



Cradle-to-Grave Regulation Debated at “ObamaCare” Hearing

"And then the question is when you are born, and you don't have insurance. And you will in fact get sick, and you will in fact impose costs, have you perhaps involuntarily — perhaps simply because you are a human being — entered this particular market, which is a market for health care?" Breyer asked attorney Michael Carvin (shown in photo), representing the National Federation of Independent Businesses, which opposes the law.



"If being born is entering the market," Carvin replied, "then I can't think of a more plenary power Congress can have, because that literally means they can regulate every activity from cradle to grave."

The debate over where Congress' regulatory power ends gave rise to questions about a wide range of hypothetical mandates regarding, in no particular order of importance, automobiles, broccoli, and cell phones. Addressing the "grave" aspects of "cradle-to-grave" regulation, Justice Samuel Alito challenged Solicitor General Donald Verrilli, defending the law, to explain why the power to require individuals to buy health insurance might not also be used to require the purchase of burial insurance.

"I don't see the difference," Alito said. "You can get burial insurance. You can get health insurance. Most people are going to need health care. Everybody is going to be buried or cremated at some point. What's the difference?"

"Well, one big difference," Verrilli answered, "is that — you don't have the cost shifting to other market participants."

"Sure you do, because if you don't have the money, the state is going to pay for it," Alito argued. Verrilli said the law was Congress' response to "the many billions of dollars of uncompensated costs (that) are transferred directly to other participants" in the healthcare market. Treating uninsured patients who cannot pay results in higher costs, resulting in higher premiums, "which Congress found translates into a thousand dollars per family in additional health costs," Verrilli said.

Justice Antonin Scalia raised the broccoli argument in response to Verrilli's contention that everyone is in the healthcare market, whether they choose to be or not.

"Could you define the market?" asked Scalia, drawing a parallel between the healthcare market and the supermarket. "Everybody has to buy food sooner or later, so you define the market as food, therefore, everybody is in the market; therefore, you can make people buy broccoli."

"No, that's quite different," the Solicitor General argued. "The food market, while it shares that trait that everybody's in it, it is not a market in which your participation is often unpredictable and often



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involuntary. It is not a market in which you often don't know before you go in what you need, and it is not a market in which, if you go in and — and seek to obtain a product or service, you will get it even if you can't pay for it."

Lawyers for the opposing sides offered the court different guidelines as to which of its precedents should be regarded as binding. Verrilli cited several cases in which the high court rested its decisions on a broad interpretation of the powers of Congress under the commerce clause, including *Wickard v. Filburn*, the 1942 case in which the court upheld a penalty imposed on a farmer for growing surplus wheat for consumption on his own land. The court relied on *Wickard* in *Gonzales v. Raich*, a 2005 ruling upholding a conviction under federal law for the production of homegrown marijuana for personal medicinal use. Carvin and Paul Clement, the attorney representing Florida and 25 other states challenging the Affordable Care Act, relied on the far smaller number of cases in which the court has taken a more limited view of Congress's regulatory power. They cited *United States v. Lopez*, in which the court found Congress exceeded its powers under the commerce clause by establishing "gun-free zones" around schools; and *United States v. Morrison*, a 2000 ruling that the Violence Against Women Act went beyond the power of Congress to regulate commerce among the states. Carvin reminded the court that it rejected the government's arguments in *Morrison* despite the effect domestic violence has on healthcare costs.

"Congress," he said, "found that it increased health care costs by—"

"That it had huge negative effects," Justice Breyer interrupted, "but the majority found that it was a local matter."

"I think that's his point," interjected Scalia, who was part of that majority.

Clement argued that the health insurance mandate goes beyond even the *Wickard* precedent. In that case, he said, Congress was trying to support the price of wheat by limiting supply. "It would have been much more efficient to just make everybody in America buy ten loaves of bread," he argued, just as Congress could have, by the logic of the health insurance mandate, required people to buy automobiles to help the auto industry instead of the 2009 offering of "Cash for Clunkers." Chief Justice John Roberts then reminded Clement of what he called "the key to the government's argument."

"Everybody is in this market, so that makes it different from cars or the other hypotheticals that you came up with, and all they're regulating is how you pay for it," Roberts said. But Clement argued that what the law governs is not the health care, but the health insurance market.

"The whole problem is that everybody is not in that market and they want to make everybody get in that market," Clement said. Justice Elena Kagan challenged that argument, asking Clement if he weren't "cutting the bologna thin? I mean, health insurance exists only for the purpose of financing health care. The two are inextricably linked."

Justice Breyer, who mentioned the possibility that Congress might require people to buy cell phones, noted that pollution from automobiles "travels interstate" and asked Carvin: "Does EPA then have the power to say you've got to have an anti-pollution device?"

"They can't require you to buy a car with an anti-pollution device," Carvin answered. "Once you've entered the market and made a decision, they can regulate the terms and conditions of the car you do (buy) and they can do it for all sorts of reasons. What they can't do is compel you to enter the market."

Scalia and Alito both questioned what the limit to Congress's power might be if Congress can compel



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people to buy health insurance. Alito asked Verrilli to "express your limiting principle as succinctly as you possibly can." Rather than state a general principle, Verrilli said that Congress has the authority to enact a comprehensive response to a national economic crisis and that the court should sustain the mandate as part of that response.

The court is expected to issue its ruling at the end of its term in June in what is expected to be another in a long line of 5-4 decisions by the Roberts Court. The divide appears to be along ideological, and arguably partisan, lines with liberal justices Breyer, Kagan, Ruth Bader Ginsburg and Sonia Sotomayor, all Democratic appointees, supporting the constitutionality of the law and its mandate, and Republican appointees Roberts, Scalia, Alito and Clarence Thomas coming down against it. Reagan appointee Anthony Kennedy, often a swing vote on the court, Tuesday seemed skeptical about the law. Kennedy noted that in previous cases the court has upheld laws that prevented people from acting in ways that would cause harm. The Affordable Care Act, he noted, compels an affirmative act by requiring individuals to purchase insurance.

"The government is saying that the federal government has a duty to tell the individual citizen that it must act," Kennedy said. "And that is different from what we have in previous cases, and that changes the relationship of the federal government to the individual in the very fundamental way."

The questions and hypothetical cases multiplied at such a rate during the hearing that it was sometimes difficult for the justices themselves to follow at length their own lines of questioning. At one point, Justice Breyer paused in his questioning to direct attorney Carvin back to a previous question by Kagan.

"You can go back to, go back to Justice Kagan," Breyer said. "Don't forget her question."

"I've forgotten my question," Kagan confessed, bringing a brief interval of laughter into the courtroom during the two hours of intense questioning.

"I — I was facing the same dilemma Justice Kagan," Carvin replied.

Photo of Michael Carvin: AP Images



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