uncertainty, it only becomes more likely to launch challenges or engage in further noncompliance.<sup>120</sup>

All of this is simply to say that waivers are neither per se coercive nor per se noncoercive. Context and relative positioning power matter immensely, which is why the Court’s coercion analysis has eluded clear doctrinal articulation for so long. Most waiver provisions are not coercive. A number of federal entitlement and antipoverty programs are entrenched, dating back to the War on Poverty in the

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116. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2662–64 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (discussing the level of coercion present in the Affordable Care Act).

117. See Pasachoff, *supra* note 63, at 629.

118. After having been denied a waiver in the fall of 2014, Florida explicitly challenged the administration’s authority in regard to waivers and requested a hearing before an administrative law judge, relying in part on the analysis in this article. Letter from Governor Rick Scott, *supra* note 6.

119. Brigham Daniels, *When Agencies Go Nuclear: A Game Theoretic Approach to the Biggest Sticks in an Agency’s Arsenal*, 80 GEO. WASH. L. REV. 442, 474 (2012).

120. See *id.* at 475–76, 490, 497–98.

1960s or the Great Depression,<sup>121</sup> and the funds that flow through them are large.<sup>122</sup> But to be overly coercive, *Sebelius* indicates they must also impose some new, unexpected conditions that are different in kind, not just in degree.<sup>123</sup> This requirement precludes a viable challenge of the run-of-the-mill waiver because it does not impose new conditions. Even those that impose conditions would presumably be aimed at moving a state toward compliance with the existing statutory requirements. Thus, those conditions would not transform the program in kind.

Under certain circumstances, however, a waiver could violate *Sebelius*'s antileveraging approach to coercion. The paradigmatic leveraging case would arise not out of the statutory terms of the program, but from the way in which the agency exercises a waiver of that program. Assuming the funds and entrenchment are significant, *Sebelius*-style coercion might arise in two contexts: (1) the statutory waiver language sets no meaningful substantive limits on the conditions that the secretary might impose and the agency grants waivers only based on conditions that go outside of the scope of the statutory framework, either in substance or structure, or (2) the agency imposes conditions beyond those which the statute explicitly authorizes. Under both circumstances, the agency would have replaced the substantive provisions of a statutory program with a new program of its own making, which the states would have had no way of anticipating when they initially signed onto the program, much less clear notice.

If the statute explicitly granted an agency broad power to condition, the agency would argue that the state was on notice of the possibility of open-ended conditions. But *Sebelius* contemplates precise, not generalized, notice. When states signed up for Medicaid decades ago, they knew it was subject to revision.<sup>124</sup> They could not have expected the program to remain static. Congress could and would always tinker with it.<sup>125</sup> But *Sebelius* indicates that knowledge of possible change is insufficient to nullify coercion when the underlying change is a matter of kind rather than degree.<sup>126</sup>

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121. See generally Patricia E. Dille, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063 (1997) (discussing the evolution of entitlement programs across time).

122. *Id.*

123. See *NFIB v. Sebelius*, 132 S. Ct. 2566, 2605–06 (2012) (plurality opinion).

124. See *id.* at 2605.

125. See *id.* (“Congress has in fact [made adjustments to the Medicaid program], sometimes conditioning only the new funding, other times both old and new.”).

126. See *id.* at 2605–06.

When an agency transforms an entrenched and financially substantial program through conditioned waivers that the statute did not previously announce, a state likely has no choice but to agree.<sup>127</sup> The choice is to suffer federal sanctions or accept the conditions of a new waiver. The sanctions could be as simple as fund termination, which could also include reimbursing the federal government for some prior expenditures.<sup>128</sup> Where citizens depend on or benefit from those services, there is harm to both the state and its citizens. When the funds are high enough, *Sebelius* indicates that suffering these harms is not a real option.<sup>129</sup> The other potential sanction might be to keep the money—or some of it—but suffer sanctions or consequences on the program and those that receive its funds, which may again harm the state's subdepartments and citizens.<sup>130</sup> These sanctions also entail the state earning the label of failure or statutory violator, which carries less tangible but potentially serious stigmatic and political harms.<sup>131</sup> Thus, freely saying no to the conditions and exercising its own policy judgment may not be an option for the state.

In sum, in contexts where agencies use waiver power to impose conditions that go outside the scope of the underlying statute, the program is transformed in ways that states could not have anticipated. If the program is entrenched and involves significant funds, states may have no choice but to agree. If states lack a real choice, they have been subject to unconstitutional coercion. The political uncertainty this situation may create only further intensifies the underlying coercion. This context, however, is more likely the exception than the rule. Most waivers and conditions would likely be narrower and would not involve impermissible coercion.

### 3. Agencies Using Conditional Waivers to Remake Law

Waiver powers that effectively permit agencies to remake the law raise two delegation doctrine questions. First, can Congress grant agencies such power? Second, are there any limits on the scope of the power that Congress may grant? Barron and Rakoff definitively answer the first question, which also happens to be the easier one. No direct or roughly analogous Supreme Court precedent prohibits a waiver power,

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127. *See id.* at 2605.

128. *See, e.g., id.* at 2607.

129. *See id.* at 2604 (“[T]he financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement’—it is a gun to the head.”).

130. *See, e.g.,* 20 U.S.C. § 6316(c)(10)(C) (2012).

131. *See, e.g.,* Ryan, *supra* note 8, at 973.

or a conditional waiver power, on its face.<sup>132</sup> Thus, Congress can extend agencies the authority to waive statutory requirements and replace them with new ones. Barron and Rakoff reach this conclusion by distinguishing the presidential line-item veto—which the Court struck down—from conditional waivers<sup>133</sup> and by emphasizing that delegation doctrine permits agencies wide discretion in filling in legislative blanks through regulation, so long as the legislation contains an intelligible principle.<sup>134</sup> They reason the same principle would permit agencies to fill in blanks through conditions on waivers.

At a functional level, waiver power is very close to a presidential line-item veto power, the latter of which the Court struck down in *Clinton v. City of New York*.<sup>135</sup> Both nullify or cut off the implementation of a duly enacted law.<sup>136</sup> They are, however, entirely distinct in form. A line-item veto changes the constitutionally dictated process through which a congressional bill becomes law.<sup>137</sup> Waiver does nothing to formally change legislation or the way it is made. Rather, waiver involves an agency exercising the discretion afforded to it by a duly enacted law. In addition, a line-item veto would formally eviscerate a portion of the law that has passed both Houses of Congress, whereas waiver leaves the law in place and amounts to a deferral on enforcing it.<sup>138</sup> Thus, Barron and Rakoff reason that *Clinton's* holding is inapplicable to big waivers.<sup>139</sup>

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132. See Barron & Rakoff, *supra* note 7, at 317–18. *But see* Andrew Dudley, Comment, *Opening Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*, 41 ARIZ. ST. L.J. 273 (2009) (arguing that the implications of “constitutional, practical, and judicial concerns” in the context of “excisionary delegations” to agencies militate against waiver power).

133. See Barron & Rakoff, *supra* note 7, at 313–14.

134. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 428–30 (1935); Barron & Rakoff, *supra* note 7.

135. 524 U.S. 417, 447–49 (1998).

136. See Barron & Rakoff, *supra* note 7, at 268–69, 313–14.

137. See *id.* at 313 (explaining that the Line Item Veto Act was found to violate the presentment requirement of the Constitution).

138. See *id.* at 313–14.

139. Barron and Rakoff's conclusion is likely correct, but they do not fully account for the possibility that the Court in *Clinton* had functional concerns beyond the formalistic presentment clause problems. Presentment formalities aside, a line-item veto affords the executive more practical power in the lawmaking process than Congress, which is contrary to our constitutional structure, even if Congress could find some way to achieve it without violating the presentment clause. Big waiver involves the same functional shift of power to the executive. If this functional shift is important, one should be careful in dismissing *Clinton*. Barron and Rakoff do indirectly respond to this problem by emphasizing a timing difference between veto and waiver. *Id.* at 316–17. A line-item veto invalidates congressional judgment within days of Congress reaching a conclusion. In other words, the executive second guesses and overrides Congress. Because waiver



The functional balance of power between Congress and the executive is limited only by the nondelegation doctrine, which is extremely permissive, making successful constitutional challenges to big waiver on this ground generally unlikely. Baron and Rakoff reason that if the nondelegation doctrine allows Congress to grant agencies the power to initially make law through regulation, Congress may also grant them the power to unmake and remake law through conditional waivers.<sup>140</sup> So again, on the question of whether Congress can extend waiver power to an agency, including the power to condition waivers, the answer is yes. This, however, is a justification for small waiver, not necessarily big waiver with broad or relatively limitless power to condition the waiver.

Big waiver, unlike standard delegations of regulatory authority, may involve a greater delegation than previously seen, and one not easily susceptible to congressional constraint. In theory, conditional waivers, big or small, pose no more problems than any other regulatory authority, so long as Congress has articulated an intelligible principle by which the agency is to exercise its power. But, in practice, conditional waiver power raises questions and concerns that traditional delegations do not.

First, as a functional matter, conditional waivers are three steps removed from Congress, whereas traditional rulemaking is only one step removed. The typical delegation of rulemaking authority involves a broadly worded congressional standard and a directive to agencies to pass regulations (step one).<sup>141</sup> A conditional waiver can involve a specifically worded statute, no initial delegation to the agency (step one), intervening facts that give rise to the waiver (step two), and the

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would occur later in time, Congress's factual predicate may have proven false. Rather than second-guessing Congress, an agency waiver may be necessary to carry out Congress's judgment and desire that the law adapt to and fit varied circumstances. Thus far, however, waiver power is not subject to time limitations or factual predicates, meaning waiver power could operate nearly identically to a line-item veto. A court concerned with the functionally similar transfer of power to the executive would unlikely have its concerns alleviated by the mere fact that Congress has evaded the presentment clause problem by delaying the point at which the executive might act until right after the bill becomes law. Nonetheless, those concerns are more easily addressed through delegation doctrine and administrative law, which the following paragraphs address. Thus, Baron and Rakoff's conclusion regarding *Clinton* stands.

140. See *id.* at 325–26.

141. See, e.g., 42 U.S.C. § 7409(b)(1) (2012) (“National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.”); see also Bressman, *supra* note 79 (discussing how the Court addressed Congress's broad delegation of authority in *AT & T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999)).

imposition of conditions on those waivers (step three).<sup>142</sup> This further removal from Congress is a legitimate reason why a court may be more restrictive on delegations. If the functional and temporal removal from Congress does not factor into the analysis, a permissive nondelegation doctrine could theoretically permit Congress to pass a statutory framework that never requires revisiting or revision—regardless of changes in the predicate upon which Congress initially acted—as the agency would always have the authority to take “the next step.” In other words, Congress would no longer need to legislate.

Second, articulating workable intelligible principles for conditional waivers may be more challenging than with a traditional delegation. With big waiver, Congress is necessarily trying to legislate for unforeseeable future circumstances,<sup>143</sup> which makes articulating substantive criteria for conditions difficult. If Congress articulates precise intelligible principles for the waiver and conditions, the legislation would easily comply with the nondelegation doctrine, but the principle likely hamstrings agencies in confronting changed circumstances for which the provisions were written.<sup>144</sup> Vaguer principles free the agency to address changed circumstances, but they tend to become less intelligible and create more constitutional concerns. To be fully effective in meeting a distant and unknown future, the intelligible principle would need to be as broad as possible. This alone does not render the delegation unconstitutional but suggests that effective big waivers may inherently tend toward the outer reaches of delegation doctrine and risk breaches of it, while traditional delegations do not.

Third, the power to undo law and remake it is potentially larger than the power to make it. In so far as the power to remake is exercised formally and temporally further from Congress and under more vague language, an agency has the propensity to act more on its judgment than Congress's. If Congress's initial statute explicitly constrains the conditional waiver power or the Court reasons that the overall statute operates as a limitation on the scope of conditions, the conditional waiver power remains in check. This, however, is not equivalent to the big waiver power to remake the law that Barron and Rakoff propound. If an agency has true power to remake the law, Congress would have retained no power for itself other than to write a “first draft” of a law

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142. See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.); U.S. DEP'T OF EDUC., *supra* note 18 (describing the conditions for the granting of NCLB waivers).

143. See Barron & Rakoff, *supra* note 7, at 270–71.

144. See *id.* at 322–23.

that has no binding effect on the agency. And, if an agency can unmake the law for any reason and then condition that unmaking on any basis it wishes, almost nothing would be off limits to the agency. In other words, a veto power followed by an unconstrained legislative power is broader than a power to regulate within an existing and continued legislative framework. So long as the legislation exists, it necessarily limits. Once it is waived, it does not limit. It is this small but meaningful distinction of substantive power that also distinguished the President's normal constitutional legislative veto from the statutorily enacted—and unconstitutional—presidential power to exercise a line-item veto.<sup>145</sup> The latter is a greater power than the former.

These distinctions and concerns, however, do not point to a simple doctrinal solution. One solution is to ignore the problems and summarily reason that conditional waivers are constitutional because remaking the law is no different than making it pursuant to an intelligible principle. To the extent big waiver would be the largest delegation to date, this solution would be yet another concession to the notion that there are no meaningful limits to delegation. The other option is for the Court to limit waivers through constitutional doctrine. The Court could hold that (1) big waivers are per se unconstitutional delegations because they veto law, (2) conditional waivers are per se unconstitutional because they rewrite the law, (3) waivers and the conditions to be imposed on them must be constrained by an intelligible limiting principle in the statute, or (4) waivers and the conditions to be imposed on them must be constrained by a definite—more than intelligible—limiting principle in the statute.

The first two holdings are undesirable. As Baron and Rakoff point out, big waiver is a positive policy development in many respects—the exact thing the Court has shied from impeding in the past.<sup>146</sup> The likelihood of the Court categorically limiting waiver power is next to zero.<sup>147</sup> The third holding would provide greater flexibility, but possibly too much if the Court wanted to provide a meaningful hedge against the dangers of big waiver. If big waiver is a bigger power than traditional delegation, applying the intelligible principle doctrine to waivers would theoretically permit larger delegations than the already enormous ones previously sanctioned. On the other hand, a factually intense analysis of conditional waivers and the context in

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145. See *Clinton v. City of New York*, 524 U.S. 417, 442–44 (1998).

146. See Barron & Rakoff, *supra* note 7, at 270–71.

147. See generally Bressman, *supra* note 79 (arguing that rather than reining in Congress's delegation authority, courts will require agencies to limit their own authority under those delegations).

which they operate, on a case by case basis, could expose the breadth of the delegation in some circumstances and demonstrate that a statute lacked a sufficiently intelligible principle. Part IV.B's application of delegation doctrine to NCLB waivers provides but one example.

The fourth holding would avoid the problems of the first three. It would permit conditional or big waiver, but could circumscribe waiver power in a way that makes the size of the power granted through big waiver roughly proportional to traditional delegations under the intelligible principle doctrine. Thus, it would retain the current balance of power between Congress and the executive branch struck by the Court in *Whitman v. American Trucking* and its progeny. Weighing against this approach, however, is that a "definite principle" approach would increase the legislative burden on Congress and require statutory precision that could indirectly limit Congress's ability to prospectively deal with complex and evolving contexts through agency waiver power.<sup>148</sup>

In sum, the Court has two viable constitutional approaches to dealing with the problem of big waiver, but each has a potential downside, which explains why the Court has avoided adopting restrictive constitutional delegation doctrine for so long. Faced with the issue of big waivers, the Court could easily stay its current doctrinal course, adopting the approach of third holding but would have good reason to consider the fourth. This Article's analysis considers both in its later application of delegation doctrine to NCLB waivers.

#### 4. Statutory Construction to Avoid Constitutional Issues

##### *a. Requiring Explicit Condition Power and Scope*

To avoid the dangers of policing delegations through constitutional doctrine, the Court has increasingly turned to statutory and administrative law analysis, with a particular focus on scope of authority.<sup>149</sup> Rather than finding the delegations themselves unconstitutional—even when they normatively might be—the Court has found that agencies exercised powers beyond the scope of those

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148. See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 321 (2000) (arguing that revival of nondelegation doctrine poses two serious problems: "judicial enforcement of the nondelegation doctrine would raise serious problems of judicial competence and would greatly magnify the role of the judiciary in overseeing the operation of modern government" and this oversight would do little "to improve the operation of the regulatory state. It may well make things worse, possibly much worse.").

149. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 220 (1994); see also Sunstein, *supra* note 148, at 329–36 (discussing the Court's cannons for policing delegation without resorting to constitutional doctrine).

delegated by statute.<sup>150</sup> In the era of big delegations, this entails the Court narrowly construing the scope of Congress's delegation. Whether the problem originates from an otherwise unconstitutional delegation or an overreach by the agency, the Court, through scope analysis, can place checks on Congressional delegations.

A scope of authority approach to conditional waiver power could, likewise, enforce meaningful limits without impeding Congress's ability to extend power to agencies when needed. A scope analysis could guard against delegation problems in one of two ways. The first would be to reason that the power to condition does not fall within the scope of the power to waive. Thus, in the absence of explicitly statutory language, an agency lacks the authority to condition waivers. One step further would be to reason, even when condition power is explicitly granted, agencies can only impose those categories or types of conditions provided for in the statute. This second approach would put the onus on Congress to articulate how and when conditions can be imposed but allow Congress substantial latitude when it articulates terms.

The second approach, however, might overlook nuance in how waivers operate in practice. Absent an emergency necessitating a waiver,<sup>151</sup> the decision to waive is rarely clear cut. In a typical case, the decision of whether to waive would involve an agency's assessment of state's past compliance with the statute, the extent of the current noncompliance, and the likelihood of the state achieving further compliance in the future.<sup>152</sup> In this context, an agency would not want to unconditionally waive compliance, nor would it want to flatly deny waiver.<sup>153</sup> But limiting the agency to these two options increases the risk of the agency adopting an intractable position rather than engaging in back and forth negotiations aimed at both the agency and the state getting something out of the deal.<sup>154</sup> If forced to choose between unconditioned waiver and no waiver, an agency might often grudgingly choose no waiver and impose sanctions—the “agency nuke”—in the attempt to scare other states straight.<sup>155</sup> This option amounts to the

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150. See *MCI Telecomms.*, 512 U.S. at 234.

151. See Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVTL. L. REV. 257, 267–70 (2010) (discussing environmental emergency waivers and noting that “[w]aiver provisions are frequently triggered by emergencies”).

152. See Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHI.-KENT L. REV. 1359, 1365–66 (1997) (discussing circumstances under which an agency would waive its own regulations).

153. See Barron & Rakoff, *supra* note 7, at 326; Daniels, *supra* note 119, at 471–73.

154. See Daniels, *supra* note 119, at 485–86, 493–94.

155. See Second Amended Complaint, *supra* note 97, at ¶¶ 104–06, 114, 117–26, 133–36, 143–59 (demonstrating the Bush administration's early refusal to grant waivers of provisions of the No Child Left Behind Act); see also CAL. EDUC. CODE §§ 10601, 10601.5, 10802, 10804 (West 2014). It

lesser of two evils that thwarts both congressional and agency objectives in the short term.<sup>156</sup>

*b. Inferring Condition Power and Scope*

Rather than cutting off the ability to impose any waiver conditions not specifically articulated by a statute, a scope of authority analysis could infer a conditional waiver authority but limit the conditions to those falling within the overall scope of the controlling statute. Thus, if a statute was designed to achieve objectives A and B, an agency could not condition a waiver on a state achieving objective C instead. A scope of analysis might, likewise, impose scope limitations not just on objectives—as objectives may be broad and manipulable—but on the methods of achieving the objectives if Congress has delineated a type of method or placed certain methods off-limits.<sup>157</sup> This approach would offer agencies the ability to negotiate further statutory compliance without the problem of open-ended authority.

This approach can also be harmonized with the Court's "intelligible principle" nondelegation doctrine. If an intelligible principle is the hallmark of constitutional delegations, the statutory text and framework as a whole operates as the intelligible principle by which an agency can condition a waiver. Inferring an intelligible principle for waiver conditions from the statute also reserves the law-making function and substantive judgments for Congress, while affording practical flexibility to Congress and agencies. In this respect, implying waiver condition authority that is limited to the scope of the statute maintains the precedential status quo, allowing agencies no more or less delegation authority in regard to waivers than elsewhere.

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took a statutory amendment by Congress, eliminating California's statutory prohibition against linking student and teacher data, to deal with California's noncompliance on the high quality teacher requirement.

156. After all, Congress includes waivers as an escape clause from statutes and, thus, one that can be reasonably exercised.

157. See Barron & Rakoff, *supra* note 7, at 325–26. Using scope to limit methods becomes more complicated because waiver conditions that did anything other than condition the waiver on future substantial compliance would necessarily entail the state taking a different approach to compliance. A scope analysis that tightly limited methods would effectively eliminate the ability to condition waivers. Thus, by method scope, I mean to suggest that if Congress had said that the way to improve educational achievement is to increase teacher certification requirements, a scope analysis might prohibit waiver conditions mandating funding equity. While that condition might also improve achievement, it does so through a method far removed from increasing teacher certification requirements.

*c. Identifying the Scope of Permissible Conditions*

An implied scope approach, however, does not come without costs. It demands difficult analysis to determine the scope of a statute and raises the question of whose judgment of scope takes primacy: the courts' or the agencies'. The broader the statute in coverage or more complex in its statutory framework the more difficult it would be to characterize the scope of permissible conditions an agency can impose through waiver.

Consider environmental regulation. Current environmental laws focus not on the environment in general but on specific aspects. Individual statutes cover distinct aspects or categories of the environment (air, water, waste, etc.) and limit regulation in those categories to "activities" producing "pollutants."<sup>158</sup> But imagine a statute that included four different mechanisms through which to achieve its stated purpose of promoting a healthy environment. Would the promotion of a healthy environment define the scope or the four mechanisms that Congress adopted to achieve that purpose? If the former, an agency could broadly define healthy environment and arguably adopt any rational means under the sun to promote it.<sup>159</sup> For instance, one might argue that light and noise pollution degrade our environment and, thus, could be regulated.<sup>160</sup>

If the statute's chosen mechanisms for achieving a healthy environment defined the scope, the statute would have an articulable limiting scope that would likely exclude light and noise pollution regulation. Yet, the statute would still be subject to expansive interpretation of what things fall within the statute's current mechanisms. Assume, for instance, Congress had mandated an improvement in pollutants filtration in smoke stacks. A cap-and-trade system, although not mentioned or conceived of in the statute, arguably falls within the increase on filtration method because the agency reasons that a cap-and-trade system will incentivize substantial numbers of companies to increase filtration.

The point here is how quickly and how far the chain of proximate cause or asserted proximate cause could be stretched to make a desired policy position fit within an existing statutory scheme. This difficulty,

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158. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (2012); Toxic Substances Control Act, 15 U.S.C. §§ 2601–2671; Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388; Clean Air Act, 42 U.S.C. §§ 7401–7671q.

159. See John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 55–60 (2009) (“[E]nvironments affected by pollution are simply areas defined by boundaries of our own making.”).

160. See *id.* at 29, 56, 67.

of course, is not new. It is the standard battle that routinely occurs between agencies and regulated entities in regard to administrative rulemaking. With rulemaking, however, Congress has made it clear that agencies should fill statutory gaps. Thus, Congress contemplates and allows agency rationalizations. But when both the power to condition waivers and their scope are implied, an agency can both assert and define its own power.

To place any practical limit on agencies' conditioning of waivers, courts (not agencies) must be the arbiters of scope. Even Barron and Rakoff concur on this point.<sup>161</sup> An agency could make a strong argument that the *Chevron* deference standard should apply to its reasonable interpretation of a statute's scope,<sup>162</sup> but scope inquiries are distinct from interpretations of ambiguous statutory language. Scope raises a question of legal authority, which is the domain of courts, as opposed to substantive and context-specific concepts in which agencies may have unique expertise. The Court, on more than one occasion, has emphasized this type of distinction between legal authority and substantive interpretation, rejecting agencies' attempt to use their interpretative discretion as a guise to expand their legal authority.

In *MCI Telecommunications Corp. v. AT&T*,<sup>163</sup> Congress had granted the Federal Communications Commission the power to "modify" statutory requirements.<sup>164</sup> The FCC reasoned that the power to "modify" justified the agency's elimination of tariffs—tariffs that Congress had initially provided for by statute.<sup>165</sup> The Court did not defer to the FCC's interpretation of "modify" but defined the term itself as meaning "to change moderately or in minor fashion."<sup>166</sup> The Court then assessed the scope of the statute and how tariffs fit within it, concluding that the tariff provisions were at "the heart" of the statute.<sup>167</sup> Thus, the "elimination of the crucial provision of the statute for forty percent of a major sector of the industry is much too extensive

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161. See Barron & Rakoff, *supra* note 7, at 323–24 (reasoning if the determination of big waiver power is under review, courts should make the decision independently because big waivers enlarge agency power).

162. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. at 837, 842–44 (1984) (creating the presumption that a reviewing court should assume that Congress has delegated the gap-filling task to the agency where Congress has left the statute ambiguous).

163. 512 U.S. 218 (1994).

164. *Id.* at 220; see also 47 U.S.C. § 203(b)(2) (2012).

165. *MCI Telecomms.*, 512 U.S. at 220.

166. See *id.* at 225–28.

167. *Id.* at 229.



to be considered a 'modification' " and "goes beyond the meaning that the statute can bear."<sup>168</sup>

In *FDA v. Brown & Williamson Tobacco Corp.*, the Court applied the same reasoning, this time focusing on the importance of the interpretation and authority asserted by the agency.<sup>169</sup> There the Court reasoned that the larger the authority asserted by the agency, the more clear it must be that Congress had intended that authority.<sup>170</sup> "[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."<sup>171</sup> The Court reiterated this same point in *Whitman v. American Trucking Associations*: "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."<sup>172</sup>

This line of cases offers strong support for the notion that when Congress reaches a conclusion as to how best to achieve its ends and creates a particular regulatory scheme—as opposed to leaving it to an agency in the first instance—it is antithetical to infer that Congress intended to permit an agency to replace that scheme with any one for which the agency can make a reasonable argument. In short, implied waivers and conditions cannot give rise to big waiver power—that is, the power to remake a statute. Thus, Barron and Rakoff concede that "[i]f we accept that the statute in *MCI* was linguistically ambiguous about granting the agency the authority of little waiver or big waiver, Justice Scalia's opinion can be read as establishing a clear statement rule for recognizing the existence of a big waiver authority."<sup>173</sup>

Barron and Rakoff discount this logic, however, for two reasons. First, Congress rarely hammers out the fundamental details of regulation, and, as a result, inferring waiver power does not portend numerous reversals of Congressional will.<sup>174</sup> Second, when Congress grants the power to waive, it is granting a reversal power.<sup>175</sup> As to the first point, the number of congressional reversals is irrelevant as to

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168. *Id.* at 229, 231.

169. *See* 529 U.S. 120, 159–60 (2000).

170. *See id.* In *Brown*, the Food and Drug Administration argued that its explicit statutory authority to regulate drugs included the authority to regulate tobacco, notwithstanding the fact that Congress had passed various other tobacco regulation statutes in which the FDA played no role. *Id.* at 125, 143–57.

171. *Id.* at 160.

172. 531 U.S. 457, 468 (2001).

173. Barron & Rakoff, *supra* note 7, at 322.

174. *See id.* at 323–234.

175. *Id.*

whether those reversals are authorized. Thus, Barron and Rakoff's rejoinder rests on the single premise that reversal power is incidental to waiver power. But the term "waive" will not bear the weight of their interpretation. Waive is only the equivalent of reverse if, by reverse, one only means "to terminate the current course of action." When they speak of waive, they mean something more than terminate the current course of action. They mean big waiver, which includes termination and replacement.

In addition, when Congress intends waiver power as an escape clause from harming states that have acted in good faith, Congress is not extending to agencies a power to reverse Congress but to effectuate its will to do no undesirable harm. A reversal power can do the opposite. It can give agencies the power to determine that Congress's regulatory plan is insufficiently effective and needs change as the agency moves forward, or even more aggressively, that the agency has a better idea even if Congress's was not flawed. Congress can surely grant an agency reversal power without violating nondelegation and scope doctrine, but the lesson of the foregoing line of cases is that this power is so significant that Congress must explicitly grant it. Agencies cannot simply infer it. And courts, not agencies, are the appropriate arbiters of scope.

### III. IMPOSING NEW POLICY BY WAIVING NO CHILD LEFT BEHIND

Evaluating the constitutionality of the conditions imposed on NCLB waivers requires an understanding of the circumstances and events through which they developed. As funding legislation, NCLB was set to automatically expire after a period of years and required reauthorization in 2007.<sup>176</sup> States' progress, or lack thereof, toward full proficiency on standardized tests during the intervening years made it clear that the Act needed more than a basic reauthorization. To avoid labeling an overwhelming majority of the nation's schools as failures that were subject to mandatory sanctions, NCLB needed a substantial rewrite.<sup>177</sup> The demands of the Great Recession and the debate over the Affordable Care Act reduced an otherwise crucial reauthorization to an afterthought. Two years into his term, President Obama finally issued a detailed blueprint for reauthorization of the Elementary and

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176. MARIS A. VINOVSIS, FROM A NATION AT RISK TO NO CHILD LEFT BEHIND: NATIONAL EDUCATION GOALS AND THE CREATION OF FEDERAL EDUCATION POLICY 200 (2009).

177. See Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1753, 1756 (2012) (explaining the Act set unrealistically high expectations that could only be met by blatant test manipulation).

Secondary Education Act (“ESEA”).<sup>178</sup> The terms of the blueprint mirrored the policies that the Administration had already been pursuing through a competitive grant process funded through economic stimulus funds.

Continued fights over health care and the economy and a shift of power in Congress prevented reauthorization from moving forward.<sup>179</sup> Relations between the Administration and Congress grew so acrimonious that the Administration effectively gave up on any major legislative effort in any area, indicating it would take administrative action to achieve its policy ends.<sup>180</sup> In education, this meant using the widespread occurrence of NCLB noncompliance and the Secretary of Education’s waiver authority to promote policies consistent with the Administration’s previously announced reauthorization policies. Thus, rather than an escape clause for states, waivers became a mechanism for achieving the Administration’s affirmative policy objectives that could not be achieved elsewhere. In short, the waiver process became a substitute for the legislative process.

The Administration’s objectives cannot resolve questions of constitutional authority and statutory scope, but the lead-up to the waivers provides an important frame of reference for identifying the scope of NCLB, proposed changes to it, and the conditional waivers that substituted for both. Because the waiver conditions mirrored the legislative rewrite of NCLB, which the Administration insisted was necessary in light of the Act’s past failures, they beg the question of how that new legislative agenda could fall within the scope of the statute it was intended to replace. The following subsections identify the policy high points of the competitive grant process, the reauthorization blueprint, and the waiver conditions, drawing connections between them and providing a basis by which to assess whether the final waivers fall within the scope of NCLB.

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178. See U.S. DEPT’ OF EDUC., *supra* note 16. The ESEA was originally passed in 1965, and has been reauthorized seven times since. NCLB, enacted in January 2002, was the most recent authorization of the Act.

179. See e.g., Sam Dillon, *New Challenges for Obama’s Education Agenda in the Face of a G.O.P.-Led House*, N.Y. TIMES, Dec. 12, 2010, at A36, available at [http://www.nytimes.com/2010/12/12/us/politics/12education.html?\\_r=0](http://www.nytimes.com/2010/12/12/us/politics/12education.html?_r=0), archived at <http://perma.cc/8Y9W-KYD7> (noting that the new House committee chairman with jurisdiction over education had expressed interest in reducing the federal role in education); *US States, Local Governments Plead for New ‘No Child Left Behind,’* REUTERS (Feb. 5, 2013), <http://www.reuters.com/article/2013/02/05/usa-education-legislation-idUSL1N0B5AJU20130205>, archived at <http://perma.cc/KPT8-BDEX> (discussing letter from National Governors’ Association reiterating continued requests for NCLB reauthorization).

180. See Peter Nicholas & Don Lee, *Obama Uses Executive Power—and the Bully Pulpit*, L.A. TIMES, Oct. 24, 2011, <http://articles.latimes.com/2011/oct/24/news/la-pn-obama-housing-20111024>, archived at <http://perma.cc/LML6-F9FS>.

### A. *Setting the Stage: Race to the Top Grants*

In February 2009, Congress authorized \$787.2 billion to stimulate and stabilize the failing economy.<sup>181</sup> Ninety-seven billion dollars was allocated to cover states' and local districts' education budget shortfalls and to prevent the massive layoff of teachers.<sup>182</sup> A small but significant slice of those education funds were reserved for competitive grants.<sup>183</sup> The Secretary of Education was authorized to use the funds to foster educational innovation and improvement.<sup>184</sup> The authorizing legislation deferred to the Secretary regarding the criteria by which state applications would be evaluated.<sup>185</sup>

The first of these competitive grant programs was the \$4.35 billion Race to the Top Fund ("RTT").<sup>186</sup> The Department indicated that it would use RTT to spur four innovations and reforms:

Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;

Building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction;

Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and

Turning around our lowest-achieving schools.<sup>187</sup>

States that did not commit to these strategies would be ineligible for grants.<sup>188</sup>

181. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 3, 123 Stat. 115, 115-16 (codified at I.R.C. § 1 note (2012)).

182. See U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT: SPENDING REPORT BY PROGRAM 1 (2011), available at <http://www2.ed.gov/policy/gen/leg/recovery/reports.html> (detailing the funding allocated under the ARRA to educational programs); U.S. DEP'T OF EDUC., AMERICAN RECOVERY AND REINVESTMENT ACT REPORT: SUMMARY OF PROGRAMS AND STATE-BY-STATE DATA 3-4 (2009), <http://www2.ed.gov/policy/gen/leg/recovery/spending/arra-program-summary.pdf>, archived at <http://perma.cc/G2JA-C4ZS> [hereinafter, U.S. DEP'T OF EDUC., SUMMARY OF PROGRAMS] ("As the economy slowed in 2008, State revenues declined dramatically and many were unable to fully fund their . . . education budgets.").

183. See American Recovery and Reinvestment Act of 2009 § 14006; U.S. DEP'T OF EDUC., EDUC., SUMMARY OF PROGRAMS, *supra* note 182, at 3.

184. See American Recovery and Reinvestment Act of 2009 § 14006; U.S. DEP'T OF EDUC., EDUC., SUMMARY OF PROGRAMS, *supra* note 182, at 241.

185. See American Recovery and Reinvestment Act of 2009, §§ 14006(c), 14007.

186. See *id.*

187. 74 Fed. Reg. 59,836 (Nov. 18, 2009); U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM: EXECUTIVE SUMMARY 2 (2009), available at <http://www2.ed.gov/programs/racetothetop/executive-summary.pdf>.

188. See 74 Fed. Reg. 59,843-45 (Nov. 18, 2009); Race to the Top Fund, 74 Fed. Reg. 59,688, 59,696-97 (Nov. 18, 2009) (codified in scattered sections of 34 C.F.R. subtit.B ch.II)

The workplace and college standards requirement had a specific intent behind it: incentivizing states to adopt the Common Core standards or curriculum.<sup>189</sup> In fact, all twelve states that received a RTT grant adopted or promised to adopt the Common Core.<sup>190</sup> To be fair, several states had already begun the process of adopting the Common Core, but the Department clearly took a side in the debate.<sup>191</sup> The data and teacher effectiveness requirements were, likewise, designed to foster another specific agenda: basing teacher hiring, promotion, retention, and compensation on value-added assessments of teaching.<sup>192</sup> The fourth requirement was part escape clause, part new agenda. The school turnaround requirement diverged from the NCLB approach of sanctioning all schools that fail to meet full proficiency, instead only requiring states to focus their turnaround strategies on the very lowest performing schools.<sup>193</sup>

While small in size, RTT proved effective in spurring significant change. Why is slightly less clear. Either states were willing to do almost anything to offset their dramatically falling revenues during the recession, or they substantively agreed with the Department's policies. Heated battles over teacher accountability and charter school laws at the local level suggest the former,<sup>194</sup> particularly given how quickly

189. See Robert S. Eitel & Kent D. Talbert, *The Road to a National Curriculum: The Legal Aspects of the Common Core Standards, Race to the Top, and Conditional Waivers*, 13 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 17, 21 (2012); 74 Fed. Reg. at 59,733 ("In [the Race to the Top Fund], the phrase 'common standards' does not refer to any specific set of common standards, such as the Common Core Standards.").

190. See Eitel & Talbert, *supra* note 189, at 21. As discussed *supra* note 1, the definition of curriculum and whether the Common Core is curriculum became a heated battle, albeit well after it had already been adopted. Telling is the fact that the state agencies appeared to give little thought to calling it curriculum. See, e.g., *Common Core*, ENGAGE NY, <https://www.engageny.org/common-core-curriculum>, archived at <https://perma.cc/H9KF-6ZNX> (last visited Feb. 9, 2015). What is very clear is that the Common Core standards require that they adopt a Common Core Curriculum. See generally *id.*

191. See Eitel & Talbert, *supra* note 189, at 21.

192. See Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 98-99 (2011).

193. In later guidance, the Department demanded one particular type of turnaround strategy and innovation: charter schools. Secretary Duncan cautioned that states that "put artificial caps on the growth of charter schools will jeopardize their applications under the Race to the Top Fund." David Nagel, *Charter School Support Is a Prerequisite for Race to the Top Funds*, JOURNAL (June 09, 2009), <http://thejournal.com/articles/2009/06/09/charter-school-support-is-a-prerequisite-for-race-to-the-top-funds.aspx>, archived at <http://perma.cc/TSA5-YR2K>.

194. See e.g., Lesli A. Maxwell, *California "Fire Wall" Becomes Hot Issue*, EDUC. WEEK, Aug. 12, 2009, at 19; Erik W. Robelen, *State Picture on Charter Caps Still Mixed: Some Easing Restrictions as Federal Officials Urge, Though Others Reluctant*, EDUC. WEEK, Aug. 12, 2009, at 19.

states adopted the new policies notwithstanding controversy.<sup>195</sup> Motivations aside, the important point is that RTT was the first sign of a major shift in federal education policy, both in substance and form. “While NCLB largely focuses on the implementation of accountability mechanisms to leverage educational improvement, [RTT] at least appears to involve some sort of overarching strategy focused on building the capacities of states, districts, and schools to meet performance goals.”<sup>196</sup> Moreover, unlike NCLB, RTT focuses on “the quality and consistency of state standards themselves” and “emphasizes the broad improvement of the educator workforce and the development of data systems, linked to state standards, that can facilitate this improvement effort.”<sup>197</sup>

*B. The Administration’s Blueprint for Reauthorizing the Elementary and Secondary Education Act*

A year later, the Administration released *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*.<sup>198</sup> It summarized its four goals as “(1) Improving teacher and principal effectiveness; (2) Providing information to families to help them evaluate and improve their children’s schools; (3) Implementing college- and career-ready standards; and (4) Improving student learning and achievement in America’s lowest-performing schools by providing intensive support and effective interventions.”<sup>199</sup> For the purposes of this Article, two points are crucial. First, the Administration itself directly tied the blueprint to its prior RTT policy goals, stating that the blueprint was “[m]odeled after the Race to the Top.”<sup>200</sup> In fact, the four goals of reauthorization are almost identical to the conditions placed on RTT applications. The only distinctions between the two are semantic phrasing and the blueprint’s inclusion of the generic goal of better informing parents. Second, the Administration indicated that the blueprint goals were a hard break

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195. See CTR. ON EDUC. POL’Y, AN EARLY LOOK AT THE ECONOMIC STIMULUS PACKAGE AND THE PUBLIC SCHOOLS 2 (2009) (reporting that forty-one states planned to apply for RTT grants even though the requirements governing the program are stricter than the requirements for other ARRA programs); Superfine, *supra* note 192, at 107–08.

196. Superfine, *supra* note 192, at 105.

197. *Id.*

198. U.S. DEP’T OF EDUC., *supra* note 16 (describing the educational reform vision of the Obama Administration).

199. *Id.* at 3.

200. *Id.* at 36.

from the substance and structure of NCLB.<sup>201</sup> President Obama stated: “My Administration’s blueprint for reauthorization of the Elementary and Secondary Education Act is not only a plan to renovate a flawed law, but also an outline for a re-envisioned federal role in education.”<sup>202</sup>

Had NCLB been reauthorized, the subject of this Article would have been mooted, but reauthorization was initially stalled by the demands of the failing economy and the Administration’s focus on health care reform.<sup>203</sup> Reauthorization was later made all but impossible by intractable political fights over passing the budget, raising the debt ceiling, and repealing the Affordable Care Act.<sup>204</sup> At that point, the Administration gave up on legislation, indicating it would not wait on Congress.<sup>205</sup> Instead, the Administration would pursue policy changes through executive action.<sup>206</sup> In most areas, the administrative action was but a half-measure to forestall immediate problems, but education provided the context to exercise a more expansive power.

### C. The Conditions of Waiver

By the fall of 2011, more than eighty percent of the nation’s schools were set to be labeled as failing.<sup>207</sup> Under NCLB, those education systems would be subject to a series of escalating and harsh consequences, including school closings, district restructuring, and fund termination.<sup>208</sup> Those sanctions would have been a practical and political disaster for both the schools and the U.S. Department of Education. The best solution—altering the legislation through reauthorization—was off the table at that point. The only viable option was for the Department to use its waiver power.

NCLB provides that “the Secretary may waive any statutory or regulatory requirement of this chapter for a State educational agency,

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201. See *id.* at 2.

202. *Id.*

203. Perry Bacon Jr., *Health-care Debate Delayed Action on Other Big Issues*, WASH. POST, Jan. 19, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/18/AR2010011803519.html>, archived at <http://perma.cc/7LC8-JCVM>.

204. *Id.*; Michele McNeil, *Committee Sets Sights on ESEA: House Hearings Mark Start of Reauthorization Process*, EDUC. WEEK, Feb. 24, 2010, at 20–21.

205. See, e.g., *Jobs & The Economy: Putting America Back to Work*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/economy/jobs/we-cant-wait>, archived at <http://perma.cc/V9BU-M7CT> (last visited Mar. 10, 2015) (President Obama stating, “Where [Congress] won’t act, I will.”).

206. Bacon, *supra* note 203; Richard Wolf, *Obama Seeks an End Run Past Congress*, USA TODAY, Oct. 27, 2011, at 5A.

207. Dillon, *supra* note 3.

208. 20 U.S.C. § 6316(b)(7) (2012) (describing sanctions).

local educational agency, Indian tribe, or school through a local educational agency, that . . . requests a waiver.”<sup>209</sup> In other words, the Secretary is free to waive all of the accountability, teacher and testing requirement provisions that were the hallmark of NCLB.<sup>210</sup> A state that desires a waiver must “submit a waiver request” that specifically identifies those statutory or regulatory provisions of NCLB for which it is requesting a waiver and explain how a waiver will “(i) increase the quality of instruction for students; and (ii) improve the academic achievement of students.”<sup>211</sup> It must also set “measurable educational goals” and the methods for measuring and meeting those goals.<sup>212</sup>

In September 2011, Secretary Arne Duncan invited states to apply for waivers or request flexibility.<sup>213</sup> He also announced the Administration’s intent to break course from NCLB because too many circumstances had changed since its passage. First, state-level responses to RTT and movement toward the Common Core had demonstrated that better reforms were possible. He remarked that these reforms “were not anticipated when the No Child Left Behind Act of 2001 (NCLB) was enacted nearly a decade ago.”<sup>214</sup> Second, NCLB’s approach simply does not work. He explained: “[I]t inadvertently encouraged some States to set low academic standards, failed to recognize or reward growth in student learning, and did little to elevate the teaching profession or recognize the most effective teachers.”<sup>215</sup> He would use the waiver process to “help ensure that Federal laws and policies can support these [new] reforms and not hinder State and local innovation aimed at increasing the quality of instruction and improving student academic achievement.”<sup>216</sup>

The Secretary was crystal clear regarding what a state must do to receive a waiver: comply with his conditions. First, states must adopt “college- and career-ready expectations for all students in . . . at least

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209. *Id.* § 7861(a).

210. *Id.* § 7861(c).

211. *Id.* § 7861(b)(1)(B)(i)–(ii).

212. *Id.* § 7861(b)(1)(C).

213. Letter from Arne Duncan, U.S. Sec’y of Educ., to Chief State School Officers (Sept. 23, 2011), available at <http://www2.ed.gov/policy/gen/guid/secletter/110923.html>, archived at <http://perma.cc/Y5NL-ZL5H>. After some states chose not to seek or were denied waivers, the Department began allowing individual school districts to apply for waivers. See, e.g., Lyndsey Layton, *Arne Duncan Gives No Child Left Behind Waivers to California Districts*, WASH. POST, Aug. 6, 2013, available at [http://www.washingtonpost.com/local/education/arne-duncan-gives-no-child-left-behind-waiver-to-calif-districts/2013/08/06/7de21f48-fed2-11e2-96a8-d3b921c0924a\\_story.html](http://www.washingtonpost.com/local/education/arne-duncan-gives-no-child-left-behind-waiver-to-calif-districts/2013/08/06/7de21f48-fed2-11e2-96a8-d3b921c0924a_story.html), archived at <http://perma.cc/JAD7-XA2C>.

214. Letter from arne Duncan, *supra* note 213.

215. *Id.*

216. *Id.*



reading/language arts and mathematics” and develop assessments of that curriculum that “measure student growth.”<sup>217</sup> Second, states “must develop and implement a system of differentiated recognition, accountability, and support for all [schools],” which means setting differentiated and achievable annual measurable goals and focusing turnaround strategies on the lowest performing schools and those with the highest achievement gaps.<sup>218</sup> Third, states and local districts must adopt “teacher and principal evaluation and support systems” that “meaningfully differentiate [teacher] performance” into at least three levels based on “student growth” data and other factors.<sup>219</sup> States and districts must use that data to “evaluate teachers and principals on a regular basis” and “inform personnel decisions.”<sup>220</sup> Finally, states must “remove duplicative and burdensome reporting requirements that have little or no impact on student outcomes.”<sup>221</sup>

These conditions mirrored the RTT conditions and the reauthorization blueprint.<sup>222</sup> A meaningful distinction cannot be found between the three. The Department’s waiver guidance documents are simply a solidification of the broad concepts first articulated in RTT and the blueprint, with the Administration offering nuance and detail regarding how states should measure student growth, evaluate teachers, and focus on failing schools.<sup>223</sup> And by this time, the external work on developing the Common Core had significantly advanced, making it the de facto means by which to comply with the waiver requirement of college- and career-ready standards.<sup>224</sup>

Two things, however, were very different. First, the conditions were no longer part of a voluntary grant program or negotiated political process; they were unilateral executive prerogative. Second, these

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217. U.S. DEPT OF EDUC., *supra* note 18, at 5.

218. *Id.*

219. *Id.* at 6.

220. *Id.*

221. *Id.*

222. Michele McNeil & Alyson Klein, *Obama Outlines NCLB Flexibility: Plan Waives Cornerstone Provisions of Law*, EDUC. WEEK, Sept. 28, 2011, at 1. 20. 21 (“Many of the provisions in the waiver package are embedded in the Obama administration’s March 2010 blueprint for revamping the ESEA, such as a shift toward college- and career-ready standards and a more nuanced accountability system.”).

223. U.S. DEPT OF EDUC., *supra* note 18, at 4–6.

224. See Eitel & Talbert, *supra* note 189, at 12–13; see also Alyson Klein, *Arne Duncan Extends NCLB Waivers For Five States, Some with Caveats*, EDUC. WEEK BLOG (Aug. 14, 2014, 3:41 PM), [http://blogs.edweek.org/edweek/campaign-k-12/2014/08/arne\\_duncan\\_extends\\_nclb\\_waive\\_1.html?qs=Arne+Duncan+Extends+NCLB+Waivers+For+Five+States,+Some+With+Caveats](http://blogs.edweek.org/edweek/campaign-k-12/2014/08/arne_duncan_extends_nclb_waive_1.html?qs=Arne+Duncan+Extends+NCLB+Waivers+For+Five+States,+Some+With+Caveats), archived at <http://perma.cc/H345-LBKT> (indicating North Carolina’s renewal of its NCLB waiver was held up in 2014 because the state was considering revising or reversing its adoption of the Common Core).

conditions supplanted existing law with a new approach. NCLB's standardized testing goals, demographic group accountability, teacher certification requirements, and punitive sanctions would all be gone.<sup>225</sup> Also gone would be states' wide discretion over selecting and measuring academic standards.<sup>226</sup>

This consistent policy agenda may have seemed natural and advantageous to the Administration. But from a legal and legislative perspective, it raises serious questions of whether the Administration had the authority to impose its agenda through NCLB waivers. The legislation that provided RTT funding granted the Administration the power to pursue educational improvement as it saw fit in the context of competitive grants.<sup>227</sup> The reauthorization process afforded the Administration the platform to promote and critique any agendas it saw fit and use any successes from RTT to back up its position. The Administration did both.

For two years, Secretary Duncan and President Obama asked Congress to grant them the power through the ESEA to force states to do two things in particular: (1) adopt college and career standards and (2) measure student growth and teacher effectiveness.<sup>228</sup> In 2011, the President's budget explicitly put this power request before Congress. In his budget request, he boiled down the reauthorization of NCLB to the following statement: "replace [NCLB's adequate yearly progress model] with a broader picture of school performance that looks at student growth and school progress."<sup>229</sup> Implicit in this request and various other policy statements is either the concession that the Administration lacked the power to unilaterally pursue its education agenda or that doing so was politically unwise. Regardless, when it did not receive this power through reauthorization and its leverage through competitive grants was gone, the Administration stopped asking Congress for the power and nudging states to voluntarily comply; it instead took the power through the waiver process. It eliminated the entirety of the existing statutory framework and unilaterally replaced it with something else.

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225. See Robinson, *supra* note 11, at 327, 329–30; Superfine, *supra* note 192, at 90.

226. See Robinson, *supra* note 11, at 324–25 (“[T]he existing structure of education federalism led Congress to allow each state to set its own academic standards.”).

227. U.S. DEPT OF EDUC, *supra* note 187, at 2.

228. See Andrew G. Caffrey, *No Ambiguity Left Behind: A Discussion of the Clear Statement Rule and the Unfunded Mandates Clause of No Child Left Behind*, 18 WM. & MARY BILL RTS. J. 1129, 1156 (2010).

229. Nick Anderson, *Obama Would Scrap ‘No Child’ Standard*, WASH. POST, Feb. 2, 2010, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/01/AR2010020101129.html>, archived at <http://perma.cc/U9X8-TZ7U>.

The Administration may have always had the legal authority to impose policy change through waivers and simply never highlighted it. Having Congress reauthorize the ESEA consistent with the Administration's policy would have had significant political benefits. Thus, the Administration could have calculated that it would forego executive action unless its hand was forced. There is merit to this narrative. For example, two recent presidents insisted they possessed the authority to unilaterally deploy American troops into harm's way—and probably do have such power—but, nonetheless, preferred to get some form of congressional approval before doing so.<sup>230</sup> On the other hand, this military example is unique. The Constitution vests the President with unilateral authority internationally that it does not vest domestically.<sup>231</sup>

In addition, it is hard to square the President and Secretary's claims that legislative change is necessary with later claims that the exact "change" they had requested could be achieved without actually amending the legislation. It is even harder when the authority by which the Secretary purports to achieve all of the Administration's desired substantive policy change is encompassed within the simple (albeit significant) power to waive statutory provisions. If such a power existed, one would have expected the Administration to, at least, signal that it would use this power if Congress did not act, as a means of spurring Congress. In short, while the events leading up to the waivers do not definitively resolve the issues surrounding the executive authority to pursue policy through waivers, the events offer no evidence that the executive believed that it had such power. Instead, the facts suggest implicit concessions that the Administration lacked such a power and only offered a rationalization for that power once it became clear the legislative process would not yield the results it desired.

More important, this backstory helps define the scope of NCLB and the waiver conditions. Even if the constitutional authority to condition waivers exists, the power would be limited by scope

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230. See, e.g., Peter Baker & Jonathan Weisman, *Obama Seeks Approval by Congress for Strike in Syria*, N.Y. TIMES, Aug. 31, 2013, at A1, available at <http://www.nytimes.com/2013/09/01/world/middleeast/syria.html?pagewanted=all&r=0>, archived at <http://perma.cc/K6V7-C9RA>; Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 POL. SCI. Q. 389, 395–96 (2003) (discussing President Bush's initial conclusion that he did not need authorization to go to war in Iraq and his later decision to ask Congress for approval); Letter from the President to Congress (Feb. 11, 2015), available at <http://www.whitehouse.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection>, archived at <http://perma.cc/L285-LB9E> (requesting authorization from Congress for use of force against the Islamic State of Iraq and the Levant).

231. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

analysis.<sup>232</sup> As emphasized in later sections, determining whether agency action falls within the scope of statutory language or a statute's overall framework raises questions of substance and inference.<sup>233</sup> On this point, the ways in which the Administration framed NCLB, RTT, reauthorization, and the waivers serve as meaningful guideposts. Without the specter of litigation and the perception bias it would bring, the Administration articulated and distinguished the scope of those education policies.

#### *D. A Rushed and Coercive Process*

By the end of 2012, forty-five states had submitted requests for a waiver or flexibility, and the Department later approved all but two.<sup>234</sup> The process involved quick but intense interactions between states and the Department regarding the changes the waiver conditions would require for teachers and curriculum standards. Iowa experienced one of the most contentious interactions. According to local officials, complying with the Department's teacher evaluation requirements—categorizing teachers by three levels of effectiveness and basing employment decisions on them—presented a direct conflict with state law on teachers' rights.<sup>235</sup> Some other states had taken executive action to meet the Department's conditions, but Iowa's governor indicated he lacked the legal authority to unilaterally implement such a teacher evaluation system.<sup>236</sup> The Department's conditions would require legislative amendments. Iowa's legislature then indicated that such a significant change to teachers' rights would require serious study and consideration,<sup>237</sup> which precluded the immediate response the Department was demanding. As a result, the Department denied Iowa's waiver application.<sup>238</sup> Confronting similar problems, a few other states chose to forgo submitting a waiver application that year.<sup>239</sup>

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232. See Barron & Rakoff, *supra* note 7, at 325–26.

233. See *id.*

234. *ESEA Flexibility*, *supra* note 5.

235. *No Child Left Behind Waiver Request in Iowa Denied by Department of Education*, HUFFINGTON POST (June 25, 2012), [http://www.huffingtonpost.com/2012/06/22/dept-of-education-turns-d\\_n\\_1620062.html](http://www.huffingtonpost.com/2012/06/22/dept-of-education-turns-d_n_1620062.html), archived at <http://perma.cc/D58U-6LTT>.

236. Miker Wiser, *Feds Deny Iowa No Child Left Behind Waiver*, WATERLOO-CEDAR FALLS COURIER (June 21, 2012, 9:00 PM), [http://wfcourier.com/news/local/govt-and-politics/feds-deny-iowa-no-child-left-behind-waiver/article\\_e035d3a-bc09-11e1-9db6-0019bb2963f4.html](http://wfcourier.com/news/local/govt-and-politics/feds-deny-iowa-no-child-left-behind-waiver/article_e035d3a-bc09-11e1-9db6-0019bb2963f4.html), archived at <http://perma.cc/B92Z-X9HE>.

237. See *id.*

238. *Id.*

239. See, e.g., John Martin, *More States and D.C. Receive NCLB Waivers; Vermont, Alabama, Nebraska Reject Them*, CNN (July 24, 2012, 6:06 AM), <http://>

Senator Lamar Alexander, then the ranking member of the U.S. Senate Health, Education, Labor, and Pensions Committee and now the chairman, claimed the Department transformed the waiver process from an application process into a game of “Mother May I?,” exacting huge tolls from states that lacked any leverage. “This simple waiver authority has turned into a conditional waiver with the [Education] Secretary having . . . authority to make decisions that [are normally reserved for] state and local governments.”<sup>240</sup> He further accused the Administration of using its waiver power to subvert the legislative process, claiming that the Secretary had rewritten the law.<sup>241</sup> The chairman of the House Education and the Workforce Committee shared Alexander’s concerns.<sup>242</sup> Political characterizations aside, the Secretary’s leverage was indisputable. All but a couple of states moved at breakneck pace—by legislation or executive action—to make the curriculum and teacher changes necessary to meet the Department’s conditions.

The pace of change may have masked the condition’s substantive breadth from the wider public, but once the change set in, so did the backlash. Teachers and affiliate organizations in several states subsequently filed lawsuits challenging the changes as violations of teachers’ state and federal constitutional rights.<sup>243</sup> Likewise, a national grassroots movement against the Common Core began forming in late 2013 and early 2014.<sup>244</sup> By the summer of 2014, some states had passed legislation to repeal the prior executive or legislative action adopting it;<sup>245</sup> others were considering following suit;<sup>246</sup> and others were

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[schoolsofthought.blogs.cnn.com/2012/07/24/more-states-and-d-c-receive-nclb-waivers-vermont-alabama-nebraska-reject-them](http://schoolsofthought.blogs.cnn.com/2012/07/24/more-states-and-d-c-receive-nclb-waivers-vermont-alabama-nebraska-reject-them), archived at <http://perma.cc/W3VJ-NA9T>.

240. Klein, *supra* note 24; see also McNeil & Klein, *supra* note 222, at 31 (urging states to simply submit applications rather than play the game).

241. Alyson Klein, *Arne Duncan Makes Sales Pitch for Waivers, Turnarounds, Early Ed in Senate Hearing*, EDUC. WEEK BLOG (Apr. 30, 2014, 2:46 PM), [http://blogs.edweek.org/edweek/campaign-k-12/2014/04/arne\\_duncan\\_makes\\_sales\\_pitch\\_.html?q=s=Arne+Duncan+Makes+Sales+Pitch+for+Waivers](http://blogs.edweek.org/edweek/campaign-k-12/2014/04/arne_duncan_makes_sales_pitch_.html?q=s=Arne+Duncan+Makes+Sales+Pitch+for+Waivers), archived at <http://perma.cc/S2LA-BHL6>.

242. McNeil & Klein, *supra* note 222.

243. See Derek Black, *North Carolina’s Teacher Tenure Repeal Found Unconstitutional*, EDUC. LAW PROF BLOG (May 21, 2014), [http://lawprofessors.typepad.com/education\\_law/2014/05/north-carolinas-teacher-tenure-repeal-found-unconstitutional.html](http://lawprofessors.typepad.com/education_law/2014/05/north-carolinas-teacher-tenure-repeal-found-unconstitutional.html), archived at <http://perma.cc/BJZ8-H6ZP>.

244. Joseph P. Williams, *Who Is Fighting Against Common Core?*, U.S. NEWS & WORLD REPORT (Feb. 27, 2014, 3:58 PM), <http://www.usnews.com/news/special-reports/a-guide-to-common-core/articles/2014/02/27/who-is-fighting-against-common-core>, archived at <http://perma.cc/CU32-NJMD>.

245. Valerie Strauss, *Two More States Pull Out of Common Core*, WASH. POST ANSWER SHEET BLOG (June 5, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/06/05/two-more-states-pull-out-of-common-core/>, archived at <http://perma.cc/S48B-H94G>.

246. *Id.*

embroiled in litigation challenging whether the adoption of the Common Core violated state law.<sup>247</sup> In short, the waiver process's front-end efficiency was largely a product of the states having little choice but to side-step difficult local problems of politics and law, which resurfaced later when important constituents caught up to the change.

#### IV. THE CONSTITUTIONAL AND STATUTORY FLAWS OF NO CHILD LEFT BEHIND WAIVERS

The particular conditions that the Department required of states in exchange for waivers raise both constitutional and statutory problems. First, when states initially agreed to the terms of NCLB in 2001, they had no notice that they would be subject to new conditions should they later need to apply for a waiver. Congress could have put states on notice, but it did not. Thus, the waiver conditions likely violate the constitutional requirement of clearly stated conditions on federal spending. Second, the imposition of these conditions occurred under particularly coercive circumstances. Ten years into NCLB's multiyear program, the Secretary told states they would be subject to the Act's sanctions and loss of funds unless they agreed to his new unilateral conditions. Although the coercion was not identical to *Sebelius*, the relevant factors are substantially the same: unforeseeable changes, transformation of an entrenched program into a new one, and high stakes that deprived states of meaningful choice.

The third and most fatal flaw is the absence of any explicit statutory authority authorizing the Secretary to condition waivers. Even if one inferred an authority to condition waivers, the particular conditions the Department imposed are beyond the scope of NCLB. Thus, either way, Congress has not delegated the authority that the agency, in fact, exercised. Moreover, serious constitutional questions arise as to whether Congress could delegate such a power under these circumstances. The conditional waiver power exercised by the Department would potentially amount to the broadest and most expansive delegated power ever afforded an agency and, as such, goes beyond the Court's already permissive precedent regarding delegations of power. In short, while conditional waivers may be constitutional as a general matter, they have statutory and constitutional limits, which the

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247. See, e.g., *Pack v. State*, 330 P.3d 1216 (Okla. 2014) (per curiam); Complaint, *Bateman v. Utah State Bd. of Educ.* (Utah Dist. Ct. July 31 2014), available at [http://libertasutah.org/drop/commoncore\\_lawsuit.pdf](http://libertasutah.org/drop/commoncore_lawsuit.pdf), archived at <http://perma.cc/4R3M-EEQC>.

Department's conditions transgressed. The following sections address each of these analyses in turn.

### *A. Inadequate Notice of Conditions*

The most exacting Spending Clause limitation is that any conditions placed on federal funds must be clearly and unambiguously stated when the state receives the funds.<sup>248</sup> NCLB clearly states that the Secretary has waiver power, but NCLB makes no mention of a power to condition waivers. The waiver provision does add that a state's applications for waiver must explain how a waiver will "(i) increase the quality of instruction for students; and (ii) improve the academic achievement of students,"<sup>249</sup> and must include "measurable educational goals" and methods for measuring and meeting those goals.<sup>250</sup> These requirements, however, are expressed as the points to which an application should speak and, thus, the criteria by which the Secretary should evaluate applications. They give no notice that some specific conditions beyond those broad criteria might be imposed on a state. To the contrary, the provisions explicitly articulate a waiver request process driven by state applications and the Secretary's evaluation of them based on an application's ability to meet broadly articulated goals, not on a Secretary's preconceived conditions. The Secretary can deny those applications based on his discretionary judgment, but not based on a predefined litmus test with no grounding in statutory text.

Even if one reasoned that the statutory criteria for granting waivers implied an authority to condition waivers, the permissible conditions would be limited to those falling squarely within those criteria and the scope of the overall statute. An open-ended authority that gave the Secretary significant flexibility in fashioning conditions on funds would be inconsistent with the clear statement rule because a funding recipient would have insufficient notice of the conditions that it might be required to meet later. At most, states would be on notice that NCLB's terms are subject to change, but the clear statement rule requires notice of the future terms themselves.<sup>251</sup> Notice of the possibility that change may occur does not provide this.

The Department might counter that while the statute did not provide specific notice, the agency gave states notice prior to imposing the conditions. It is enough that the statute provided notice of future

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248. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

249. 20 U.S.C. § 7861(b)(1)(B)(i)–(ii) (2012).

250. § 7861(b)(1)(C).

251. *See Dole*, 483 U.S. at 207.

change by the agency, so long as the agency did not apply the changes retroactively. In the context of statutory frameworks that do not entail multiyear projects and compliance that is interconnected across time, that position might warrant consideration, but it does not here. NCLB was developed as a multiyear program spanning the course of more than a decade.<sup>252</sup> Upon accepting NCLB funds in year one, states committed to developing their own curricular standards and tests and to set course upon progressive yearly academic progress, for which they were accountable on a yearly basis.<sup>253</sup> Once they began the process, changing course along the way was untenable. The Department's waiver conditions, however, do exactly that: demand changes to states' existing programs midstream. In that respect, they are post facto or retroactive conditions of which a state must have had notice at the time of the passage of NCLB, not simply prior to their post facto development. In other words, NCLB conditions that substantively change the law are equivalent to changing the rules of a sporting event in the final minutes of the game. Fair play is not preserved simply because both teams know the rules going forward.

Most fatal to any clear notice defense of the NCLB waiver conditions is the fact that Congress was so definite in the articulation of all the other conditions it intended to place on states, including an articulation of the conditions that it was not imposing. First, NCLB articulated a detailed and lengthy set of conditions for adopting state standards, testing, teacher quality, accountability, and sanctions.<sup>254</sup> The specific articulation of a detailed framework of statutory conditions is inconsistent with the notion of an unstated, open-ended agency power to replace NCLB's express condition with something new. Yet, this is what the Department did. By its own words, it imposed conditions that "re-envision[ed the] federal role in education" and "renovat[ed] a flawed law"<sup>255</sup> with reforms that "were not anticipated when the No Child Left Behind Act of 2001 (NCLB) was enacted nearly a decade ago."<sup>256</sup>

Second, Congress specifically articulated the limits of its detailed framework, should they be later mistaken:

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252. See Ryan, *supra* note 8, at 940–41; Superfine, *supra* note 192, at 89–90.

253. 20 U.S.C. § 6311(b)(2)(A)–(C) (requiring "adequate yearly progress"); Ryan, *supra* note 8, at 939–41.

254. 20 U.S.C. § 6311(a)(1), (b)(1)(C) (2012) (adopting "challenging academic standards"); § 6311(b)(2) (testing at least once annually for students in grades three through eight and once in high school); § 6311(b)(2)(A)–(C) (requiring schools to make "adequate yearly progress" for accountability); §§ 6319(a)(2), 7801(23) (requiring a "highly qualified" teacher in every public school classroom); § 6316 (b)(5)(B), (b)(8)(B) (declaring sanctions for failing schools).

255. U.S. DEPT OF EDUC., *supra* note 16, at 2 (presidential letter introducing the blueprint).

256. Letter from Arne Duncan, *supra* note 213.



Nothing in this subchapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction, as a condition of eligibility to receive funds under this chapter.<sup>257</sup>

The college- and career-ready standards waiver condition is contrary to this limit. The most forgiving reading of this waiver condition is that it demands a *type* of curriculum, standard, or program of instruction—college and career ready—without demanding a specific curriculum. This forgiving reading, however, fails because, as practically understood, the Department did demand a specific curriculum, standard, or program of instruction: the Common Core.<sup>258</sup> Moreover, even if not a demand for specific curriculum, it was a demand for a sufficiently specific type of curriculum that the demand is inconsistent with the statute.

Finally, the overarching structure of NCLB is one built, at every level, on states determining educational content, delivery, and teacher quality.<sup>259</sup> The federal government's role is limited to ensuring that states follow through on the substance to which states themselves commit.<sup>260</sup> The waiver conditions represent a shift in decisionmaking, away from states to the Secretary.<sup>261</sup> The Secretary set the waiver conditions, and states had to abide by them. The conditions take away states' primary control over teacher certification, instead mandating that states adopt a specific type of teacher quality assessment.<sup>262</sup> The same is true of the college and career ready standards mandate. That states may retain flexibility at the margins of curriculum and teacher assessment cannot mask the fact that the waiver conditions direct or mandate states to do specific things with their curriculum and teachers.<sup>263</sup> These shifts in substance, curriculum, and decisionmaking authority are simply too inapposite to the statutory language and framework of NCLB to reasonably fall within the scope of any clearly

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257. 20 U.S.C. § 7371.

258. See Eitel & Talbert, *supra* note 189, at 21.

259. See Ryan, *supra* note 8, at 939–942.

260. See *id.* at 942–43.

261. See Eitel & Talbert, *supra* note 189, at 24.

262. U.S. DEP'T OF EDUC., *supra* note 18, at 6.

263. As discussed *supra* in notes 1 and 190, the meaning of curriculum has become a subject of intense debate, primarily driven by political objectives, rather than a meaningful discussion of curriculum. In those notes, this Article takes the position that curriculum includes a host of policy, implementation, and practical decisions. Thus, rigid distinctions about what is or is not curriculum are fraught with problems, but those using the Common Core understand it to be curriculum, controlling of curriculum, or directly related to curriculum. See, e.g., *Common Core*, *supra* note 190.

stated conditions in NCLB. Thus, states could not have anticipated them when they first agreed to participate in NCLB.<sup>264</sup>

### *B. Coerced Conditions*

#### 1. Altering an Entrenched Program: The Elementary and Secondary Education Act 1965 to 2012

If *Sebelius* prohibits “tak[ing] an entrenched federal program that provides large sums to the states and tell[ing] states they can continue to participate in that program only if they also agree to participate in a separate and independent program,”<sup>265</sup> the conditions that the Department placed on NCLB waivers raise constitutional concerns. In terms of entrenched federal spending programs, the ESEA ranks toward the top of the list. NCLB is but the current popular title of the most recent reauthorization and amendment of the ESEA. The ESEA has been in place since 1965, funding and regulating the supplemental education of poor and disadvantaged students ever since.<sup>266</sup> During the last two decades, its entrenchment has only grown deeper, with federal funding and detailed requirements steadily

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264. That granting a waiver is within the Secretary’s discretion cannot resolve notice problems either. The right to exercise discretion in executing a statutory waiver process is not equivalent to the power to impose unlimited conditions as a predicate to the exercise of discretion. *See generally* Andrew Dudley, *Opening Borders: Congressional Delegation of Discretionary Authority to Suspend or Repeal the Laws of the United States*, 41 ARIZ. ST. L.J. 273 (2009) (considering the constitutional, practical, and judicial implications of delegating discretionary authority to the executive branch in exercising a statutory waiver process). While the Secretary is free to deny waivers within his discretion even though they might speak to the statutory factors, he may not preclude the consideration of waivers or the possibility of granting waivers based on conditions and policy objectives not provided for in the statute. *See Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (striking down agency decision based on the consideration of factors not included in the statute). To do so is not to exercise discretion, but to impose unilateral policy beyond the scope of the statute under the guise of discretion.

The Court’s reasoning in takings jurisprudence is also instructive on this point. In a series of cases, the Supreme Court has rejected governments’ attempts to use their discretion in granting permits to exact conditions or concessions from landowners. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). That the government could have, in its discretion, rejected the permit request is of no accord. The government is prohibited from using this discretionary power to exact conditions that are not related and proportional to the request being made by the landowner.

265. Bagenstos, *supra* note 30, at 865. Pasachoff uses different phraseology, but identifies the same three key inquires. Pasachoff, *supra* note 63, at 583.

266. *See, e.g.,* Ryan, *supra* note 8, at 937.

increasing.<sup>267</sup> Under NCLB, the program involves multiyear commitments that cannot simply be switched on and off.

## 2. Monetary and Nonmonetary Consequences of Saying No

While the fifty-year history and growth of the ESEA strongly indicate program entrenchment, money still matters, and whether NCLB funds are sufficiently large to coerce states is less obvious. In *Sebelius*, the Court evaluated funding largess in terms of the overall state budget, focusing on the fact that Medicaid funds accounted for more than ten percent of states' overall budgets.<sup>268</sup> If this sets the minimum for establishing coercion, NCLB funds do not come close. But, if Medicaid funding is only an example and the percentage is not the sole determinate, NCLB waivers have serious coercive potential.<sup>269</sup>

Although the Department has been vague about the financial consequences of NCLB violations, Eloise Pashachoff reasons that only Title I funds would be at stake.<sup>270</sup> Those funds were \$14.4 billion in total in 2014.<sup>271</sup> This is only two percent of states' K–12 budgets and less than one percent of states' overall budgets.<sup>272</sup> In other words, NCLB waivers jeopardize funds that have only one-tenth of the impact on state budgets that Medicaid does.

Evaluating NCLB funding only at the macro-level, however, understates the statute's coercive power. First, in poorer states like South Dakota, Mississippi, and Louisiana, federal education funds have a much stronger foothold. Federal education funds in total, not just Title I, are more than fifteen percent of education spending in those states.<sup>273</sup> And in the nation's poorest districts, federal funds can be more than thirty percent of a school's budget.<sup>274</sup> Thus, the Department's total

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267. See generally Robinson, *supra* note 11 (detailing the increase in a cooperative federalism approach to education in the past twenty years).

268. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2581 (2012).

269. See *id.* at 2663–64 (Ginsberg, J., dissenting) (“After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States . . . and equals . . . 6.6% of all state expenditures combined.”).

270. Michael D. Barolsky, Note, *High Schools Are Not Highways: How Dole Frees States From the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 738 (2008) (“NCLB provides no clear guidance to states on what they stand to lose for violations. The text of the statute merely directs the Secretary of Education to withhold payment to states upon finding the state noncompliant with any material provision of the Act.”).

271. *Federal, State, and Local K-12 School Finance Overview*, NEW AM. FOUND. (April 21, 2014, 10:59 PM), available at <http://febp.newamerica.net/background-analysis/school-finance>, archived at <http://perma.cc/Y5N5-MGL8>.

272. *Id.*

273. *Id.*

274. *Id.*

or perceived leverage, which it will not clarify, may be greater than Title I funds alone, particularly since those non-Title I funds still flow through other titles of the ESEA.

Second, when looking at Title I dollars alone, the impact is still significant. In several states, Title I funds provide a twenty percent increase in per pupil funding beyond what the state provides.<sup>275</sup> In a typical year in North Dakota, Title I provided a thirty-seven percent increase in spending per pupil.<sup>276</sup> In other words, without Title I funds, these states would find it extremely difficult to continue to deliver education as they know it throughout the state.

Third, the most appropriate level at which to examine the impact of Title I may be the district level, not the overall state budget. Medicaid is a state program, and, thus, analysis at that level makes sense. But education programs operate—and vary significantly—at the school district level. In many states, courts have forced the state to take primary responsibility for funding education, but this is not the case in all states.<sup>277</sup> Moreover, regardless of the state, in districts with high concentrations of poverty, Title I funds can amount to a much larger increase in per pupil expenditures than they do at the state level.<sup>278</sup> For those districts, which are delegates of the state, the consequences of losing Title I funds would be catastrophic.

Fourth, the frame of reference with which a state evaluates education funding is different. Unlike health care, states are constitutionally obligated to deliver education.<sup>279</sup> Education is the foremost constitutional responsibility of most states.<sup>280</sup> As such, it dominates state expenditures. Elementary and secondary education is the single largest budget item for states, amounting to twenty-five percent of state budgets.<sup>281</sup> The next highest state expenditure is

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275. See EDUC. TRUST, FUNDING GAPS 2006 at 14 (2006), available at <http://www.edtrust.org/dc/publication/the-funding-gap-0>, archived at <http://perma.cc/9SQ3-TWPW>.

276. *Id.*

277. Rebell, *supra* note 22.

278. See generally EDUC. TRUST, *supra* note 275; see also Black, *supra* note 22 (explaining Title I funding formulas and the additional weights affording to districts with larger number and larger percentages of low income students).

279. Black, *supra* note 23.

280. See, e.g., *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91 (Wash. 1978) (recognizing that “[b]y imposing upon the State a Paramount duty to make ample provision for the education of all children residing within the State’s borders, the [state] constitution has created a ‘duty’ that is supreme, preeminent or dominant.”).

281. *Policy Basics: Where Do Our Tax Dollars Go?*, CTR. ON BUDGET AND POLICY PRIORITIES (Mar. 27, 2014), <http://www.cbpp.org/cms/?fa=view&id=2783>, archived at <http://perma.cc/6LLJ-Y9AN>.

Medicaid at sixteen percent.<sup>282</sup> In California, elementary and secondary education is thirty-nine percent of the budget.<sup>283</sup> At the local level, education can consume an even larger percentage of the budget.<sup>284</sup> In other words, Title I dollars appear relatively small because states' education obligations are so large. But regardless of their relative size, Title I dollars offset a meaningful portion of the cost of states' foremost and largest constitutional obligation. If states lost those federal funds, state constitutional law would force many states to replace those federal funds.<sup>285</sup> The same is not true of Medicaid.

Finally, more than money is at stake with a NCLB violation. States and districts are also subject to sanctions and stigma. NCLB sanctions would label states' premier constitutional programs as failures and demand structural reforms.<sup>286</sup> Professor Daniels, in his wide-ranging analysis of federal agency powers, specifically identifies NCLB's accountability measures as a "regulatory nuke" because they are destructive and politically taboo.<sup>287</sup> The stigma of suffering a "regulatory nuke" cannot be underestimated either. Local communities have expressed opposition to NCLB and federal oversight in education,<sup>288</sup> but the political consequences of failure and restructuring would be heavily, if not almost exclusively, felt at the local level. Appointed and elected state and local education officials would be the "failures" who face job loss, not federal officials and politicians. As the Court has elsewhere indicated, inverting political accountability can increase coercion.<sup>289</sup>

In sum, while NCLB funding levels do not approach those of Medicaid, NCLB exerts a level of coercion that far exceeds the raw dollars at stake. Title I dollars cover a significant percentage of the cost of educating low-income children, whom states are obligated to educate with or without federal money, and violations of NCLB carry serious

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282. *Id.*

283. CAL. BUDGET PROJECT, *Where Do California's Tax Dollars Go?* (July 2011), [http://calbudgetcenter.org/wp-content/uploads/110728\\_Where\\_Do\\_State\\_Tax\\_Dollars\\_Go\\_pb.pdf](http://calbudgetcenter.org/wp-content/uploads/110728_Where_Do_State_Tax_Dollars_Go_pb.pdf), archived at <http://perma.cc/85UB-KZM9>.

284. *See, e.g., id.*

285. *See generally* Ross Wiener, *Strengthening Comparability: Advancing Equity in Public Education*, in ENSURING EQUAL OPPORTUNITY IN PUBLIC EDUCATION: HOW LOCAL SCHOOL DISTRICT FUNDING PRACTICES HURT DISADVANTAGED STUDENTS AND WHAT FEDERAL POLICY CAN DO ABOUT IT 40 (2008) (explaining the existing problems with the comparability requirement for Title I funding).

286. *See* Daniels, *supra* note 119, at 464.

287. *Id.* at 450, 464.

288. *See* L. Darnell Weeden, Essay, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239 (2006).

289. *NFIB v. Sebelius*, 132 S. Ct. 2566, 2602–03 (2012) (plurality opinion).

political and structural consequences beyond money. These realities tipped the scales to the point where some states may have had no real choice but to comply with whatever conditions the Department of Education put forward in 2012.<sup>290</sup> The time had already passed for legislative reform. Compliance through waiver conditions was the only remaining viable option. That several complied against their free will is further supported by the fact many states, in the midst of budget shortfalls, had rejected these same conditions and foregone equally large sums of money in the RTT application process.<sup>291</sup> They could not do the same under NCLB.

### 3. Transforming No Child Left Behind into a Nationalized Education Program and Teacher Assessment

The foregoing coercion is of no consequence under *Sebelius* unless the federal government is also insisting that the states sign onto a separate and independent program to remain eligible under the initial program.<sup>292</sup> On this factor, the waivers would appear to replicate the Affordable Care Act's flaw. To remain eligible for NCLB funding, the waiver conditions forced states to implement four new policies, which, as emphasized above, the Administration touted as moving education in a different direction. These new policies were a change in kind, not just degree from NCLB, which, as *Sebelius* emphasizes, would distinguish them from the expected year-to-year tinkering with federal programs.<sup>293</sup> Thus, the conditional waivers, as exercised, likely meet the final *Sebelius* factor.

As a final note, one might argue that the *Sebelius* analysis is altogether inapplicable to waiver conditions because waiver conditions involve agency action rather than congressional action. This defense, however, would implicitly concede that the Department was acting

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290. To be clear, several states had already voluntarily taken steps to adopt the Common Core and teacher evaluation systems prior to the waiver process. This Article's analysis is most directly applicable to those states that took action only in response to federal demands, but it is still broadly applicable on the question of the Secretary's and Congress's authority. That many states may have agreed with the Secretary's conditions may mean those states have no compulsion claim, but the absence of compulsion does not render the Secretary's action authorized by statute or constitution. In *New York v. United States*, 505 U.S. 144 (1992), the Court rejected the United States' argument that it could compel state action in regard to radioactive waste pursuant to the Commerce Clause because the states had asked the United States to set up an interstate compact. Although proceeding as a Tenth Amendment claim to limit Congress's Commerce Clause power, the case is instructive on the question of the limits of Spending Clause authority.

291. Superfine, *supra* note 192, at 107.

292. See Bagenstos, *supra* note 30, at 865–66.

293. See *Sebelius*, 132 S. Ct. at 2605 (plurality opinion); Eitel & Talbert, *supra* note 189, at 24.

beyond the scope of congressional authority. If conditional waivers of the sort exercised by the Department were authorized by Congress, *Sebelius* applies because the waiver conditions are congressional conditions. If the conditions were not authorized by Congress, *Sebelius* might not apply, but the defense of the agency conditions would implicitly concede the lack of agency authority. Either way, the waiver conditions would fail.

### *C. Exceeding Statutory Authority and the Constitutional Problem with Granting It*

Agencies can only exercise powers delegated to them by Congress,<sup>294</sup> and Congress can only delegate those powers that the Constitution permits.<sup>295</sup> Thus, constitutional concerns aside, for the Department of Education to possess the power to condition waivers, NCLB would have to expressly articulate such a power and the conditions an agency might impose, or imply a conditional power. An implied power, however, would limit permissible conditions to those falling within the scope of the statute. While NCLB explicitly granted the Secretary waiver power, it did not explicitly grant the power to condition those waivers, much less mention the permissible substance of those conditions. Thus, if the power to condition NCLB waivers exists, it is an implied power. But an implied power would not justify the particular conditions the Secretary imposed because they went beyond the scope of NCLB.

The conditions the Secretary imposed were so broad that it is not clear that Congress could, in advance, have articulated a conditional waiver power to justify them. The grant of power would have been so broad and unconstrained that a strong argument against its constitutionality would arise. It would have been not a power to waive NCLB—which Congress can grant—and not just the power to remake NCLB within certain limits after the waiver—which Congress can also grant. It would have been a power to eviscerate NCLB and remake it any way the Secretary sees fit. Such a power would lack an intelligible principle and vest all educational law making power in the Secretary.

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294. See generally *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984) (analyzing statutory language to determine what authority Congress explicitly or implicitly granted to the agency).

295. *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

This would be unconstitutional. The following sections take up each of these issues—statutory power and constitutional power—in turn.

### 1. Exceeding Limited Statutory Authority

An analysis of the scope of statutory authority that NCLB grants the Secretary largely mirrors the earlier application of the clear statement rule to NCLB waivers and need not be rehashed in detail here. It suffices to say that NCLB's statutory text extends the power to waive, but it says nothing of a power to condition waivers. It only indicates that states shall apply for waivers. States' waiver applications must identify educational goals, set measurements for those goals, and explain how a waiver will "increase the quality of instruction" and "improve the academic achievement."<sup>296</sup> The statute provides that the Secretary "may" waive NCLB's provisions and, thus, explicitly grants him discretion in doing so. That discretion, however, pertains to his judgment of whether an application meets those objectives or is wise to approve. It is not an explicit grant of authority for the Secretary to establish narrow parameters or conditions under which he will grant an application, notwithstanding the merit an application otherwise presents in meeting statutory objectives.<sup>297</sup> In short, the waiver power does not include an explicit power to condition waivers.

One might argue that the power to condition waivers is implied or inherent in the power to grant a waiver.<sup>298</sup> As demonstrated above, however, an implied power to condition has limits. It is not an implied power to remake the law as the Secretary sees fit. At most, it is an implied power to impose conditions that fall within the scope of the existing statute. Waiver, by name and definition, is the authority to exempt an entity from the law's application.<sup>299</sup> As to this authority, NCLB specified the circumstances under which the Department has the authority to exempt states. While the Secretary may have discretion as to when and who to exempt, the power is framed as a narrowing of the

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296. 20 U.S.C. § 7861(b)(1)(B)(i)–(ii) (2012).

297. To use discretionary government power to achieve ulterior objectives not provided for by law is central to the Court's takings jurisprudence. The Court has prohibited local government from using its discretionary power to grant land use exemptions or permits to exact disproportionate or unrelated concessions from landowners. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). Of course, this precedent bears no direct relevance to waivers, but offers a compelling rationale for limiting the ends that government might achieve through discretionary power. Moreover, those limitations closely correlate with the scope analysis developed in this article.

298. Barron & Rakoff, *supra* note 7, at 326.

299. See *Waiver*, BLACK'S LAW DICTIONARY 1718 (9th ed. 2009).



statute's reach or scope, not an expanding of the statute's scope or reach. Thus, one might infer a power to impose waiver conditions that force a state to take additional steps toward complying with NCLB, but one cannot reasonably infer the power to impose conditions that require a state to make progress toward ends not embodied by NCLB.

Broad waiver condition power under NCLB would require explicit statutory authorization. As the Court in *Utility Air Regulatory Group v. EPA*.<sup>300</sup> emphasized, "[t]he power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms that turn out not to work in practice."<sup>301</sup> Because NCLB has clear terms that did not work and lacks clear statutory terms for revising them, the statute does not imply the authority to impose conditions that alter it. If Congress "wishes to assign to an agency decisions of vast . . . political significance," Congress must "speak clearly."<sup>302</sup>

A less aggressive defense of the Secretary's implied conditional waiver power would be that the Secretary, in exercising his discretion to grant waivers, will review the substance of each state's application and look for aspects of an application that signal compliance with the statutory requirements for a waiver. "Waiver conditions" might be no more than an advance articulation of his criteria for evaluation. The Secretary's transparent advance articulation of the criteria that will factor into his exercise of discretion does not necessarily transform discretion into an excess of statutory authority. The criteria could be guideposts for helping the Secretary measure progress toward Congress's statutorily articulated goals. For instance, predetermined waiver criteria, such as substantial compliance in areas A and B, would assist the Secretary in being fair and consistent and ensuring statutory compliance. It would also assist states in preparing applications. Moreover, criteria or guideposts could be defended as reasonable interpretations of the statutory goal under *Chevron* deference.<sup>303</sup>

This argument, even if valid, fails to provide a defense for NCLB waivers. First, the Department did not announce college- and career-ready standards, data systems, and teacher evaluation as criteria for assessing the merit of an application. States were not awarded credit on a sliding scale of how well they performed on these criteria. These were absolute conditions that a state must meet, regardless of the merit

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300. 134 S. Ct. 2427 (2014).

301. *Id.* at 2446.

302. *Id.* at 2444.

303. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

or substance otherwise included in the application.<sup>304</sup> Second, and more important, the conditions did not fall within the scope of NCLB, making it impossible to conceptualize them as criteria or conditions that measured or furthered compliance with the Act. As the Court emphasized in one of its most recent and important administrative law decisions:

[e]ven under *Chevron's* deferential framework, agencies must operate "within the bounds of reasonable interpretation." And reasonable statutory interpretation must account for both "the specific context in which . . . language is used" and "the broader context of the statute as a whole." . . . Thus, an agency interpretation that is "inconsisten[t] with the design and structure of the statute as a whole," does not merit deference.<sup>305</sup>

In other words, the assessment of whether an agency's regulation, interpretation, condition, or criteria does not operate in a vacuum. The fact that the Secretary might be able to make a theoretical argument that the waiver conditions are reasonably related to some aspect of NCLB is irrelevant.<sup>306</sup> The appropriate question is whether a broad conditional waiver power and the particular conditions imposed can reasonably be framed as falling within the scope and intent of NCLB's overall provisions and structure, as written.<sup>307</sup> The answer is no. The following subsections substantiate this point in detail.

#### *a. Scope of No Child Left Behind*

NCLB is one-thousand pages long, detailing five major education policies. First, it demands that states develop content and performance standards in reading, math, and science.<sup>308</sup> Second, states must develop tests that are aligned with those standards, and administer them on a regular basis.<sup>309</sup> Third, schools and school districts must make adequate yearly progress toward the final goal of one-hundred percent proficiency for all major student demographic groups on those exams by 2014.<sup>310</sup> Fourth, states must hold schools and districts accountable for progress and impose specific sanctions and turnaround methods for insufficient progress.<sup>311</sup> Finally, all teachers of core academic subjects must be "highly qualified,"<sup>312</sup> which means that

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304. U.S. DEPT OF EDUC., *supra* note 18, at 1–3.

305. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2442 (internal citations omitted).

306. *Id.*

307. See *generally* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

308. 20 U.S.C. § 6311(a)(1), (b)(1)(C) (2012).

309. § 6311(b)(2).

310. § 6311(b)(2)(A)–(C), (F).

311. See *e.g.*, § 6316(b)(1)(A), (E)(i); § 6316(b)(5)(B); § 6316(b)(8)(B).

312. § 6319(a)(2).

a teacher is fully certified and competent based on the teacher's course of study in college or passing a state-based exam or evaluation.<sup>313</sup>

This five-component Act is built on a framework of the federal government holding states accountable for the substance that states themselves dictate. States define the curriculum standards, develop the tests, determine the cut-off scores for passing the tests, and determine the meaning of "highly qualified" teacher.<sup>314</sup> Whatever its flaws,<sup>315</sup> this chosen structure for NCLB reflects a "cooperative federalism" approach, whereby both the state and the federal government share responsibility under the Act.<sup>316</sup>

### *b. Scope of the Waiver Conditions*

The waiver conditions are distinct in both substance and form from NCLB. First, while NCLB afforded states almost complete autonomy in regard to curricular standards, the waivers demanded career- and college-ready standards, which were not mentioned in NCLB. As a practical matter, states had to adopt the Common Core or something that closely resembled it. While these standards are a response to the watered down standards states first adopted under NCLB,<sup>317</sup> the fact remains that NCLB did not authorize the Department then or now to demand specific curriculum or standards.<sup>318</sup> In short, the waivers change the final decisionmaker on curriculum standards from the states to the federal government. Moreover, such a shift is explicitly prohibited by statute.<sup>319</sup>

Second, the waivers conditions make the same shift in regard to teacher qualifications and eliminate states' authority to independently

313. *Id.*

314. Ryan, *supra* note 8, at 947–48, 976.

315. *See id.* at 947–48 (describing how NCLB encourages states to create easier tests in order to make it easier for students to achieve proficiency).

316. Pinder, *supra* note 11, at 11–14; Robinson, *supra* note 11.

317. *See* DEREK W. BLACK, EDUCATION LAW: EQUALITY FAIRNESS AND REFORM (2013).

318. 20 U.S.C. § 7371:

Nothing in this subchapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content, academic achievement standards and assessments, curriculum, or program of instruction, as a condition of eligibility to receive funds under this chapter."

319. *See* 20 U.S.C. § 1232a ("No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control . . ."); § 3403(b) ("No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control . . ."); § 7907(a) ("Nothing in this chapter shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum. . .").

control how they evaluate teachers. States must evaluate teachers based on students' progress on standardized exams and then place teachers in one of three categories of performance.<sup>320</sup> This measure is partly a response to states' failure to put highly qualified teachers in every class.<sup>321</sup> In this respect, the condition is generally related to NCLB's goal of improving teaching but is nonetheless beyond the scope of the NCLB's specific goal of ensuring qualified teachers and its chosen approach for doing this. The value-added assessment of teachers based on students' exam performance and categorization of teachers by performance are not even remotely intimated by NCLB. NCLB sought only to differentiate between the qualified and unqualified, and it left that differentiation to states.

In short, NCLB is an extremely detailed Act that specifically refrained from addressing the substance of curriculum, standards, instruction, and teacher certification. These important details were left undeveloped for an explicit and obvious reason: the substance of those subjects rested within the domain of states. Through the waivers, the Department specified those details itself—an authority not belonging to it—and did so with terms that are inconsistent with NCLB. Thus, the Department inverted NCLB's state-led "cooperative federalism" approach to one of federal dictates.

### *c. Eliminating No Child Left Behind's Centerpiece*

Most striking, however, may not be a comparison of NCLB's scope to the waiver conditions, but the fact that NCLB's centerpiece, if not primary goal, is gone. NCLB's regime of standardized tests and teacher certification were not ends in themselves. The purpose was to create the data and mechanisms through which to hold states and schools accountable for the achievement of all demographic groups and to force them to close achievement gaps between them.<sup>322</sup> The failure to do this is what brought states to the point of statutory violation.<sup>323</sup> The waivers eliminated and replaced this central goal.

The waivers allow states to collapse subgroups into larger groups—thereby eliminating subgroup accountability—and focus not on closing achievement gaps but measuring general progress.<sup>324</sup> Of

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320. *ESEA Flexibility*, *supra* note 5, at 3.

321. BLACK, *supra* note 317.

322. See U.S. DEPT OF EDUC., A GUIDE TO EDUCATION AND NO CHILD LEFT BEHIND (2004); Ryan, *supra* note 8.

323. See Dillon, *supra* note 3.

324. See Klein, *supra* note 24 (discussing concerns about "supersubgroups," which were not part of the original NCLB law).

course, waiver power gives the Secretary the authority to excuse states' failure on this score, but that this primary goal is not part of the waivers only cements the conclusion that the conditions that the Secretary did impose are related to new goals and not within the scope of NCLB. This type of "course reversal" is exactly what the Court in *Utility Air Regulatory Group. v. EPA*<sup>325</sup> indicated an agency cannot do absent explicit authorization. An agency cannot, under the guise of reasonable interpretation, adopt positions that "would overthrow [an] Act's structure and design."<sup>326</sup>

The fact that the Secretary and President had on several prior occasions distinguished its new education policies from NCLB's approach, and had gone so far as to call for the Act to be amended to fit its policies, undermines the argument that those policies could later be treated as reasonable interpretations of NCLB. Similar prior admissions in *Utility Air* were particularly damning to the EPA's position.<sup>327</sup> And the Court directly chided the EPA for trying to use reasonable statutory interpretation as the avenue through which to ram its predetermined policy agenda: "[a]n agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."<sup>328</sup> The historical events preceding NCLB waivers indicates this is what the Administration did.

## 2. The Exercise of Unlimited Judgment

The Court's tendency to avoid constitutional issues by striking down agency power on other statutory grounds, coupled with the specific absence of conditional waiver power in NCLB, make it unlikely that the Court would reach the merits of constitutional challenge to NCLB waivers. Most likely, a court would hold that the Secretary exceeded his statutory authority in conditioning NCLB waivers, at least, under current facts. Nonetheless, fleshing out the constitutional issue is relevant to future reauthorizations of the ESEA, which might include broader waiver and condition power. The problems this constitutional analysis reveals should also give courts pause before entertaining the notion that NCLB implies a waiver power sufficiently broad to authorize the Secretary's recent conditions.

Congress could easily extend to the Secretary of Education the authority to condition waivers without transgressing the nondelegation

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325. 134 S. Ct. 2427 (2014).

326. *Id.* at 2442.

327. *Id.*

328. *Id.* at 2445.

doctrine, but the problem presented by the current waivers is distinct due to the breadth of the conditions imposed. The question here is whether a power to condition waivers, largely as the Secretary sees fit, would be a delegation so broad that it would amount to an unconstitutional delegation of Congress's lawmaking power. A broad and constitutional waiver delegation might have stated that "the Secretary shall have the power to waive the forgoing provisions and impose conditions on the grant of those waivers that facilitate the improvement of student achievement scores." Since Congress could have delegated such a power to the Secretary in the first instance without even bothering to have first articulated its own detailed accountability, testing, and teaching standards, Congress could grant the same authority through waiver should Congress's own standards prove ineffective. These are the circumstances that Barron and Rakoff envisioned and defended.<sup>329</sup>

But Congress would be going one step further were it to pass detailed legislation regulating education, granting the Secretary the power to waive that legislation, and indicating that the Secretary shall also have the power to condition waivers with terms that the Secretary "shall deem appropriate" or "deem consistent with the improvement of education." No intelligible principle inheres in either of these iterations of conditions. "Deem appropriate" merely provides that the Secretary shall have the power to set conditions within his discretion, not that he should act pursuant to an intelligible principle. One might attempt to infer that the scope of the underlying statute operates as a limit on the scope of conditions. Thus, an intelligible principle exists, but such an inference would be inconsistent with the waiver power granted: to impose conditions as the Secretary deems appropriate. In other words, this inference would prove the point: unbounded discretion to condition lacks an intelligible principle.

"Improvement of education" comes closer to articulating an intelligible principle. Improvement of education would place some options—those that hurt public education—off limits. Thus, Congress would have offered an intelligible principle and a universe of options within which the Secretary can exercise judgment and discretion. At the surface level, this would be enough for the Court to uphold the current waiver conditions.<sup>330</sup>

Cutting against this forgiving reading of "improvement of education" as an intelligible principle is the fact that the universe of

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329. Barron & Rakoff, *supra* note 7, at 270–71, 335–36.

330. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) ("In the history of the Court we have found the requisite 'intelligible principle' lacking in only [*Panama and Schechter*].").

options that the Secretary could reasonably believe might improve education is so broad that an "improvement of education" limitation on conditions is functionally no different than a "shall deem appropriate" limitation. Save a Secretary whose intent is to destroy education—a person who presumably could not survive confirmation—any action that a Secretary believed to be in furtherance of public education could meet this standard.

This breadth alone does not violate the intelligible principle standard. The Court has elsewhere found an intelligible principle in the power to "promulgate regulations fixing prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the [in some respects conflicting] purposes of th[e] Act,'"<sup>331</sup> and in the power to enact broadcasting regulations in the "public interest."<sup>332</sup> These cases may very well represent post facto rationalizations stemming from an absolute unwillingness to strike down delegation. But to the extent prior cases are doctrinally and factually grounded, not simply rationalizations, they are distinct from a broad conditional waiver power for the Secretary of Education, suggesting that an open-ended conditional waiver power in education goes too far.

First, the context in which a delegation occurs is crucial in assessing the permissible breadth of the delegating language. In *Whitman*, the Court indicated "that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."<sup>333</sup> For instance, "Congress need not provide any direction to the EPA regarding the manner in which it is to define 'country elevators,' which are to be exempt from new-stationary-source regulations governing grain elevators," but "it must provide substantial guidance on setting air standards that affect the entire national economy."<sup>334</sup> In short, the thing to be regulated plays a significant role in determining how specific the intelligible statutory principle should be.

Second, while the delegating language in prior cases may have been broad, either statutory language or the context in which the language was to operate narrowed the power. For instance, *National Broadcasting v. United States*<sup>335</sup> involved one of the broadest forms of

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331. *Yakus v. United States*, 321 U.S. 414, 420, 423–26, (1944).

332. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26, (1943); see also *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24–25 (1932) (Interstate Commerce Commission's power to approve railroad consolidations).

333. *Whitman*, 531 U.S. at 475 (citing *Loving v. United States*, 517 U.S. 748, 772–73 (1996); *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975)).

334. *Id.*

335. 319 U.S. 190 (1943).

delegatory language one could imagine: “in the public interest.” But the context in which that delegation occurred was relatively narrow: public broadcasting. The contexts of regulation—radio and television—and those entities to be regulated were both relatively small in number.<sup>336</sup> Moreover, the power at issue was not the power to generally regulate broadcasting “in the public interest” but the narrower power to grant public broadcasting licenses.<sup>337</sup> The Court also emphasized that “public interest” was not “a mere general reference to public welfare without any standard to guide determinations”; rather, Congress articulated the term to be understood in light of the agency’s experience in the market of granting licenses.<sup>338</sup> Thus, the Secretary was not free to grant or deny licenses based on anything he deemed to be in the public interest. Under these circumstances, the intelligible principle was broad on its face but, in context, had a more specific meaning and operated within a bounded context in which the number of available options was necessarily small.

Likewise, the EPA’s regulation of the environment may appear limitless, but statutory language explicitly narrows the scope in which broad delegating language operates. The EPA does not possess the power to regulate the environment in general. It only possesses the much narrower power to regulate certain aspects of the environment—air, water, and waste—and only activities that emit particular “pollutants” in those aspects of the environment.<sup>339</sup> Thus, again, broad delegating language is not necessarily equivalent to broad or unlimited power.

The same would not be true in regard to a broad power to condition waivers in education. The field of education itself is particularly broad—unlike broadcasting—and is not limited by categories, criteria, or activities—unlike the environment. An authority to condition waivers, limited only by the authority “to improve education,” would permit a Secretary to impose almost any education strategy he could imagine. Thereby, the Secretary could control the operating procedures for over 13,000 school districts; the entire universe of things that that each of our nation’s approximately 100,000 public schools might teach and how (along with sanctions for failing to do so); certification and employment terms for 3.1 million teachers; and grade promotion, graduation, and future life chances for 49.8 million

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336. *Id.* at 216.

337. *Id.*

338. *Id.* at 226 (citing *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24–25 (1932)).

339. *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (noting that the text of the Clean Air Act requires the EPA to set standards for a “discrete set of pollutants”).



students.<sup>340</sup> Local school boards and superintendents currently oversee the largest, most visible, and most substantive expenditures in every community in the country. An open-ended conditional waiver power would grant the Secretary power over them all. Thus, delegations of power in education, per *Whitman's* reasoning, should require a more definite intelligible principle than many of the cases that have previously come before the Court.

Third, the nature of public education itself, and the delivery of it, involves pedagogical and value-based assessments that are fundamentally different from many other areas of regulation.<sup>341</sup> For instance, although not a perfect science, the regulation of air and water pollutants involves scientific data and research.<sup>342</sup> An agency might exercise judgment in regard to how much particulate to allow in the air or water, but the existence of particulate and its harmfulness along a spectrum are scientific facts that are not in question.<sup>343</sup> Likewise, the Food and Drug Administration may make judgments about how "safe" or "efficacious" a food or drug must be, but hard science establishes the underlying safety or efficacy.<sup>344</sup>

The same cannot be said in education. There are open debates about what should be taught, how long to teach, and how to test or evaluate students, and relatively little hard evidence to substantiate competing claims. Even when consensus is reached on an item, all must readily admit that our assessments of students are rough approximations of what they learned. For these reasons, tough educational questions have, thus far, been answered by state and local elected officials. In other words, the democratic process answers these questions; it does not delegate them to the federal executive. To defer to the agency in regard to these educational judgments is not to defer to objective expertise but to permit the agency to decide disputed value judgments. The struggle over these disputed values has always occurred between local, state, and federal democratic bodies, not between state democratic bodies and federal administrative bodies.

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340. *Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=372>, archived at <http://perma.cc/FKT5-4XAP> (last visited Jan. 16, 2015).

341. See BLACK, *supra* note 317.

342. See, e.g., *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512 (D.C. Cir. 2009) (discussing the role that the recommendations of the Clean Air Scientific Advisory Committee and other scientific data play in the Environmental Protection Agency's air quality standards).

343. *Id.*

344. See James O'Reilly, *Jurisdiction to Decide an Agency's Own Jurisdiction: The Forgotten Tale of the Hynson Quartet*, 58 ADMIN. L. REV. 829 (2006).

The foregoing distinctions, at the very least, caution against lightly assuming that Congress could delegate an unbounded conditional waiver power to the Department of Education, or any agency for that matter, if the substance of the thing to be regulated is itself relatively unbounded. Granting the Secretary of Education the authority to waive major aspects of NCLB and impose conditions as the Secretary sees fit in exchange would likely be the most expansive delegation of authority to date, and one devoid of any intelligible or meaningful limiting principle. Thus, relying on the sliding scale principle of *Whitman*, a conditional waiver power in education requires either that the statute explicitly narrow the field of education in which that conditional power might operate or articulate a precise principle by which the Secretary might condition waivers. Without explicit bounds, a conditional waiver in education is, as a practical matter, necessarily a power lacking in an intelligible limiting principle.

## V. CONCLUSION

With no more power than the authority to waive noncompliance with NCLB, Secretary Arne Duncan achieved a goal that educational equality advocates had long sought but never secured: the federalization of certain aspects of public education. His path to the “holy grail” of education, however, was fundamentally flawed. He only reached it by imposing waiver conditions that were neither explicitly nor implicitly authorized by the text of NCLB. Thus, he exceeded his statutory authority and violated the Constitution’s clear notice requirements regarding conditions on federal funds.

States only acceded to these new and unforeseeable terms because their impending noncompliance with NCLB put so much at stake financially, practically, and politically. By the time Secretary Duncan announced the conditions, states were devoid of options and left in a position where the Secretary could compel them to accept terms that, under most any other circumstances, they would reject. The Administration took the states’ vulnerability as an opportunity to unilaterally impose policy that had already failed in Congress. In doing so, the Administration may have unconstitutionally coerced states.

An explicit grant of conditional waiver power could have cured some of these problems but not all. To have justified conditions as broad as Secretary Duncan’s, the statute would have had to either explicitly authorize the types of conditions Secretary Duncan imposed or explicitly grant him an open-ended authority to condition waivers. The former is implausible because Congress does not possess perfect foresight. The latter is unconstitutional because it would not have been

constrained by an intelligible principle. The latter also would have granted the Secretary a power broader than any other previously approved by the Court.

The import of this analysis reaches far beyond education. An agency power to remake the law through statutory waivers may be a useful and an efficient mechanism for adapting laws to changing circumstances and needs. Congress can, and likely will, explicitly extend this authority to some agencies in the future. But as the experience of NCLB's conditional waivers demonstrates, conditional waiver power, if not carefully circumscribed, is fraught with practical and constitutional dangers. It has the potential to give agencies a power that exceeds that of the legislation under which the agency is acting. The executive could unilaterally achieve ends that neither it nor Congress could have achieved through negotiated legislation, including bringing states further under the regulation of agencies than the organic statute the agency is waiving. In these respects, conditional waiver authority can threaten the balance of powers the Constitution secures between states and the federal government, and between Congress and the executive. Thus, it is no surprise that the NCLB waiver process has sparked a series of bitter legal fights at all branches of local, state, and federal government, with Congress suing the President over its use of executive power, state boards of education suing state legislatures and vice versa over the Common Core Curriculum, and teachers and students suing states over changes to teacher evaluation and retention rights. Next in line is a direct challenge to the Secretary of Education's authority to impose and enforce the conditions it exacted in exchange for NCLB waivers.