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Judicial activists in the Supreme Court

By [E.J. Dionne Jr.](#),

Three days of Supreme Court [arguments over the health-care law](#) demonstrated for all to see that conservative justices are prepared to act as an alternative legislature, diving deeply into policy details as if they were members of the Senate Health, Education, Labor and Pensions Committee.

Senator, excuse me, Justice Samuel Alito [quoted Congressional Budget Office figures](#) on Tuesday to talk about the insurance costs of the young. On Wednesday, Chief Justice John Roberts sounded like the House whip in discussing whether parts of the law could stand if other parts fell. He noted that without various provisions, Congress “wouldn’t have been able to put together, cobble together, the votes to get it through.” Tell me again, was this a courtroom or a lobbyist’s office?

It fell to the court’s liberals — the so-called “judicial activists,” remember? — to remind their conservative brethren that legislative power is supposed to rest in our government’s elected branches.

Justice Stephen Breyer noted that some of the issues raised by opponents of the law were about “the merits of the bill,” a proper concern of Congress, not the courts. And in arguing for restraint, Justice Sonia Sotomayor asked what was wrong with leaving as much discretion as possible “in the hands of the people who should be fixing this, not us.” It was nice to be reminded that we’re a democracy, not a judicial dictatorship.

The conservative justices were obsessed with weird hypotheticals. If the federal government could make you buy health insurance, might it require you to buy broccoli, health club memberships, cellphones, burial services and cars? All of which have nothing to do with an uninsured person getting expensive treatment that others — often taxpayers — have to pay for.

Liberals should learn from this display that there is no point in catering to today’s hard-line conservatives. The individual mandate was a conservative idea that President Obama adopted to preserve the private market in health insurance rather than move toward a government-financed, single-payer system. What he got back from conservatives was not

gratitude but charges of socialism — for adopting their own proposal.

The irony is that if the court's conservatives overthrow the mandate, they will hasten the arrival of a more government-heavy system. Justice Anthony Kennedy even hinted that it might be more "honest" if government simply used "the tax power to raise revenue and to just have a national health service, single-payer." Remember those words.

One of the most astonishing arguments came from Roberts, who spoke with alarm that people would be required to purchase coverage for issues they might never confront. He specifically cited "pediatric services" and "maternity services."

Well, yes, men pay to cover maternity services while women pay for treating prostate problems. It's called health insurance. Would it be better to segregate the insurance market along gender lines?

The court's right-wing justices seemed to forget that the best argument for the individual mandate was made in 1989 by a respected conservative, [the Heritage Foundation's Stuart Butler](#).

"If a man is struck down by a heart attack in the street," Butler said, "Americans will care for him whether or not he has insurance. If we find that he has spent his money on other things rather than insurance, we may be angry but we will not deny him services — even if that means more prudent citizens end up paying the tab. A mandate on individuals recognizes this implicit contract."

Justice Antonin Scalia seemed to reject the sense of solidarity that Butler embraced. When Solicitor General Donald Verrilli explained that "we've obligated ourselves so that people get health care," Scalia replied coolly: "Well, don't obligate yourself to that." Does this mean letting Butler's uninsured guy die?

Slate's [Dahlia Lithwick called attention to this exchange](#) and was eloquent in describing its meaning. "This case isn't so much about freedom from government-mandated broccoli or gyms," Lithwick wrote. "It's about freedom from our obligations to one another . . . the freedom to ignore the injured" and to "walk away from those in peril."

This is what conservative justices will do if they strike down or cripple the health-care law. And a court that gave us *Bush v. Gore* and *Citizens United* will prove conclusively that it sees no limits on its power, no need to defer to those elected to make our laws. A Supreme Court that is supposed to give us justice will instead deliver ideology.

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