Professor Chandler’s op-ed piece in today’s Houston Chronicle discusses a bill that would let states opt out from much of the health care reform law.

**Health reform plan flawed but has potential benefits - Letting states opt out invites experimentation**

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Nevermind.” That's how some have rephrased President Obama's statement of support this week for a bill that would let states opt out as early as 2014 from much of the health care reform law. Some see it as Obama's confession that the health care reform he pushed through in 2010 was deeply flawed. The right wing sees it as a concession that the reform is a deficit-increasing job killer. The left sees it as a capitulation moving us further from a single-payer system. And some see it as a cheap hedge against the constitutional risks created by an unamended bill: Can Congress really be said to be trampling on states’ rights when states can just opt out of the law?

None of this is correct. The core idea behind the legislation introduced by politicians ranging from the far left (Bernie Sanders, socialist/independent, Vermont) to the mid-right, (Scott Brown, Republican, Massachusetts), is actually a pretty good one. And although it perturbs the constitutional calculus, the amendment does not eliminate the constitutional issue.

The key point of the proposed legislation, which would let states opt out just as the reform bill hits its stride, is that it gives a federal executive official, the secretary of Health and Human Services, discretion whether to let states, their citizens and their businesses escape many of the new taxes, assessments and subsidies created by the current reform. That discretion is likely, however, to be raw politics masquerading as an educated guess. The secretary isn't supposed to grant a waiver unless the state can show that its proposal will increase access to health care as much as the federal proposal. Although possibly by 2017 — the time the existing bill lets states opt out — there might be evidence on which such computations could be based, in 2014, before a health-insurance exchange ever opens, no one will know how much the federal plan will increase access or how much the state alternative will increase access. The secretary who grants a waiver is also supposed to somehow calculate and rebate back to the states a bundle of cash equal to the amount of benefits the states, citizens and businesses would have received from the federal government if only they had stayed in. The secretary also won't have a clue how much precious federal money to rebate.

The Pre-existing Condition Insurance Plan already in effect under health care reform illustrates the problem. This plan lets sick people get heavily subsidized government insurance. The best models — the foundation for all those budget projections — heralded that this plan would cut the number of uninsured by 375,000 by the end of 2010. At last count, 12,000 had enrolled. Turns out, the uninsured may be more willing to scrounge for health care than the smartest people in the room had thought, even when insurance is relatively cheap. So how many people will enroll in the exchange-based plans in 2014 and beyond is anyone's guess. It depends on too many
interacting factors and unknowable events. Predictions of how many will benefit from these newly concocted state-based alternatives are likely to lie even more in the realm of palmistry.

So the states will have to beg the executive branch of the federal government for a waiver, and the standards for obtaining such a waiver will be high. Cynics might say they require states to replicate or exacerbate the flaws in the highly regulatory, stunningly complex federal approach. And, in the end, the states will still be forced to tailor their alternatives to the legislative and administrative commands of the federal government or to surrender the alleged rights of their citizens to be free from regulation of inactivity under the theory that it is interstate commerce. As a result, if there are any constitutional deficiencies with the existing law, they are unlikely to be cured by any opt-out with teeth.

There is, however, great promise in the idea of letting states experiment while setting up some federal carrots for them to be more adventuresome in the field than they had been before 2010. Moreover, the fiscal risks created by giant, monolithic federal health care reform are likely to be diversified if more states get to adopt their own plans. With collaboration and civility, we might be able to develop friendlier waiver standards that take effect before states, citizens and their businesses undertake the giant ramp-up for the current federal plan. Doing so would let us determine sooner and with greater safety whether the left, the right or neither is correct about the differing paths of health care reform.

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