Roberts at 10:
The Evolving Story of John Roberts and Congress's Commerce Clause and Spending Clause Powers

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Overview

As we noted in our introductory chapter, the story of John Roberts's first decade as Chief Justice is, at least superficially, a complicated one. No area of the law may reflect the complicated nature of that story better than the scope of federal power under the Commerce Clause and the Spending Clause. Chief Justice Roberts has been championed for casting the critical vote to uphold, in substantial part, federal health care reform in *National Federation of Independent Business v. Sebelius* (*NFIB*).[1] Indeed, at the time, CAC celebrated the Court for "put[ting] the law over politics even in the most contentious legal dispute of our times."[2] But the decision was hardly an unreserved victory: at the same time the Court upheld the individual mandate as a permissible exercise of Congress's taxing power, the Court invalidated, as written, the statute's expansion of Medicaid, and Chief Justice Roberts wrote at length about the limits of Congress's power under the Commerce Clause and the Necessary and Proper Clause.

Now, as we take a look back at *NFIB* in the broader context of John Roberts's first decade on the High Court, it seems fair to say that the decision typifies the complicated (and still evolving) story of John Roberts's legacy vis-à-vis the Commerce Clause and the Spending Clause. Although Roberts may not have the fervor for continuing the states' rights revolution that his predecessor (and former boss) Chief Justice William Rehnquist did, his views on the scope of Congress's power under the Commerce Clause and the Spending Clause are nonetheless fairly conservative—indeed, more conservative than he let on at his confirmation hearing. Indeed, one sees in the Chief Justice's decisions so far a real anxiety about the scope of federal regulatory power and the size of the federal administrative state. Faced with a case of such significant political dimensions that it threatened to compromise the institutional legitimacy and reputation of the Court—not to mention Roberts's own reputation as Chief Justice—Chief Justice Roberts upheld the ACA's individual mandate. But what his views will mean over the next decade or two in less politically charged cases remains very much a live question.

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[1] 132 S. Ct. 2566 (2012).

[2] *Constitutional Accountability Center Statement on Victory in Supreme Court Health Care Case*, CONSTITUTIONAL ACCOUNTABILITY CTR. (June 28, 2012), http://theusconstitution.org/media/releases/constitutional-accountability-center-statement-victory-supreme-court-health-care-ca-0.

I. Background

To understand the significance of *NFIB* and Chief Justice Roberts's opinion in that case, it is important to understand the jurisprudential backdrop against which he was writing. Dating back to the earliest days of our nation, it was generally accepted both that Congress had broad power under the Commerce Clause to enact legislation to address national problems, and that the Supreme Court would defer to Congress's reasonable assessment of when such legislation was necessary. Indeed, this early case law was consistent with what the Framers had intended when they replaced the weak Articles of Confederation with a more energetic and effective federal government under the new Constitution. As Chief Justice Marshall explained in *M'Culloch v. Maryland*, "'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers."[3] In another opinion, Marshall reiterated that "[t]he power over commerce . . . was one of the primary objects for which the people of America adopted their government," and "[t]he wisdom and the discretion of Congress . . . and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse."[4] With the exception of the *Lochner* era, during which the Supreme Court regularly overturned federal laws attempting to regulate the workplace and the national economy, judicial deference to congressional legislation under the Commerce Clause was the rule.

This all changed with the Court's decision in *United States v. Lopez*, an opinion authored in 1995 by Chief Justice Rehnquist. In *Lopez*, the Court, in a 5-4 decision, held that the Gun-Free School Zones Act of 1990 exceeded Congress's power under the Commerce Clause.[5] Writing for the majority, Chief Justice Rehnquist explained that to uphold the statute, the Court "would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[6] The first case since the New Deal to impose a limit on Congress's Commerce Clause power, *Lopez* was a landmark decision, calling into question long-settled understandings about the scope of federal power and Congress's authority to regulate for the nation. At the time, Linda Greenhouse wrote that *Lopez* helped "put in play for the first time in a half-century fundamental questions about the essential nature of the Federal Government."[7]

Five years later, the same five-member majority struck again in *United States v. Morrison*, invalidating the civil remedy provision in the Violence Against Women Act.[8] Although the Court was careful in both *Lopez* and *Morrison* not to question prior precedent, it nonetheless unsettled long-held understandings about congressional power. As Justice Breyer wrote in dissent in *Lopez*, "the Court's holding . . . threatens legal uncertainty in an area of law

[3] 17 U.S. 316, 404 (1819).
[4] Gibbons v. Ogden, 22 U.S. 1, 190, 197 (1824).
[5] 514 U.S. 549 (1995).
[6] *Id.* at 567.
[7] Linda Greenhouse, *Focus on Federal Power*, N.Y. TIMES, May 24, 1995, http://www.nytimes.com/1995/05/24/us/focus-on-federal-power.html.
[8] 529 U.S. 598 (2000).

that, until this case, seemed reasonably well settled."[9] The legal uncertainty in this area of law became even greater in 2005 when the Court decided *Gonzales v. Raich*, upholding, in a 6-3 decision, Congress's power to regulate medicinal marijuana grown for personal consumption.[10] Interestingly, Justice Scalia concurred separately to emphasize that he would have upheld the law pursuant to Congress's power under the Necessary and Proper Clause: "[T]he Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."[11]

At the same time that the Rehnquist Court was creating considerable uncertainty about the scope of Congress's Commerce Clause power, it was doing the same regarding Congress's power under the Spending Clause. The touchstone of the Court's modern Spending Clause jurisprudence is *South Dakota v. Dole*, a 1987 case in which the Court held, 7-2, that Congress could withhold federal funds from states that did not maintain a legal drinking age of 21.[12] In upholding the federal law, the Court announced five factors that should govern consideration of such programs, including whether the condition was clearly presented to the states and whether it was coercive. In the years following *Dole*, conservatives on the Court argued that some of the limits recognized by *Dole*, particularly the "clear notice" requirement, needed to be strengthened to safeguard states' control over their own affairs and to ensure "vigilan[ce] in policing the boundaries of federal power."[13]

To call the developments in these areas of law—particularly, the Commerce Clause—a revolution is no overstatement. Indeed, writing on the Court's landmark decision in *Lopez*, Linda Greenhouse noted, "It is a measure of how unexpected has been the emergence of the Court's debate over Federal power that no recent Supreme Court nominee has been asked more than a passing question about the issue during the confirmation process."[14] All that had changed by the time of John Roberts's confirmation hearing a decade later, of course, and questions about federal power and the Commerce Clause received far more than passing attention, as the next Section discusses.

II. Confirmation Hearing

When then-Judge Roberts testified before the Senate at his confirmation hearing in 2005, senators wanted to know one thing when it came to the Commerce Clause: would Chief Justice Roberts continue the states' rights revolution seemingly begun by Chief Justice Rehnquist.

John Roberts offered assurances that not only would he *not* continue the revolution, but there wasn't really a revolution at all. He pointed to the Court's then-recent decision in *Raich*

[9] 514 U.S. at 630 (Breyer, J., dissenting).
[10] 545 U.S. 1 (2005).
[11] *Id.* at 39 (Scalia, J., concurring in the judgment).
[12] 483 U.S. 203 (1987).
[13] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 655 (1999) (Kennedy, J., dissenting).
[14] Greenhouse, *supra* note 7.

and said, "what the Supreme Court said in the *Raich* case, which I think is very important, it said there are a lot more precedents on the [C]ommerce [C]lause besides *Lopez* and *Morrison*. And the appropriate way to regard those is two decisions in [the] more than 200-year sweep of decisions in which the Supreme Court has given extremely broad—has recognized extremely broad authority on Congress's part, going all the way back to *Gibbons v. Ogden* and Chief Justice John Marshall when those [C]ommerce [C]lause decisions were important in binding the nation together as a single commercial unit."[15] Roberts later reiterated the point: "I do think that a proper consideration of *Lopez* and *Morrison* has to take into account the more recent Supreme Court decision in *Raich*, where the Court made the point that, yes, we have these decisions in *Lopez* and *Morrison*, but they are part of a 218-year history of decisions applying the [C]ommerce [C]lause and they need to be taken into account in the broad scope. . . . [T]hey didn't junk all the cases that came before. They didn't set a new standard."[16] Finally, returning to the point again later in his hearings, Judge Roberts emphasized that *Lopez* and *Morrison* did not undermine the broad scope of Congress's authority to address national problems: "And, of course, there's decision after decision, going back to . . . one of Chief Justice John Marshall's early opinions about the scope of Congress'[s] power; and the recognition under the constitutional scheme that it is a broad grant of power; and the recognition that this body has the authority to determine when issues affecting interstate commerce merit legislative response at the federal level."[17]

There was also some (albeit more limited) discussion of Congress's Spending Clause power. Asked pointedly whether Congress may "attach conditions to the receipt of federal funds," Judge Roberts acknowledged that "Congress historically has done that" and that, given the Court's decision in *South Dakota v. Dole*, it "has that authority" as "a general proposition."[18] He also discussed a case he heard while serving on the D.C. Circuit in which he voted to uphold Congress's authority under the Spending Clause to require the D.C. Metro to waive its sovereign immunity to receive federal funds.[19]

From Judge John Roberts's testimony at his Supreme Court confirmation hearing, one might have thought that the states' rights revolution was someone else's revolution, and that, if confirmed to the High Court, Roberts would follow the Court's long-established precedents that afforded Congress wide berth in enacting federal regulatory programs and other federal laws. To some degree, this has thus far been borne out. The Roberts Court has decided few significant cases on the Commerce Clause, the Necessary and Proper Clause, and the Spending Clause—*NFIB* is by far the most significant—and John Roberts voted to uphold the most massive federal regulatory program in decades. Moreover, even as he wrote that the ACA's

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[15] *Transcript: Day Two of the Roberts Confirmation Hearings Part IV*, WASH. POST, Sept. 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301469.html.
[16] *Transcript: Day Two of the Roberts Confirmation Hearings Part VII*, WASH. POST, Sept. 13, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301981.html.
[17] *Third Day of Hearings on the Nomination of Judge Roberts*, N.Y. TIMES, Sept. 14, 2005, http://www.nytimes.com/2005/09/14/politics/politicsspecial1/14text-roberts.html?pagewanted=print&_r=0.
[18] *Id.*
[19] *Id.*

individual mandate could not be sustained as an exercise of Congress's Commerce Clause power, he still acknowledged the breadth of Congress's power under that Clause. But it's nonetheless difficult to square then-Judge Roberts's discussion of those powers in 2005 with Chief Justice Roberts's opinions in the few relevant cases the Court has heard in the past decade, as the next Section discusses.

III. *NFIB* and the First Decade

A. The Commerce Clause and the Necessary and Proper Clause

In his opinion in *NFIB* upholding the ACA's individual mandate, Chief Justice Roberts discussed at length not only the taxing power under which he upheld the mandate, but also the Commerce Clause and the Necessary and Proper Clause. As to the Commerce Clause, the Chief Justice began by recognizing that although "[t]he path of [the Court's] Commerce Clause decisions has not always run smooth . . . it is now well established that Congress has broad authority under the Clause."[20] Further, "[g]iven its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time."[21]

At the same time, he explained that this power "must be read carefully to avoid creating a general federal authority akin to the police power"[22] because, as he explained, "[t]he Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States."[23] To avoid investing the federal government with such an overarching power, Roberts distinguished between statutes that regulate activity and those that regulate *inactivity*; the latter, he concluded, are unconstitutional because otherwise "Congress [could] use its commerce power to compel citizens to act as the Government would have them act."[24] The Chief Justice's discussion of the Necessary and Proper Clause also emphasized that it should not be read to create a general police power in the federal government. "The individual mandate," he wrote, "vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power. . . . [S]uch a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. . . . Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it."[25]

The Chief Justice echoed these concerns about the creation of a federal police power in *United States v. Kebodeaux*, in which the Court, in a 7-2 decision, held that Congress had the

[20] 132 S. Ct. at 2585.
[21] *Id.* at 2586.
[22] *Id.* at 2578.
[23] *Id.* at 2591.
[24] *Id.* at 2589.
[25] *Id.* at 2592.

power under the Military Regulation and Necessary and Proper Clauses of Article I to require Anthony Kebodeaux to register as a sex offender.[26] Chief Justice Roberts concurred in the Court's judgment, but wrote separately because he "worr[ied] that incautious readers will think they have found in the majority opinion something they would not find in either the Constitution or any prior decision of ours: a federal police power."[27] He elaborated: "I write separately to stress not only that a federal police power is immaterial to the result in this case, but also that such a power *could not* be material to the result in this case—because it does not exist."[28]

It is difficult to know what to make of the Chief Justice's writings in these cases. On the one hand, he does acknowledge that Congress has "broad authority" under the Commerce Clause, a point the joint dissenters in *NFIB* seemed loathe to acknowledge. In contrast, they described "the precise scope of the Commerce Clause and the Necessary and Proper Clause [as] uncertain."[29] It's also plausible that Roberts's activity-inactivity distinction will have little practical effect on Congress's ability to legislate under its Commerce Clause power in the future. On the other hand, Chief Justice Roberts found himself unable to uphold the individual mandate as an exercise of Congress's "broad authority," even though Justice Ginsburg and the other more liberal members of the Court concluded that "[s]traightforward application of [the principles embodied in the Court's precedents] would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation."[30] At a minimum, the Chief Justice's opinion evinces an anxiety about the scope of the federal government's power under the Commerce Clause. Indeed, the Chief Justice professed to feel comfortable upholding the mandate under the taxing power because "although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior."[31]

To his credit, the Chief Justice has not seized on every opportunity to restrict Congress's power: in *Bond v. United States*, he resisted his conservative colleagues' calls to restrict Congress's power to enact legislation implementing validly enacted treaties under the Necessary and Proper Clause, instead deciding the case on more narrow statutory grounds.[32] And, in other contexts, the Chief Justice has been willing to sign onto broad statements of federal power. Perhaps most significant, he joined Justice Kennedy's opinion in *Arizona v. United States*, in which the Court held, 5-3, that parts of Arizona's immigration law S.B. 1070 were preempted by federal law, with Justice Kennedy writing that "[t]he Government of the

[26] 133 S. Ct. 2496 (2013). In *United States v. Comstock*, Chief Justice Roberts joined the Court's 7-2 decision to uphold under the Necessary and Proper Clause a federal law that required the civil commitment of individuals already in federal custody. 560 U.S. 126 (2010).
[27] 133 S. Ct. at 2507 (Roberts, C.J., concurring in the judgment).
[28] *Id.*
[29] 132 S. Ct. at 2647 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting). The joint dissenters did say that "[w]hen Congress is regulating . . . industries directly, it enjoys the broad power to enact all appropriate legislation to protec[t] and advanc[e] commerce." *Id.* at 2645 (internal quotation marks omitted).
[30] 132 S. Ct. at 2617 (Ginsburg, J., concurring).
[31] *Id.* at 2600.
[32] Bond v. United States, 134 S. Ct. 2077 (2014).

United States has broad, undoubted power over the subject of immigration and the status of aliens."[33] The Chief Justice also joined Justice Scalia's opinion in *Arizona v. Inter Tribal Council of Arizona, Inc.*,[34] in which the Court held, 7-2,that the National Voter Registration Act preempted Arizona's requirement that voters present proof of citizenship when they registered to vote, and Justice Scalia noted that the "power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount.'"[35]

But it is nonetheless clear that the Chief Justice is concerned about the scope of federal power and, in particular, the breadth of the federal regulatory state, as has been manifest in his writings in other areas.[36] Indeed, the strength of the Chief Justice's feelings on this topic are evidenced by the very existence of his opinion in *NFIB*: arguably, because he concluded that the individual mandate could be upheld pursuant to Congress's taxing power, he need not have written any of what he did about the Commerce Clause and the Necessary and Proper Clause. Perhaps he wrote what he did to try to give some solace to conservatives who he knew would be disappointed in his decision to uphold the mandate, or perhaps he wrote because of the strength of his feelings about these issues. Most likely, both factors played a role in his decision. Regardless of why he wrote, what he wrote tells us something important about his views on federal power, even if what exactly those views mean for future cases remains unclear.

Two other aspects of the Chief Justice's opinion in *NFIB* also merit mention. First, in his discussion of the Necessary and Proper Clause, Roberts wrote that "[e]ach of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power."[37] In writing this, the Chief Justice may have been trying to push back on suggestions in *United States v. Comstock*, a 7-2 decision he joined in which the Court gave a broad reading to the Necessary and Proper Clause, and in Justice Scalia's concurrence in *Raich* that that the Necessary and Proper Clause could be an independent source of federal authority broader than the other enumerated powers. Tellingly, the Chief Justice concluded his discussion of the Necessary and Proper Clause in *NFIB* by saying that "[t]he commerce power thus does not authorize the mandate."[38]

Second, Chief Justice Roberts rested his conclusion that the mandate failed under the Commerce Clause in part on the fact that, in his view, Congress had "never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted

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[33] 132 S. Ct. 2492, 2498 (2012).
[34] 133 S. Ct. 2247 (2013).
[35] 133 S. Ct. 2247, 2253 (2013) (quoting *Ex parte* Siebold, 100 U.S. 371, 392 (1880)).
[36] Tom Donnelly & Doug Kendall, *Scalia vs. Roberts*, SLATE.COM (May 24, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/scalia_vs_roberts_conservatives_face_off_on_the_supreme_court.html ("Echoing the libertarian canard that "the Framers could hardly have envisioned today's 'vast and varied federal bureaucracy,' " Roberts decried the government for its "thousands of pages of regulations" and agencies such as the FCC for "poking into every nook and cranny of daily life." ").
[37] 132 S. Ct. at 2592.
[38] *Id.* at 2593.

product."[39] He acknowledged that "[l]egislative novelty is not necessarily fatal," but nonetheless concluded that "'the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent.'"[40] In offering this view, he echoed his own opinion in a case the Court had decided two years earlier (*Free Enterprise Fund v. Public Company Accounting Oversight Board*).[41] Perhaps this language is nothing more than rhetoric, but if given teeth, it could impose an unwarranted limitation on any effort by Congress or the President to address new problems with creative solutions. According to the Chief Justice, the very novelty of the solution will count against its constitutionality.

Thus, although Chief Justice Roberts has not yet shown the same fervor on these issues as his predecessor, it is clear that his views are more conservative than he let on at his confirmation hearing. Given the Chief Justice's quite conservative views, why did he ultimately conclude that the individual mandate was constitutional? The answer may be as simple as the opinion itself suggests: despite the problems he perceived with the government's Commerce Clause and Necessary and Proper Clause arguments, he nonetheless concluded that the mandate was a permissible exercise of Congress's taxing power. But, of course, there has been endless speculation about whether other considerations motivated the Chief Justice's decision, at least in part. Perhaps faced with the prospect of issuing a decision that would undermine the institutional legitimacy and reputation of the Court—and indeed, his own reputation as Chief Justice—he was unwilling to strike down the ACA in full, but wanted to lay down markers that would facilitate cabining further expansion of the regulatory state in less politically charged cases in the future. Or perhaps he found untenable his conservative colleagues' willingness to strike down the *entire* ACA (not just the mandate), but was unwilling to allow the significant disruptions to the health insurance market that would have resulted if the mandate had been held unconstitutional, but other portions of the ACA were allowed to stand. Of course, we can offer no definitive explanation now, but it may be that the Chief Justice's future decisions will help shed additional light on his decision in *NFIB* and on his views on federal power, more broadly. At this point, though, it's difficult to put too much stock in then-Judge Roberts's confirmation hearing statements about how he saw *Lopez* and *Morrison* fitting into the 200-years of Commerce Clause jurisprudence that preceded them.

B. Spending Clause

In the days and weeks following the announcement of the Court's decision in *NFIB*, the focus was on Chief Justice Roberts's decision to part ways with his conservative colleagues and vote to uphold the individual mandate. Less attention was paid to the fact that Roberts had joined with his conservative colleagues (and two of the Court's more liberal members) to conclude that the law's expansion of Medicaid was unconstitutional on Spending Clause grounds.

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[39] *Id.* at 2586.
[40] *Id.* (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 505 (2010) (internal quotation marks omitted))
[41] 561 U.S. 477 (2010).

In discussing the Spending Clause, the Chief Justice explained that Congress may only exercise the spending power when states voluntarily and knowingly decide to accept federal funds; "[r]especting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system," he wrote.[42] He added that by threatening to withhold states' existing Medicaid funds if they did not expand Medicaid, "this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health coverage effected by the Act."[43] He viewed the condition as a "means of pressuring the States to accept policy changes"—"a gun to the head" and "economic dragooning," as he more colorfully put it.[44] Roberts acknowledged that the Social Security Act, which originally established Medicaid, warned the states that the program might be amended in the future, but he described the expansion by the ACA as a "shift in kind, not merely degree."[45] Finally, he emphasized the importance of political accountability, noting that "when the State has no choice [but to accept federal funds], the Federal Government can achieve its objectives without accountability."[46]

Although the Court did not agree with the law's challengers that sustaining their Spending Clause argument required "invalidation of the entire ACA"[47] and held that the expansion could go forward so long as states would not lose existing funds if they chose not to expand Medicaid, the significant consequences of the Court's decision are clear: 21 states have opted not to go forward with the Medicaid expansion,[48] resulting in millions of people who would have been covered by Medicaid remaining uninsured.[49] What is less clear are the consequences of this decision for the federal government's ability to regulate pursuant to its Spending Clause power going forward. In his opinion, Chief Justice Roberts noted a prior case in which the Court "did not attempt to 'fix the outermost line' where persuasion gives way to coercion."[50] He concluded, "We have no need to fix a line [here] either."[51]

The exact line may not be clear, but the fact that Chief Justice Roberts believes in enforcing limits on Congress's power under the Spending Clause is. In the other Spending Clause case decided since Roberts was elevated to the High Court, *Arlington Central School District Board of Education v. Murphy*, Chief Justice Roberts joined Justice Alito's opinion

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[42] 132 S. Ct. at 2602.
[43] *Id.* at 2603.
[44] *Id.* at 2604, 2605.
[45] *Id.* at 2605.
[46] *Id.* at 2603.
[47] Brief of State Petitioners on Medicaid, Florida v. Dep't of Health & Human Servs., 132 S. Ct. 2566 (2012) (No. 11-400), 2012 WL 105551, at *54 n.18.
[48] *Status of State Action on the Medicaid Expansion Decision*, HENRY J. KAISER FAMILY FOUND., http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/ (last visited Oct. 16, 2014).
[49] Sam Dickman et al., *Opting Out of Medicaid Expansion: The Health and Financial Impacts*, HEALTH AFFAIRS BLOG, Jan. 30, 2014, http://healthaffairs.org/blog/2014/01/30/opting-out-of-medicaid-expansion-the-health-and-financial-impacts/.
[50] 132 S. Ct. at 2606.
[51] *Id.*

holding that parents who successfully challenged a school board placement decision under the Individuals with Disabilities in Education Act could not recover the costs of retaining expert witnesses to support that claim because the statute did not provide sufficient notice to satisfy *Dole*'s "clear notice" test.[52] In dissent, Justice Breyer criticized the majority for abusing the clear notice test and disregarding what Congress clearly intended the statute to mean. As he noted, none of the Court's prior rulings "suggest[] that *every spending detail* of a Spending Clause statute must be spelled out with unusual clarity."[53]

It is still too early to say what exactly these decisions mean for the scope of Congress's power under the Spending Clause and Congress's ability to use that power to adopt large-scale regulatory programs that require state cooperation. It may be that *NFIB* will one day be seen as marking a revolution in Spending Clause jurisprudence in the same way that *Lopez* and *Morrison* are for the Commerce Clause, or it may be that the Court will largely continue to respect the wide berth it recognized in *Dole*. Even as much of the story remains to be written, though, it seems fair to say that we are no longer living in a world in which Congress can regulate free of concern that its Spending Clause legislation will be struck down. At his confirmation hearing, all then-Judge Roberts was willing to say about the Spending Clause was that Congress "has th[e] authority" to attach conditions to funds as "a general proposition." But after his first decade on the bench, that authority is not now what it once was.

IV. Conclusion

NFIB may be most significant now for what it did, but in the long term, it could also be significant for what it said. Although Chief Justice Roberts voted to uphold the ACA's individual mandate—and deserves credit for doing so—much of what he said in his opinion in that case suggests a deep anxiety about the scope of federal power and the growth of the federal administrative state. It is, of course, impossible to know for sure where that anxiety will lead in future cases, but there's reason to worry that his concerns about the scope of federal regulatory power were trumped in this case only by institutional legitimacy concerns that might not be present in other cases down the road.

At minimum, although Chief Justice Roberts may not have the same appetite to change the law in these areas as Chief Justice Rehnquist had, it also seems clear that Chief Justice John Roberts's views on the Commerce Clause and the Spending Clause aren't exactly what Judge Roberts presented them to be at his confirmation hearing in 2005. Just how different they are remains to be seen. The story of John Roberts and Congress's Commerce Clause and Spending Clause powers is very much an evolving one.

[52] 548 U.S. 291 (2006).
[53] *Id.* at 317 (Breyer, J., dissenting).