

# Health care reform should survive legal challenges

**By Frank Askin/ Star-Ledger Guest Columnist**

Right-wing opponents of health care reform seem to have come to the unfounded conclusion that the new legislation violates not only their own policy preferences, but the United States Constitution as well. Indeed, Republican attorneys general across the country seem to have discovered a cottage industry in such litigation. I suggest they are not only grasping at straws, but also wasting taxpayer money that could be better spent on health care.

While I cannot guarantee that the partisan, conservative majority of the U.S. Supreme Court will not come up with some new theory to vindicate their right-wing brethren, there is little in constitutional law or history to support such an outcome. Indeed, these efforts closely resemble the failed attempts of Southern politicians to nullify anti-discrimination laws in the 1950s, which ran asunder of the supremacy clause of the federal Constitution.

There appear to be two constitutional challenges being raised.

One attacks individual mandates that require the uninsured to purchase insurance policies or pay a tax if they fail to do so.

It is not at all clear how the states or the attorneys general have standing to bring such a challenge since the provision has no impact on the states themselves. Moreover, the authority of Congress to adopt such legislation under the commerce clause of the Constitution seems unassailable.

The impact on the national economy of the uninsured who become ill or are injured in serious accidents is well documented. Can they really insist on a free-ride from the taxpayers when they wind up in the emergency room? The Supreme Court has even upheld the power of Congress under the commerce clause to forbid doctors from performing certain kinds of abortions, and has upheld legislation making it a federal crime for individuals to grow marijuana plants on their window sills for home medicinal use.

Does any one really believe it is unconstitutional to require automobile drivers to buy auto insurance? People may be able to opt out of that system by deciding never to drive a motor vehicle, but can any one opt out of the health care system when they become ill or incapacitated?

Should the younger members of the population have a right to opt out of paying Social Security and Medicare taxes from which they will not see any benefit for many years — if ever, should they die prematurely?

Challengers point to two fairly recent Supreme Court opinions that struck down legislation as not authorized by the commerce clause — one involving the possession of a handgun within a school zone. The court noted in both cases that Congress was attempting to regulate noneconomic activity.

But when it comes to insurance regulation, the court has held: "Perhaps no modern commercial enterprise affects so many persons in all walks of life as does the insurance business."

Given Congress' judgment that mandatory health insurance is essential for making effective the scheme of health care reform established by the bill, there can be little serious question that the individual mandate is necessary and appropriate to the ends promoted by the legislation.

The opponents of the bill also complain that the federal government is imposing unjustified financial burdens on the states by requiring them to pay some portion of extra Medicaid costs.

The Supreme Court has long upheld programs under the Constitution's spending clause requiring states that accept federal program funds to comply with federal requirements under those programs. In any event, states can simply opt out of Medicaid if they choose not to participate — but, of course, by so doing they would deprive their residents of the millions of federal dollars to cover their residents who would otherwise wind up being treated by local providers without compensation.

These lawsuits seem to be a Republican Hail Mary pass in the desperate hope that the conservative Supreme Court majority will rescue them as it did the **George W. Bush** campaign in 2000 in *Bush vs. Gore*.

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