

TRENDMACRO LIVE!

## On the SCOTUS Obamacare Decision

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### A blow to growth, reaffirming taxes in the "fiscal cliff" and the regime of "forced exchanges."

We take [today's Supreme Court decision](#) to generally uphold Obamacare as a negative for growth, on the face of it.

- The decision leaves in place an important component of the year-end "fiscal cliff" -- a 3.8% surcharge on investment income including dividends, capital gains and interest, for high-earning households (see ["The 2013 Fiscal Cliff Could Crush Stocks"](#) May 5, 2012).
- By failing to invalidate the private mandate, the decision leaves in place a regime of "forced exchanges," in which wealth is reduced and economic efficiency is impaired as people consume products and services they don't want, or for which they cannot effectively negotiate. We plan to write next week on the underappreciated power of the negative and positive externalities arising, respectively, from forced and voluntary exchanges, as they apply to a possible reawakening of the housing market.
- The rationale for upholding the private mandate would appear to put no limit on the government's power, provided that the mechanism by which it enforces its will is framed as a "tax." Presumably, by this logic, the individual mandate would have been found unconstitutional if it were enforced by a "fine" instead. So if all that counts is the enforcement mechanism -- not the nature of that which is being enforced -- then it should be constitutional to, say, force Jews to convert to Islam so long as the penalty for failing to comply is a "tax."
- It is particularly disappointing to see Chief Justice John Roberts, a George W. Bush appointee of seemingly impeccable constitutionalist credentials, being the swing vote, and writing the majority opinion. We can only guess at his political motivations -- and make no mistake about it, the Supreme Court is a political institution.
- The Court has been under political pressure from President Obama since the 2010 [State of the Union address](#). After Obama attacked a Court decision on campaign finance as having "reversed a century of law," Justice Samuel Alito, sitting in the audience, was so taken aback as to [visibly mouth the words "not true."](#) In [a press conference in April](#), Obama issued a warning to the Court about the

#### Update to strategic view

**US MACRO:** The Supreme Court's Obamacare decision is an immediate blow to growth. It leaves in place the coming tax on investment income that forms a large part of the year-end "fiscal cliff." It leaves in place a regime of wealth-reducing and efficiency-reducing "forced exchanges," and creates a dangerous rationale for more of them in the future -- apparently anything goes, so long as the enforcement mechanism is framed as a "tax." It creates uncertainty by destabilizing the dynamics of the November elections, creating as yet unresolved risks and opportunities for both sides.

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Obamacare case, which was aggressive to the point of absurdity: "I'm confident that...an unelected group of people would...not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress."

- In the 1930's, President Franklin Roosevelt threatened to "pack" the Supreme Court in the wake of rulings that struck down New Deal legislation. Fearful for its long-term independence, the Court subsequently became far more amenable. Perhaps a version of that dynamic is in play today in Roberts' political calculus.
- Finally, the decision creates uncertainty because it is not clear yet how this will impact the November elections. At first blush, it bestows a flattering validation on the president, which may help him with undecided independents. At the same time, it gives Mitt Romney and GOP congressional candidates a strong rallying point for opposition, which should help to mobilize the conservative base -- which has so far been lukewarm on Romney. It is unfortunate that Romney's record on similar issues as governor of Massachusetts is so far from pristine, but perhaps this give him his opportunity to redeem himself. So in the longer term, today's decision may prove to be pro-growth, provided that it focuses the GOP -- and the electorate -- on removing the regulatory barriers that are currently holding growth back.

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## Bottom line

The Supreme Court's Obamacare decision is an immediate blow to growth. It leaves in place the coming tax on investment income that forms a large part of the year-end "fiscal cliff." It leaves in place a regime of wealth-reducing and efficiency-reducing "forced exchanges," and creates a dangerous rationale for more of them in the future -- apparently anything goes, so long as the enforcement mechanism is framed as a "tax." It creates uncertainty by destabilizing the dynamics of the November elections, creating as yet unresolved risks and opportunities for both sides.



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