The Economist

Obamacare and the Supreme Court

It doesn't mean anything, yet

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THE reaction to John Robert's Obamacare-saving ruling is something to behold. Because few seriously contemplated that the chief justice's vote would decide the constitutionality of the individual mandate, neither left nor right was able to coordinate in advance on talking points. What we have, then, is a stimulating cacophony of conflicting views. At this point, I don't think any of them are entirely wrong. Not yet.

The elder statesmen of conservative opinion-making are not displeased with Mr Roberts compromise. George Will hails a grand conservative victory:

Conservatives won a substantial victory on Thursday. The physics of American politics – actions provoking reactions – continues to move the crucial debate, about the nature of the American regime, toward conservatism. Chief Justice John Roberts has served this cause.

[...]

By persuading the court to reject a Commerce Clause rationale for a president's signature act, the conservative legal insurgency against Obamacare has won a huge victory for the long haul. This victory will help revive a venerable tradition of America's political culture, that of viewing congressional actions with a skeptical constitutional squint, searching for congruence with the Constitution's architecture of enumerated powers. By rejecting the Commerce Clause rationale,

Thursday's decision reaffirmed the Constitution's foundational premise: Enumerated powers are necessarily limited because, as Chief Justice John Marshall said, "the enumeration presupposes something not enumerated."

For Michael Barone, the ruling is more a mixed bag, but he shares Mr Will's optimism about its portent for limited government:

Constitutionally, many conservatives are unhappy that Chief Justice Roberts and the four justices generally considered liberal voted to uphold the mandate to buy health insurance as a tax, which Congress is clearly empowered to levy.

Moreover, the Constitution's limits on congressional power have now become, for the first time in seven decades, a political issue. They're likely to remain one for years to come.

But the fact remains that a majority of five justices, including Roberts, also declared that Congress' power to regulate commerce does not authorize a mandate to buy a commercial product. This will tend to bar further expansion of the size and scope of the federal government.

Mr Barone urges us not to forget that "the Supreme Court did overturn part of the Obamacare legislation, the provision allowing the federal government to cut off states from all Medicaid funding if they refuse to vastly expand Medicaid eligibility as the legislation requires".

John Yoo, a conservative jurist best known for defending the government's right to torture suspected terrorists, declines to pick up what Messrs Will and Barone have set down:

All this is a hollow hope. The outer limit on the Commerce Clause in Sebelius does not put any other federal law in jeopardy and is undermined by its ruling on the tax power (discussed below). The limits on congressional coercion in the case of Medicaid may apply only because the amount of federal funds at risk in that program's expansion—more than 20% of most state

budgets—was so great. If Congress threatens to cut off 5%-10% to force states to obey future federal mandates, will the court strike that down too? Doubtful.

Worse still, Justice Roberts's opinion provides a constitutional road map for architects of the next great expansion of the welfare state. Congress may not be able to directly force us to buy electric cars, eat organic kale, or replace oil heaters with solar panels. But if it enforces the mandates with a financial penalty then suddenly, thanks to Justice Roberts's tortured reasoning in Sebelius, the mandate is transformed into a constitutional exercise of Congress's power to tax.

The *Wall Street Journal* editorial board agrees:

Chief Justice Roberts has hollowed out dual federal-state sovereignty and eviscerated the very limit on the Commerce Clause that he posits elsewhere in his opinion and that has some conservatives singing his praises. From now on, Congress can simply regulate interstate commerce by imposing "taxes" whenever someone does or does not do something contrary to its desires.

This line of thinking is why many liberals are entirely unperturbed by Mr Roberts' allegedly brilliant judicial statesmanship. According to Joey Fishkin, a law professor at the University of Texas:

The decision was the most important court victory for liberalism in my lifetime. For all that Chief Justice Roberts gave conservative movement activists in his compromise ruling yesterday—and he gave them a lot—he gave liberals something even more precious.

[...]

The solution the Chief found was to hold that the mandate can fairly be read as no command at all, but rather as an incentive: you either buy insurance, or you pay a tax. Your choice. And of course, "The Federal Government does have the power to impose a tax on those without health insurance." In other words, the Chief found that it was reasonable to read the

mandatory exhortation out of the law. This is a (slightly different) version of the compromise I imagined in a post on this blog a few weeks ago: striking down the mandatory command but leaving in place the tax penalty.

[...]

The Commerce Clause language certainly moves the needle back from Raich in the direction of Lopez, but that is a subtle shift of interest only to constitutional lawyers. (It's not even clear that the Commerce Clause language is formally a holding; I think there is a strong case that it is all dicta, since it is not necessary to reach any part of the Court's result.) The spending clause holding could well have more substantial doctrinal reverberations, but that is very hard to predict.

Stepping back from constitutional doctrine, what happened yesterday? Basically, one really important thing happened. The Affordable Care Act was upheld essentially in its entirety. This means we are headed for a long-term change in the basic social bargain in the United States.

Mr Fishkin seems to take for granted that should Mitt Romney become president, he will not actually repeal Obamacare, and for all I know, he's right.

I lay all this out in such tedious detail by way of making the case that there's *no fact of the matter* about the implications of the Obamacare decision. Many conservatives tend to get fixated on the fantasy that the constitution has a determinate meaning and that constitutional questions therefore have determinate answers. In fact, the fetish for determinacy is so strong that sometimes conservatives become confused by it. In one breath they denounce the courts' activist misinterpretation of the constitution's plain meaning, and then, in the next, lament that henceforth judges will be forever and inescapably bound by the plain implications of the precedent they have just created. But if the judges are the exegetical libertines conservatives say they are, why not predict that they'll simply make of their latest decision what they choose to make of it? Duh.

Jim Antle of the *American Conservative* worries that "if the Constitution has no meaning apart from what the judges say it means, we have no written Constitution". *Of course* the constitution has meaning apart from what the judges say. Actually, it has *lots* of meanings apart from what the judges say. Too many meanings. Thankfully, the conflict inherent in the multiplicity of private reason is overcome by the fact that a majority of Supreme Court justices alone ultimately determines whether legislation passes constitutional muster. Yet the supple minds of Supreme Court justices move like quicksilver.

Perhaps the most surprising thing about the Obamacare case was the speed with which the conservative wing of the court converged on a libertarian reading of the commerce clause, which, prior to the oral arguments, most experienced court-watchers believed to be nutty. This took liberals by surprise and had a lot of them rather down in the mouth last Wednesday. That a majority of the court, chief justice included, affirmed this formerly nutty libertarian interpretation of the commerce clause *might* mean nothing. Mr Roberts's comments on the matter *might* be mere, non-binding "dicta". But it won't matter a whit that, as Mr Fishkin say, "there is a strong case that it is all dicta", if the same court majority is determined to build something on its foundations. I don't know they won't.

Similarly, it *might* be true that Mr Roberts has drawn "a constitutional road map for architects of the next great expansion of the welfare state", as Mr Yoo alleges. But it's not obvious to me that the court's conservative majority will allow Congress to "simply regulate interstate commerce by imposing 'taxes' whenever someone does or does not do something contrary to its desires". Maybe the court's conservatives will get out their constitutional ouija board and find that James Madison's immortal soul refuses to countenance this sort of thing. Perhaps not even when it comes to health care!

Of Mr Robert's strategy of re-interpreting the individual mandate as a tax, the court's dissenting conservative minority had this to say:

Finally, we must observe that rewriting [the mandate] as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population. Art. I, §9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question—perhaps because, until today, no federal court has accepted the implausible argument that [the mandate] is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue…At oral argument, the most prolonged statement about the issue was just over 50 words…One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression.

Michael Cannon, a Cato Institute health-care wonk, reads this and suggests that

there may be room here for the same individual citizens who brought this case to again file suit against the federal government for trying to impose an unconstitutional tax. It may seem unlikely that Roberts would reverse himself on the Tax Power issue. Then again, since he never specified what type of constitutionally permissible tax the mandate is, perhaps voting to strike the mandate would not be reversing himself.

Maybe this is a nutty idea. But, as we now know, that doesn't mean liberals won't eventually get mugged by it. Furthermore, as we now know, Mr Roberts is nothing if not flexible. All of which is to say that the long-term consequence of last week's big decision cannot be even roughly divined from an attentive reading of the text. The party of next year's president means rather more than these mere words can say.