



FACT SHEET

South Carolina Policy Council

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Five Things You Need to Know About the S.C. Freedom of Choice in Health Care Act

As legislators consider several measures ([S 987](#), [S 980](#), [H 4240](#), [H 4181](#), [H 4767](#)) that would protect the rights of South Carolinians to sell and purchase health care services, it's important to sort through fact and fiction regarding the S.C. Freedom of Choice in Health Care Act. The act in its various forms protects the right to purchase health care, apart from a federal health insurance mandate – that is, it safeguards the right not to purchase health insurance. The act also protects against attempts to impose one form of coverage over another.

Here are five things you need to know about protecting health care choice:

- 1) **This is about the Constitution.** The S.C. Freedom of Choice in Health Care Act is not really about health care as much as it is about defending the Constitution. People generally agree that health care is broken; but they disagree over the fixes – for instance, whether free market reform will fix health care or whether more government intervention is the answer. But everyone should agree that whatever plan becomes law, that plan has to be constitutional. The problem is that provisions of the new federal legislation are arguably unconstitutional because they seem to violate the Commerce Clause, as well as the 10th and 14th Amendments. If this were an automotive stimulus package that required every American to buy a car (as opposed to health insurance) the constitutional concerns would be similar. The fact that it's about health care only makes it all the more important that we get the constitutional questions right.
- 2) **This proposal does not nullify the federal health care act.** The S.C. Freedom of Choice in Health Care Act does not overturn the [bill recently signed](#) by President Obama. Rather, it challenges those provisions of the law that are arguably unconstitutional – the health insurance coverage mandate and related restrictions on the sale and purchase of health services. To the extent that the rest of the federal legislation is separable from the mandate, the law would likely remain in effect. Moreover, objections that this proposed state reform would be trumped by the federal Supremacy Clause are unfounded. As affirmed recently by the Supreme Court in [Gonzales v. Oregon](#) (2006), state law may go above and beyond federal law in protecting constitutional rights, especially as related to health care choices.
- 3) **Health insurance is not the only way to obtain health care.** It might seem that a law requiring everyone to purchase health insurance is a no-brainer. After all, everyone gets sick at some point and inevitably needs health care. But health insurance is not the same as health care. In fact, many people choose not to purchase health insurance and so presumably obtain their health care via direct transactions with their doctor and hospital. According to a [study by former Congressional Budget Office \(CBO\) director June O'Neill](#), “43 percent of the uninsured have incomes higher than 250 percent of the poverty level (\$55,125 for a family of

four). And slightly more than a third have incomes in excess of \$66,000.” These people don’t have health insurance, but they can (until the federal mandate goes into effect) still pay out-of-pocket for health care. The S.C. Freedom of Choice in Health Care Act would guarantee their right to continue to do so in South Carolina.

- 4) **A health insurance mandate is not the same as an automotive insurance mandate.** Note this caution from [the Congressional Budget Office](#):

A mandate requiring all individuals to purchase health insurance would be an unprecedented form of federal action. The government has never required people to buy any good or service as a condition of lawful residence in the United States. An individual mandate would have two features that, in combination, would make it unique. First, it would impose a duty on individuals as members of society. Second, it would require people to purchase a specific service that would be heavily regulated by the federal government.

The CBO’s warning indicates that a health insurance mandate is utterly unique and, as far as the Constitution goes, [radically different](#) from an auto insurance mandate. Why?

- Owing an automobile is a choice – a choice many people don’t exercise (think: New York City). Some of these people use public transportation, but many others also hire taxis or bike or walk.
 - This is a federal mandate. Auto insurance is a state mandate (exercised as part of each state’s police power).
 - Auto insurance exists to protect other drivers. Health insurance exists to protect the individual who purchases it. Likewise, not all passengers in a car are required to have auto insurance.
 - Auto insurance mandates only apply to those who drive on public roads, not private property. To this we might add that the government is constitutionally charged with providing public roadways. No such constitutional provision exists regarding health care.
- 5) **This is a big deal.** As session nears an end, some lawmakers are complaining that they just don’t have time to look at what seems to be another arcane constitutional question. But this is not just another debate going nowhere. Two states have already passed the Freedom of Choice in Health Care Act and 30 more legislatures are considering it. More important, one of the primary functions of state government is to serve as a check on federal power grabs. In the end, nothing should be more important to our lawmakers than defending the constitutional rights of their constituents. In short, this is the most important issue of the 2010 session.

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