

Sec. 8—Powers of Congress

Cl. 1—Power To Tax and Spend

Chief Justice Roberts' controlling opinion⁶⁵⁸ in *NFIB* held that the ACA Medicaid expansion created a "new" and "independent" program.⁶⁵⁹ Noting that congress' power to direct state activities under the Spending Clause is in the nature of a contract, the Chief Justice's opinion suggests that the only changes that could be made to Medicaid would be those that could be reasonably anticipated by the states as they entered the original program, when only four categories of persons in financial need were covered: the disabled, the blind, the elderly, and needy families with dependent children. The Medicaid expansion arguably changed the nature of the program by requiring recipient states, as part of a universal health care system, to meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level.⁶⁶⁰ Thus, the Medicaid expansion "accomplishe[d] a shift in kind, not merely degree."⁶⁶¹

Once the Chief Justice established that the Medicaid expansion was a "new" and "independent" program, he then turned to whether withdrawal of existing Medicaid funds for failure to implement the expansion was coercive. He noted that the threatened loss of Medicaid funds was "over 10 percent of most States' total revenue," which he characterized as a form of "economic dragooning" which put a "gun to the head" of the states.⁶⁶² He then contrasted this amount with the amount of federal transportation funds threat-

⁶⁵⁸ "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted). Justice Roberts' opinion is arguably narrower than the dissent, because, as discussed below, his opinion found a constitutional violation based on the presence of both a "new" "independent" program and a coercive loss of funds, while the dissenting opinion would have found the coercive loss of funds sufficient. *NFIB*, 567 U.S. ___, slip op. at 38–42 (Justices Scalia, Kennedy, Thomas and Alito dissenting).

⁶⁵⁹ 567 U.S. ___, slip op. at 50, 53–54. It might be argued that the Roberts opinion, with its emphasis on "new" and "independent" programs, is implicitly addressing the "relatedness" inquiry of *South Dakota v. Dole*. Justice Roberts' opinion, however, does not explicitly discuss the issue, and an argument can be made that there is a significant difference between the two inquiries. As noted, the "relatedness inquiry" in *Dole* was identified as a limitation on the Spending Clause, while the *NFIB* discussion of "new" and "independent programs" emphasized the concerns of the Tenth Amendment. Second, under *Dole*, the "relatedness" and "coercion" inquiries appear to be disjunctive, in that failure to comply with either of these factors would mean that the statute was unconstitutional. Under *NFIB*, however, the "new" and "independent" program inquiry and the "coercion" inquiry appear to be conjunctive, so that a grant condition must apparently fail both tests to be found unconstitutional.

⁶⁶⁰ Justice Roberts also noted that Congress created a separate funding provision to cover the costs of providing services to any person made newly eligible by the expansion, and mandated that newly eligible persons would receive a level of coverage that is less comprehensive than the traditional Medicaid benefit package.

⁶⁶¹ 567 U.S. ___, slip op. at 53.

⁶⁶² 567 U.S. ___, slip op. at 10, 51–52.