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Waivers, Federalism, and the Rule of Law

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Abstract

Waivers from legislation have been praised as the foundation for a new era of collaborative federalism. But these exceptions of law, often made without clear statutory authority, undermine the necessary basis for collaboration among governmental entities. That basis is law. Waivers in effect dispense from or even change laws in the interests of administrative flexibility. And, while some commentators have lauded this increased flexibility as empowering for state governments in particular, the real effect is to reduce relations based on law to a condition of perpetual bargaining in which federal administrators hold all the power. Able to change rules and even laws almost at will through new waiver programs and criteria, federal agencies gain arbitrary power, undermining the ability of states and people to plan for their futures on the basis of known rules—the most basic and necessary good provided by the rule of law.

Notes

1. 567 U.S.___ (2012), 132 S.Ct 2566.

2. 132 S. Ct. at 2602.

3. I rely, here, on the analysis provided in Eloise Pasachoff, Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law, 62 Am. U. L. Rev. 577 (2013) 593.

4. Elizabeth Weeks Leonard, Crafting a Narrative for the Red State Option, 102 Ky. L.J. 381 (2013), 397.

5. Ibid. PPACA, Pub. L. No. 111–148,§ 2401,124 Stat.119, 297–301 (2010).

6. Ibid.

7. Pasachoff at 659. I should note that Pasachoff is expressing skepticism concerning these arguments that the NFIB decision will result in federal programs being deemed coercive by the courts.

8. Pasachoff at 616. Waivers are granted pursuant to NCLB tit. IX, § 9401, 20 U.S.C. § 7861(2006).

9. Pasaschoff at 616.

10. Pasaschoff at 659.

11. Pasaschoff at 659.

12. Lon L. Fuller, The Morality of Law, 1st ed. (New Haven, CT: Yale University Press, 1964), 46–49.

13. Fuller, Morality of the Law, 39.

14. Magna Charta, Article 39, in Bruce Frohnen, ed., The American Republic: Primary Sources (Indianapolis: Liberty Fund, 2002), 145. “Diseized” refers to confiscation of lands. Id.

15. See for example the entry on John Austin in the Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/entries/austin-john/.

16. Bruce Frohnen, “The One and the Many: Individual Rights, Corporate Rights and the Diversity of Groups,” West Virginia Law Review 107 (2005): 817–18.

17. Ibid., 818, citing Lois Schwoerer, The Declaration of Rights, 1689 (Baltimore, MD: John Hopkins University Press, 1981), 9–18.

18. Aristotle, Politics, trans. Benjamin Jowett (New York: Cosimo, Inc., 2008), 140.

19. Alexander Hamilton, John Jay, and James Madison, The Federalist: The Gideon Edition, eds. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2000), 352–3 (emphasis in original).

20. Ibid., 351–52.

21. Kristen Rundle, The Impossibility of Exterminatory Legality, 59 Univ. Tor. L. J. 65 (2009), 71, 75, 96–97.

22. http://www.brg-expert.com/media/publication/327_Alberro_ToAmparoNotAmparo.pdf.

23. R. Craig Kitchen, “Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text,” Hastings Constitutional Law Quarterly 40 (2013): 555–6.

24. Sam Baker, “HHS Finalizes over 1,200 Waivers under Healthcare Reform Law,” The Hill, January 6, 2012, http://thehill.com/blogs/healthwa-tch/health-reform-implementation/202791-hhs-finalizes-more-than-1200-healthcare-waivers.

25. Patient Protection and Affordable Care Act, Pub. L. 111–148, Title I, Section 1332, 42 U.S.C.A. § 18052 (2011).

26. No Child Left Behind Act, Pub L. 107–110, 20 U.S.C.A. § 7861 (2011).

27. Lyndsey Layton, “U.S. to Grant Waivers for No Child Left Behind,” Washington Post, Aug. 08, 2011, http://articles.washingtonpost.com/2011-08-08/local/35269406_1_education-reform-education-secretary-arne-dunc-an-standards.

28. Dept. of Education, “ESEA Flexibility,” Policy, last updated July 9, 2013, http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html. California and Iowa both at one time had been turned down for waivers by the Department of Education.

29. Edsource.org/2013/Duncan-grants-nclb-waiver-to-eight-california-districts/36918.

30. Gillian E. Metzger, The Supreme Court 2011 Term, Comment, TO TAX, TO SPEND, TO REGULATE, 126 Harv. L. Rev. 83 (2012).

31. Ibid.

32. Ann Marie Marciarille, Let Fifty Flowers Bloom: Health Care Federalism after National Federation of Independent Business v. Sebelius, 81 UMKC L. Rev. 313 (2012) 337.

33. Ibid., 332.

34. Brietta Clark, Safeguarding Federalism by Saving Health Reform: Implications of National Federation of Independent Business v. Sebelius, 46 Loy. L.A. L. Rev. 541 (2013) 553.

35. David J. Barron and Todd D. Rakoff, “In Defense of Big Wavier,” 113 Columbia Law Review 113 (2013): 265.

36. Ibid., 279.

37. Philip Hamburger, “Are Health Care Waivers Unconstitutional?” http://www.nationalreview.com/articles/259101/are-health-care-waivers-unconstitutional-philip-hamburger.

38. INS v. Chadha, 462 U.S. 919 (1983). This point is made by both Hamburger and Calvin Massey, Massey's comment can be found at http://www.thefacultylounge.org/2011/02/the-constitutional-validity-of-health-care-waivers-.html.

39. Hamburger, “Are Health Care Waivers Unconstitutional?”

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