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States Are the Key to Both Strengthening and Replacing the Affordable Care Act

Stuart M. Butler, PhD

The prevailing view among health policy experts seems to be that today’s political polarization means years of trench warfare are ahead for the Affordable Care Act (ACA). According to this gloomy view, a messy stalemate is assured for years to come.

I’m not so sure. I believe the states can and will become the vehicle—both politically and technically—for an era of progress in which each political side can genuinely declare victory.

For its part, the Obama Administration has been granting waivers from regulations to encourage resistant conservative and Republican states to adopt some variation of Medicaid expansion and other features of the ACA. States like Arkansas, Indiana, Ohio, and Pennsylvania are among those at various stages of using or negotiating such waivers. A recent report on ACA implementation in the South indicates that several states opposing the ACA emphasize practical issues rather than ideological opposition. Moreover, by being open to a “private option” for Medicaid coverage, or new forms of health exchange, even states like Texas might embrace versions of some of the ACA’s core coverage objectives if granted adequate waivers.

Still, the way to think about a waiver process is not as merely a tool to bring a few more states on board the ACA. Rather, it should be seen as central to a vision of how future health reform might evolve. This vision starts with agreement on basic goals and values—many of which are actually shared by both proponents and opponents of the ACA. It then allows states much greater flexibility in pursuing those goals, either within the architecture of the ACA or outside it.

What does this look like, operationally? At a minimum it looks like a continuation of today’s limited waivers for states. The current approach is likely to induce some more Republican states to line up behind some features of the ACA, such as Medicaid expansion. And it will serve as a safety valve for those Democratic states that are unhappy with certain features of the law.

However, beginning in 2017, a less talked-about provision of the ACA takes effect that could be the game changer, coincidental with the inauguration of a new president. Section 1332, the “Waivers for State Innovation” takes effect. Added to the ACA due to the efforts of Sen Ron Wyden (D, Ore), the section allows states to request sweeping changes to the ACA’s standard provisions, including exemptions from the essential benefits package and other benefit details, from the requirement to have an exchange, from the individual and employer insurance mandate, and from other central elements of current law. To have a chance of getting that waiver, however, the state must propose a plausible plan to achieve at least the same level and quality of coverage as the ACA at no net increase in cost to the federal government.

In effect, this provision of the ACA means that if a state can reach the goals of the ACA by replacing (without Congress technically repealing) major parts of the ACA, then it can get a green light to go ahead. The provision allows states to include in the waiver mixing bowl elements of the Children’s Health Insurance Program (CHIP) and even Medicare, as well as “any other Federal law relating to the provision of health care items or services.” The scope is breathtaking. Little wonder John McDonough, DrPH, MPA, of the Harvard School of Public Health and a former top health advisor to Sen Edward Kennedy (D, Mass) and the Senate health committee, describes section 1332 as unleashing “state innovation on steroids.”

Vermont sees this provision as a path to a single-payer system, and is actively planning for a 1332 waiver. But as McDonough and others point out, section 1332 would also allow other states to pursue a wide range of options favored by conservative Democratic states and Republican states that are unhappy with the ACA.

So there is likely to be an increasing focus on preparing for section 1332 during the next 2 years, and a stronger emphasis after the 2016 election. For one thing, there could be bipartisan legislative moves to allow section 1332 to take effect earlier and let states avoid the ACA’s unpopular mandates. A bipartisan effort to do that during the passage of the ACA failed but was endorsed by President Obama. Expect another push in the next Congress.