The US Supreme Court's ruling on Obamacare illustrates the weak nature of legal limits placed on the exercise of EU powers

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US health care reform has generally been viewed as having only indirect relevance for European countries. **Frank Vibert** *argues, however, that if the legal basis for Obamacare's Supreme Court approval is interpreted as a guide for court rulings on the enumeration of powers, it should be of great concern to Europeans. He concludes that a possible lesson for the EU is that the 'principle of conferral' will not be able to set firm limits on the exercise of EU powers over its member states.*

People on this side of the Atlantic have appeared to watch American battles with health care reform (Obamacare) with a high degree of detachment. It is one of those areas of social policy where European countries seem to be 'ahead' and the US 'behind'. The reality is perhaps a little different. Most systems of health care wrestle with inequitable access, inefficiencies and cost containment. However, leaving aside the health care debate itself, there is one aspect of what has happened in the US that should concern those in the EU. It centres on the constitutional interpretation and judicial review of Obamacare by the US Supreme Court.

The key case to arrive at the US Supreme Court so far concerns the provision in the health care legislation which requires most Americans to maintain 'minimum essential' health insurance coverage. Those who do not comply will have to make a 'shared responsibility payment' to the US revenue service. The case centred on whether the US Federal government had the power under the constitution to make these provisions (the so-called 'individual mandate').

European Court of Justice (Credit: sprklg, CC-BY-SA-3.0)

Under the American system of government the constitutional issue is framed in terms of the enumeration of powers – those powers that are set out in the constitution as belonging to the federal government as compared with those powers reserved to the States. In the case of the EU treaties the analogy is with the principle of conferral. This states that the limits of Union powers (competences) are governed by the principle of conferral under which the Union shall act only within the limits of powers conferred upon it by the Member States. Powers not conferred remain with the Member States.

To its proponents the EU's principle of conferral sets firm limits on what the EU can do. It thus provides an important reassurance against the EU taking over responsibility for all areas of public policy from the Member States. Its critics believe that conferral sets very weak limits. The critics point to the many instances of vague language in definitions of EU competences that make the practical application of the principle very uncertain. They also point to the fact that EU treaties often provide more than one legal basis for the EU to act. If one legal base is challenged then the Commission and other EU institutions can rely on an alternative legal base to justify the EU taking action. The

decision last year by the US Supreme Court on the 'individual mandate' sheds light on this debate.

The judgment of the US Supreme Court on Obamacare reinforced the importance both of language and of an alternative legal base. The US Federal government had relied for its justification of the individual mandate primarily on its power to regulate interstate commerce. The majority of the Court rejected this legal base. However, the same majority found that the federal government could rely on its power to tax (the secondary argument put forward by the federal government).

To observers at the time, this judgment seemed strained because the legislation refers to the responsibility payment as a 'penalty' rather than a 'tax'. The Court engaged in a rather tortuous parsing of the word 'penalty' to show that it really was equivalent to a tax. Importantly, the majority on the Court justified their decision by referring also to the principle of deference.

The principle of deference, loosely stated, is that the Court will be hesitant about overturning legislation approved by Congress unless it has very good reason to do so. In the Obamacare judgment the US Supreme Court cited three precedents on the principle of deference. In the first, dating back to 1883, the Court stated that there was a presumption of constitutionality unless the lack was 'clearly demonstrated'. In the second, dating back to 1895, the Court stated that 'every reasonable construction' must be resorted to in order to save a statute from unconstitutionality. In the third case, from 1932, the Court stated that the test of constitutionality was whether the construction of the statute was 'fairly possible'. In the Obamacare judgment the majority stated that the Court had 'a duty to construe a statute to save it, if fairly possible'.

From a political perspective the judgment of the US Supreme Court was entirely understandable. Healthcare reform has been, and remains, the flagship policy of Obama's Presidency. Its passage was fiercely contested in Congress and efforts to remove federal funding for its implementation remain on the table in Congress in the budget and debt ceiling stand-offs. Implementation is also strongly resisted in some States. If the Supreme Court had struck down a crucial element in the legislation it would have invited a huge political backlash. However, the implications for the EU are not about the politics of health care reform. They are about the principles of judicial review and in particular about the principle of conferral.

The European Court of Justice responsible for the interpretation of EU Treaties is not the US Supreme Court. In developing its own jurisprudence on the EU principle of conferral it need not pay attention to what the Supreme Court does in respect of the American enumeration of powers. In practice the supreme courts of different jurisdictions do look at their peers.

If the ECJ were to look across the Atlantic and adopt the same principle of a 'duty to save' if 'fairly possible' then it is unlikely to reject legislation that has been approved by the European Parliament and Council and that is challenged on the grounds that it runs counter to powers that had been conferred on the Union. It can shelter behind vague language, it can turn to a different legal base, and it can justify any strained interpretation of powers by the principle of deference. In short, if the US Supreme Court judgment on Obamacare offers any guide at all, the principle of conferral appears to provide only the flimsiest of limits on the exercise of EU powers.

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Note: This article gives the views of the author, and not the position of EUROPP – European Politics and Policy, nor of the London School of Economics.

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