

From:

To: Interested members of the media

Re: Attempts to politicize Senator Wyden's state innovation waiver

Summary

Despite new attempts by pundits to paint Senator Wyden's promotion of his state waiver in national health care reform bill as a recent phenomenon, the factual record clearly shows that Wyden has consistently promoted the importance of letting states innovate throughout the national health care debate.

As the catalog of national and Oregon media coverage below demonstrates, Wyden has highlighted his state waiver proposal – both in his own Healthy Americans Act and throughout the Congressional health care debate. He was particularly vocal during the period where right-wing attorneys general were announcing plans to sue the federal government, challenging them to be constructive partners in the reform process – instead of bogging their states down in costly, counterproductive litigation.

Far from an election conversion, Senator Wyden's recent letter to Oregon Director of Human Services Bruce Goldberg reflects his ongoing commitment to provide Oregonians with a new, innovative state health program that can best meet the needs of the state.

Timeline

July 8, 2009 – Senator Wyden highlights the innovation waiver included in his own Healthy Americans Act as a solution to those proposing a public option in an interview with Portland's *Willamette Week*.

September 27 to October 7, 2009 – Wyden discussed the waiver extensively during the Senate Finance Committee markup. His success is highlighted by the New York Times.Com, The *New Republic's* blog, *Slate* magazine and even a trade publication story entitled "States May Avoid Individual Mandate."

December 22, 2009 – Wyden discusses the state waiver provision in an interview with Portland radio station KPOJ.

December 24, 2009 – The inclusion of Wyden’s wavier is highlighted in coverage of the final Senate bill in Bend, Oregon’s *The Bulletin*.

March 24 – 26, 2010 – As the Congress completes final passage of health care reform and right wing attorneys general announce plans to sue the federal government over the measure, Wyden repeatedly discusses his waiver as an alternative to lawsuits over the bill’s individual mandate. It is covered by *Huffington Post* in a story that receives over 1,600 online comments; is noted on the Oregon blog BlueOregon; is questioned by right-wing site The New Ledger and left-wing site FireDogLake; and is the subject of published stories in both *The Oregonian* and Bend’s *The Bulletin*. Wyden even appears on MSNBC’s “The Ed Show,” telling viewers, “I say to these attorneys general ‘Why don’t you work with us to innovate rather than litigate?’”

April 1, 2010 – Wyden’s work with Oregon state senator Alan Bates to pursue a wavier for Oregon to develop its own health reform model is the subject of stories in Medford’s *Mail Tribune* and the statewide radio network of Oregon Public Broadcasting. The waiver is also again highlighted in *Slate* magazine.

April 10, 2010 – Idaho Democratic gubernatorial candidate Keith Allred endorses the state pursuing the state wavier created by Wyden as an effective alternative to litigation.

May 2010 – Senator Wyden highlights the waiver provisions and the need to accelerate them in his primary election candidate surveys published on the *Oregonian* and *Salem Statesman Journal* websites.

July 12, 2010 – Wyden discusses the wavier provision in an interview with Bend radio and his work with state legislators on the matter.

August 25, 2010 – Progressive Portland Democrat Michael Dembrow announces his plans to use the state waiver option for pursuing a single payer proposal during the next Oregon legislative session, sparked by a Wyden letter to state officials.

Willamette Week, July 8, 2009

Ron Wyden: Oregon's senior senator defends his health plan from hits by unions, Obama and other Democrats, Hank Stern & Mark Zusman

[Excerpt]

Are you open to a public option?

I'm open to looking at anything that contains costs and particularly changes the incentives that drive everybody's behavior. The law for selling private health insurance in America today is inhumane. It's about taking healthy people and sending sick people to government programs more fragile than they are. And we outlawed that. There will be no more cherry-picking—you have to take all comers, you can't discriminate against people with preexisting illnesses.... The Congressional Budget Office has scored one bill as budget-neutral, and that's ours. That's because we changed the incentives that drive the system. Eighty-five percent of the businesses that offer coverage give people no choice. So we give people choices, and we give them financial incentives to shop for health care. The law we have has everybody getting choices and coverage like members of Congress. Having said what I think is the best model, the argument for the public option is that the insurance companies are doing outrageous things and the only thing that will work is to have this public option. I and others think there are additional models: the Congresspersons-type package; Germany, for example, has very good care for less money. They don't have a public option, so there are a variety of ways to go about doing it. The other part of this story is, I've got conservative Republicans on a universal coverage bill, hard-nosed insurance reforms with the most generous subsidies, up to 400 percent of poverty [level], and guaranteed lifetime portability. I think that's pretty progressive.

I realize this is hard for a Democratic senator to say, but isn't it your belief that the public option is unnecessary to accomplish your goal?

The Healthy Americans Act has several public options. We say that if in that area, private plans don't exist, you can have a public option. We say that states can also get a waiver to offer a public option.

New York Times.Com, September 27, 2010
Premiums, Penalties and Political Costs

[Excerpt]

Senator Ron Wyden, Democrat of Oregon, has proposed an amendment that would let states drop the individual mandate if they can get enough people to sign up for insurance without it. "Individual mandate has always been one of the most contentious aspects of health reform," Mr. Wyden said.

Senate Finance Committee Markup Hearing, September 29, 2009

WYDEN: Thank -- thank you, Mr. Chairman. I -- I was out of the room and may have missed a part of this, but what I think I'd like counsel to do is to compare the Grassley amendment with the amendment that is now in the mark that I authored and Senator Grassley, let me give you my sense of what we were trying to do and then we'll see what in addition to what's in the mark you're trying to do.

What I sought to do in my state waiver amendment is to give the states the maximum flexibility in terms of trying to meet the coverage requirements in the law. And I think it was relevant a couple of days ago. If anything it's more relevant given the reports in the last couple of days that states, for example, are trying to get out from under the individual mandate.

Now, counsel, as I understood your response to my earlier questions, you believe that under what's in the mark now it would be possible for a state to go about a variety of different approaches including not having an individual mandate if they complied with the coverage requirements in our proposal. Is that correct?

FONTENOT: That's correct.

BAUCUS: Senator, could you speak up? I have a hard time hearing you.

WYDEN: OK.

FONTENOT: That's correct. The -- it -- the -- what is currently contained in the modification of the mark would allow a state to waive the personal responsibility requirement and use some other mechanism, but would require them to obtain the same level of coverage.

And I believe what Senator Grassley's modification is doing is to strike that requirement that they achieve the same level of coverage.

WYDEN: So is that working now, Mr. Chairman? I can't tell.

BAUCUS: Well, I don't think your microphone works.

WYDEN: OK. All right. Here we go.

So counsel, what I think you have said is that instead of being required to meet the general coverage requirements in the proposal, this would essentially waive that and if that's the case what would replace what we have in the bill?

FONTENOT: There -- there would be no required level of coverage that the states would have to obtain.

WYDEN: So there would be no required coverage. What would the states use the

money for?

FONTENOT: Well, I believe what Senator Grassley's proposing is that anyone who's income eligible and obtains coverage under the state's new mechanism would still be able to get the tax credit, but that the state wouldn't have to achieve any particular level of coverage.

WYDEN: OK. I -- I would just like to say to my friend from -- from Iowa, because he and I have worked often on this, I will continue to work with you on it because I think the general objective of giving the states the maximum amount of flexibility to meet the coverage requirements in this proposal is a sensible idea.

And I'm prepared to let the states have that kind of running room, including the freedom to get out from under the individual mandate. But if counsel has told us that a state wouldn't have to meet any requirements for coverage at all, I think that is just more than this -- this senator could accept. But I want the senator from Iowa to know that I'm going to continue to work with him.

I think the senator from Iowa and I agree that clearly, the most contentious part of this debate is the individual mandate. We ought to stay at it until this issue is addressed and -- and in my view addressed in a bipartisan way, but to do this in a fashion that would have no requirement with respect to coverage at all is a bit too far.

Mr. Chairman, thank you.

The New Republic Blog, October 1, 2009
Can States Do the Public Option?, *Jonathan Cohn*

The latest wrinkle in the public option debate (via [Politico](#) initially) is a proposal that comes from Senator Tom Carper, the Delaware Democrat that sits on the Finance committee. According to the proposal's latest draft, which Carper's staff is circulating but--I'm told--Carper himself is not really hawking yet, the idea is to let states set up their own alternative coverage options. Those options include starting a non-profit co-operative, opening up the benefits plan for state employees, or, yes, starting a real public plan.

There's no trigger, at least in the document I've seen. All it would take would be action by a state legislature, signed by that state's governor. And states would be free to join with other states and create joint plans.

But there would be various restrictions: A state couldn't create a public plan that tied reimbursements to federal Medicare rates (even with a higher percentage added on) and they couldn't compel providers to participate. In these respects, states would be free to create relatively weak public plans--like the compromise measure Senator Charles Schumer has proposed--but not relatively strong ones--like the version Senator Jay Rockefeller has put forward.

One interesting question is whether the proposal is already redundant, thanks to an amendment that another member of the Finance committee, Ron Wyden, introduced that Chairman Max Baucus accepted before the hearings even began. It's Wyden amendment C8, which appears on [page two of the modified bill Baucus introduced formally for markup](#):

Amend Title I, Subtitle A to allow a State to be granted a waiver if the state applies to the Secretary to provide health care coverage that is at least as comprehensive as required under the Chairman's Mark. States may seek a waiver through a process similar to Medicaid and CHIP. If the State submits a waiver to the Secretary, the Secretary must respond no later than 180 days and if the Secretary refuses to grant a waiver, the Secretary must notify the State and Congress about why the waiver was not granted. – Insert at the end of b)(1) –and with citizen input through a referenda or similar means;|| – In b)(2) strike –all and insert –this|| – Insert b)(4) –the State submits a ten-year budget for the plan that is budget neutral to the Federal government.|| – Insert at the beginning of c)(2) GRANTING OF WAIVER.— The Secretary shall approve the plan only if it meets criteria consistent with that of the America's Healthy Future Act, including that it shall lower health care spending growth, improve the delivery system performance, provide affordable choices for all its citizens, expand protections against excessive out-of-pocket spending, provides coverage to the same number of uninsured and not increase the Federal deficit.

What does the gobbledegook mean? Wyden's staff says it's designed to encourage state experimentation. I haven't yet gotten an official reading from Finance Committee staff on their interpretation.

But my own reading, which I've run by a few analysts, is that it gives states the ability to implement coverage schemes that bolster coverage, control costs, and improve quality at least as well--and hopefully better than--the Senate Finance bill. That would include creating a public option. (You could even read it to allow a state-based single-payer plan.) So it's the Carper amendment, but without the restrictions.

The catch is that the secretary of HHS would be the arbiter of whether state proposals met those criteria. Liberals I consulted said the proposal worried them because it'd open the door to scaling back existing programs that serve the poor. In other words, imagine what happens in 2022, when the governor of Idaho petitions the federal government for permission to gut Medicaid--and President Sarah Palin tells her HHS Secretary to give the go-ahead.

Another problem that the Carper and Wyden proposals seem to share is that they envision many different state plans. A public plan works better, maybe a lot better, if it's national scale.

Still, it's an interesting idea--and interesting to see Wyden behind it. Public option proponents have been among those attacking Wyden in the last few months, because his Healthy Americans Act doesn't include a public option. But he always indicated he was not opposed to the idea. And when the idea came up for an actual vote this week, he voted with the majority of Democrats, in favor of not just Schumer's but also Rockefeller's strong version, as well.

Inside CMS, October 1, 2009 States May Avoid Individual Mandate

A GOP amendment to give states added flexibility on health reforms was voted down Sept. 29 after its sponsor, Sen. Charles Grassley (R-IA), apparently disagreed that the underlying mark went far enough on the issue.

Sen. Ron Wyden (D-WA) explained earlier during the markup that changes to the modified bill already allow states to avoid an individual mandate if they meet the bill's requirements to control costs and reform the delivery system. That state flexibility language is based on an amendment by Wyden that was melded into the chairman's revised mark.

Grassley's proposal would have gone much further: It would have given states a share of tax credits proportional to the improved level of coverage they attain but without setting minimum standards they must meet in order to opt out; Grassley would have merely given states "the option of pursuing alternative mechanisms to encourage the purchase of health insurance."

Wyden said that if a state can meet the requirements of the bill to lower health care spending growth, provide choices for all their people and reform the delivery system "they can do it without an individual mandate." Committee staff confirmed that is the case.

"If a state can meet the coverage requirements of the amended bill, it can essentially do whatever it wants with its waiver," Wyden told Inside Health Policy. -- Brett Coughlin and Julian Pecquet

Slate Magazine, October 7, 2009
Public Option Lite, Timothy Noah

[Excerpt]

The other new POL proposal seems a little more straightforward, though one can't know for sure because Carper has yet to go public. According to Carrie Budoff Brown in Politico, Carper would leave the decision about whether to create a public option to the states. Conrad, who voted against two versions of the public option in the finance committee, calls the Carper plan a "very constructive option," and Sen. Ben Nelson, D-Neb., who also opposes the public option, says he's warming to the idea. One drawback, noted by the New Republic's Jonathan Cohn, who has seen a rough outline of the plan, is that Carper would not permit states to set payments at Medicare rates. Then again, neither could Schumer's public option plan, and Rockefeller's (superior) version could do so only for two years. It isn't clear that Carper would allow states to band together to increase their market leverage, as Cantwell would. If the Carper plan did allow it, would Conrad and Nelson remain interested? Without the potential to scale up beyond state lines, state public options might not do a great job keeping costs down.

Cohn also notes that the Carper amendment may not achieve anything that Sen. Ron Wyden, D-Ore., didn't already achieve when he got finance committee chair Max Baucus to tuck into his chairman's mark a provision granting states a waiver to extend coverage and realize savings however they want, provided they meet the same benchmark predicted for the health insurance exchanges. That might make Cantwell's amendment superfluous, too. But Wyden's provision requires a waiver from the Health and Human Services secretary. The Cantwell and Carper proposals don't.

The Bulletin (Bend), December 24, 2009
Oregon senators' amendments in the health care bill, Keith Chu

[Excerpt]

Democratic Sen. Ron Wyden also had several provisions included in the bill:

- A limited version of his Free Choice proposal, which lets workers who spend between 8 and 9.8 percent of their earnings on insurance premiums use their employers' contribution toward their insurance to buy their own policy through an exchange.
- Higher Medicare Advantage payments for states, like Oregon, with high-quality private Medicare plans.
- Waiving the individual insurance mandate for innovative states. States that develop their own ways to meet federal coverage requirements can apply for a **waiver** of the requirement.
- Creating a test program that would let people in hospice programs receive coverage for other medical treatments through Medicare. Currently, Medicare pays for hospice services, but not other treatment after a patient enters hospice care.

KPOJ Radio (Portland), December 22, 2009
Interview with Morning Program

[Excerpt]

HOST: Good. We sure need it. Senator, last time I think I talked to you it was after the Senate Finance Committee reported out its bill and you said you wanted to make it better. And how is it better, if at all, between what was reported out of the Senate Finance Committee and what now is on the floor?

WYDEN: Well, first of all, let's talk about some features as it relates to our state and then we can talk about the bigger picture. First, we were able to get extra funds for good Medicare Advantage plans. Now, this is something that helps Oregon, but it also helps the rest of the country. As you know, Oregon has long been under-reimbursed for Medicare. We have been penalized for doing a good job. When you give good quality, but you don't pour on unnecessary services, the government turns around and slaps you with lower reimbursements. So Medicare Advantage has been particularly important. We were able to get extra dollars in the bill for good Medicare Advantage plans. That helps Oregon and it helps the entire country.

The second area that we were able to get included is a broad waiver provision so that Oregon and any other state in the country that wants to say, look, we can meet the requirements of this legislation, but we don't want some one-size-fits-all approach [indistinguishable] policy can go off and do its own thing. And suffice it to say, I think folks who are going to be running for governor are going to talk a lot about this. Because I think they're going to say, you know, let's try to figure out a way as we've done so often in Oregon, to lead the country in innovative approaches in the health care area and they're going to use my waiver.

Finally, we were able to get a provision that is the heart of the Healthy Americans Act. For listeners, it's 1108 of the legislation. It provides for free choice vouchers. What this means is that middle class folks who are paying more than eight percent of their income on health care, that are not eligible for subsidies, could get one of these vouchers and push back against the insurance companies. The biggest concern I have with this bill is there's not enough choice and not enough competition as it's currently written. I was, as you know, for the robust public option. I voted for it in the Senate Finance Committee because I think we've got to have the day when consumers can give an ultimatum to insurance companies: treat us right or we're taking our business somewhere else. With free choice vouchers, we take another step towards being able to hold insurance companies accountable. I'm going to be fighting to do more in the conference committee which will be upcoming between the House and the Senate.

Huffington Post, First Posted: 03-24-10 | Updated: 05-24-10

Wyden: Health Care Lawsuits Moot, States Can Opt Out Of Mandate, Sam Stein

Sen. Ron Wyden (D-Ore.) has a message for all the attorneys general and Republican lawmakers who are threatening lawsuits and claiming that an individual mandate for insurance coverage is unconstitutional: You don't have to abide by it -- just set up your own plan.

The Oregon Democrat isn't inviting opponents to defy the newly-enacted health care law. Instead, he's pointing out a provision in the bill that makes moot the argument over the legality of the individual mandate.

Speaking to the Huffington Post on Tuesday, Wyden discussed -- for one of the first times in public -- legislative language he authored which "allows a state to go out and do its own bill, including having no individual mandate."

It's called the "Empowering States to be Innovative" amendment. And it would, quite literally, give states the right to set up their own health care system -- with or without an individual mandate or, for that matter, with or without a public option -- provided that, as Wyden puts it, "they can meet the coverage requirements of the bill." "Why don't you use the waiver provision to let you go set up your own plan?" the senator asked those who threaten health-care-related lawsuits. "Why would you just say you are going to sue everybody, when this bill gives you the authority and the legal counsel is on record as saying you can do it without an individual mandate?"

The provision actually was taken directly from Wyden's Healthy Americans Act -- the far-more innovative health care reform legislation he authored with Republican co-sponsors. In that bill there is also an individual mandate that would require Americans to purchase insurance coverage. But states that found the mandate objectionable could simply create and insert a new system in its place. All it would require is applying for a waiver from the Department of Health and Human Services, which has a 180-day window to confirm or deny such a waiver.

That language has been inserted, almost verbatim, into the bill Obama signed into law on Tuesday. And if there is any confusion about how much leverage it gives states to drop the mandate, Wyden cleared it up months ago during a hearing at the Senate Finance Committee.

"So let us review how the waiver language works now, because my reading of what we have in the bill now is, if a state can demonstrate that they can meet the criteria -- particularly on cost containment, improving the delivery system -- they can do it without an individual mandate," the senator said at the time. "And can I ask counsel, is that a correct reading of the Waiver Amendment that I offered the chairman has

accepted at this point?"

The counsel replied: "Yes."

"The individual mandate has always been one of the most contentious aspects of health reform. I think every United States Senator believes that citizens should show some personal responsibility. That's something that is widely accepted. Unfortunately, an individual mandate can mean something different, and that's why the issue has been so contentious," Wyden said. "But counsel has now indicated -- and it was in line with what I thought we had drafted -- if you can meet the requirements of the waiver in the mark, you can do it without an individual mandate."

The New Ledger, Wednesday, March 24th, 2010
The Individual Mandate: Can States Opt Out?, *Ben Domenech*

At the Patrick Henry Building in Richmond today, Virginia Gov. Bob McDonnell signed the Virginia Health Care Freedom Act, flanked by Attorney General Ken Cuccinelli and VA Health Sec. Dr. Bill Hazel (the former head of the Inova system) among others.

“We all agree that we must expand access to quality health care and reduce costs for all Virginians. However, that should not be accomplished through an unprecedented federal mandate on individuals that we believe violates the U.S. Constitution,” said McDonnell, who was also careful to point out that the act received the votes of leading Democratic state senators and the Democratic House Minority Leader. But Sen. Ron Wyden has an interview with the Huffington Post today claiming that acts like the one McDonnell signed (pending in 30+ states as ballot initiatives or amendments) and the associated legal threats from Attorneys General over the individual mandate are pointless, given that states can simply “opt out” of the individual mandate requirement. **Update from Wyden’s office added below.**

[Here’s what Wyden tells Sam Stein:](#)

Speaking to the Huffington Post on Tuesday, Wyden discussed — for one of the first times in public — legislative language he authored which “allows a state to go out and do its own bill, including having no individual mandate” ... provided that, as Wyden puts it, “they can meet the coverage requirements of the bill.”

“Why don’t you use the waiver provision to let you go set up your own plan?” the senator asked those who threaten health-care-related lawsuits. “Why would you just say you are going to sue everybody, when this bill gives you the authority and the legal counsel is on record as saying you can do it without an individual mandate?” Sen. Wyden is one of the few politicians in either party who understands health care policy, and he’s an honest, smart, and hard-working guy. But there are a number of problems with what he is saying here, even if we take it seriously.

The Wyden language — [found in the bill here](#) (side note: I actually think some of this language originates from [a Maria Cantwell amendment in the Finance Committee](#), and called Wyden’s office to confirm, but they haven’t gotten back to me yet) — provides, as he says, that “if a state can demonstrate that they can meet the criteria — particularly on cost containment, improving the delivery system,” they can get a waiver from the Department of Health and Human Services. It would be up to Secretary Sebelius if this was in force today to determine what criteria must be met.

I checked with my colleague at Heartland, senior legal fellow Maureen Martin, about this. She says that “Senators can say whatever they want about what statutes mean. Whatever they say is irrelevant. In the end, the courts will decide what statutes

mean. Whatever Congress or the President say about the meaning of statutes is totally irrelevant. Courts look at the exact language of statutes and decide what they mean. So intent of Congress is irrelevant. It matters only what the statutes say and how that is interpreted. I'm not sure this point is well understood by the public."

There are of course a number of questions to be raised here about standing, but also about whether the waiver is adequate protection if it is only possible for a five year gap, and subject to the discretion of the HHS Secretary. My colleague John Graham at the Pacific Research Institute points out that "applying for a waiver" is not the same as "opting out" — he presumes the HHS Secretary would grant a waiver if a state imposed single-payer, such as in California and some other states.

Yet even presuming states wanted to do something pro-market, they would only be able to apply for these waivers starting in 2017, and the waivers in question would have to meet standards for "cost containment" and "improving the delivery system" — standards which can be very fluid. As with any regulatory issue that shifts at the whim of the party in power, this will almost certainly lead to more litigation as to what all of these terms mean for the states in terms of tangible, measurable standards.

Nor can states be made exempt from the tax increases for individuals and employers, the cuts in Medicare, the newly expanded unfunded liabilities in Medicaid, and a host of other aspects of this bill. Of course states could set up their own programs to cover people, but that would be a waiver almost no state would want to accept, given that they can't prohibit their taxpayer dollars from going to fund this reform elsewhere.

That's hardly a full opt out. What's more, an exemption from the individual and employer mandates really can't take place at a state level without raising a host of other legal issues. The whole point of the health freedom act in Virginia is not that the state is acting in its own defense, but that it requires the state to act as a legal matter in the defense of an individual being compelled by the federal government to purchase a product or suffer a fine.

I'm unconvinced, and I assume the AGs are as well. Wyden's statement is essentially offering a political answer to a Constitutional question. Saying that these legal issues are unimportant because a state government may exempt its citizens from the individual or employer mandate requirements doesn't help a citizen or employer whose state fails to act.

Taken as a whole, one thing is clear: a lot of lawyers and judges will be answering these questions in the months and years to come.

Update: The very pleasant folks at Wyden's office got back to me. Here's the answer on how the exemption would work: you could only get an exemption approved by the Secretary of HHS if you prove you can cover *more people* with your non-

individual mandate plan, while also meeting their new requirements for coverage (in other words, not by turning to a catastrophic + HSA plan or something along those lines).

In other words, it is hard to see all but a few rare circumstances where a state would apply for this exemption and move toward a pro-market solution. You would have to prove that you would have a greater number of people purchase a product than you would by legally requiring them to purchase that product.

FiredogLake, March 24, 2010

Ron Wyden's Disingenuous State Opt-Out Argument Against Individual Mandate Lawsuits, Jon Walker

I'm very disappointed that Sen. Ron Wyden (D-OR) has decided to make an extremely disingenuous argument against the pending individual mandate lawsuit based on his waiver for state innovation provision. I've always been a big supporter of this provision, but what Wyden is saying is just dishonest. From Huffington Post:

Sen. Ron Wyden (D-Ore.) has a message for all the attorneys general and Republican lawmakers who are threatening lawsuits and claiming that an individual mandate for insurance coverage is unconstitutional: You don't have to abide by it — just set up your own plan.

[...]

"Why don't you use the waiver provision to let you go set up your own plan?" the senator asked those who threaten health-care-related lawsuits. "Why would you just say you are going to sue everybody, when this bill gives you the authority and the legal counsel is on record as saying you can do it without an individual mandate?"

This is not accurate. You see, the problem is that the individual mandate starts in 2014, but states can't get a waiver to try a different system, potentially one without an individual mandate, until 2017. So, there is nothing states can do to stop the individual mandate from being in effect for at least three years.

Whether you agree with an individual mandate or not, it is just wrong to say people shouldn't complain because, at some point in the future, they might possibly have a way for states to opt out of it. If the state waiver started in 2014, Wyden's argument would be perfectly valid, but as the law currently stands, his statement is pure baloney.

Wyden also seems to be glossing over the serious problem of system entrenchment. While it would be easy for a state to experiment with a new health care system in 2014 if they could get a waiver right away, trying to start a new system in 2017 would be much more difficult. The law requires them to put all the effort into setting up this exchange system. Expecting a state to start all over by uprooting this new system and putting up a whole different system after only three years is a huge hurdle.

I really wish Democrats would fix the problems with Wyden's state waiver provision to [make it start right away](#). It could even be offered as a reconciliation amendment if Democrats had not taken this ridiculous no amendment stance. But until it is fixed, it is very inappropriate to claim that it is somehow an answer to anger against the individual mandate. If you think the individual mandate is wrong, the possibility that it might only be forced on you for three years is not really a solution. Ideally,

Wyden's "state waiver for innovation" would be one of the provisions in this law that might actually get "fixed" before 2014.

MSNBC's "The Ed Show, March 25, 2010

MSNBC "THE ED SHOW" INTERVIEW WITH SENATOR RON WYDEN (D-OR)
SUBJECT: SENATE VOTE ON HEALTH-CARE LEGISLATION; LEGAL CHALLENGES TO
HEALTH-INSURANCE MANDATE INTERVIEWER: ED SCHULTZ TIME: 6:20 P.M. EDT
DATE: THURSDAY, MARCH 25, 2010

MR. SCHULTZ: Senator, good to have you with us tonight.

So I guess we can say the leap of faith that the House took on the Senate and Harry Reid's letter of 52 turned out to be 56. It's all good. But the big issue at this point now, Senator Wyden, is the challenge that's coming from a number of attorney generals from individual states across the country.

Do these lawsuits have merit, in your opinion, or will federal law be able to supersede any of that?

SEN. WYDEN: I think these lawsuits are going nowhere. But they really aren't even needed, Ed. We were able to get a provision in the bill that gives the states the power to go off and innovate, come up with their own approaches as long as they meet the minimum requirements in the bill.

And one of the issues I want to stress tonight is this is a huge opportunity for public-option supporters at the state level. What public-option supporters can do at the state level is push to have their state go with this kind of approach, show that the public option is effective at holding insurance companies accountable, producing more choice and competition. And with that kind of hard evidence that could be accumulated at the state level, it'll be very hard to hold off the adoption of a public option at the national level.

MR. SCHULTZ: Okay, I believe that's Section 1332 of the Senate reconciliation bill that says that the mandate can be turned into an option of what the states want to do. Is that correct?

SEN. WYDEN: That is correct.

MR. SCHULTZ: Okay.

SEN. WYDEN: And that's why I say to these attorneys general, "Why don't you work with us to innovate rather than litigate?" They're always talking about states' rights. We're empowering the states. The counsel for the Senate from the Senate Finance Committee --

MR. SCHULTZ: So you're saying --

SEN. WYDEN: -- gave them the freedom.

MR. SCHULTZ: Okay. So Senator, you're saying that technically there is no mandate. The states are going to have to choose to do that.

SEN. WYDEN: What the legal counsel said in response to my question specifically, Ed, is under this particular state option, if a state can show that they are meeting the

minimum requirements in the bill, they do not have to have an individual mandate. And I'm telling viewers, particularly progressives around the country, "You can go to your state legislature. You can go to your governor and say that under that provision, you want your state to put a public option in place to hold insurance companies accountable."

MR. SCHULTZ: A lot of talk about it not being a bipartisan bill, but it was real close to 60. There were three Democrats that voted against the bill. Fifty-six in total did vote for it. Interestingly enough, Blanche Lincoln, who will get a primary challenge in Arkansas, both she and Senator Mark Pryor voted with the Republicans and against the bill. And, of course, Senator Ben Nelson from Nebraska also voted with the Republicans as well, and so he was also a no vote.

So as it stands right now, this is a major victory for the Democrats. Where's the risk here politically, if there is any at all?

SEN. WYDEN: I'm sure that the insurance companies are going to start trying -- beginning with the open-enrollment season that will take place this fall, they're going to continue, for example, to try to cherry pick.

We are in this legislation, of course, doing something that you and I feel very strongly about, and that is outlawing the vicious discrimination against those with pre-existing conditions. But I know that insurance companies -- and I know this from my days with the Gray Panthers -- they're still going to go out and try to do a lot of clever marketing to primarily the healthy people.

So we are going to have to be very vigilant in terms of protecting consumer rights. That'll start very quickly. And as I say, that's one of the reasons that I hope public-option advocates will look at that waiver provision and do it at the state level, because it's a way to hold the insurance companies accountable.

MR. SCHULTZ: And quickly, Senator, your thoughts on the Republicans saying that they're going to run to repeal it in the midterms.

SEN. WYDEN: I don't see how a Republican can stand up at a town-hall meeting -- I don't see how anybody can stand up at a town-hall meeting and say, "Hello, I'm really here to tell you I'm going to repeal a law that protects our people from discrimination against pre-existing conditions." I don't see how that passes the smell test.

MR. SCHULTZ: Good to have you with us, Senator Wyden; appreciate your time tonight.

SEN. WYDEN: Thank you, Ed.

MR. SCHULTZ: Thanks for all your work too.

SEN. WYDEN: Thank you.

Blue Oregon, March 25, 2010
Wyden to AGs: Read the bill!, Kari Chisholm

State attorneys general across the country have filed suit against the just-signed health reform law. They're arguing that the individual mandate is unconstitutional. (An aside: According to Mark Hall, a leading health care legal scholar, [it's not.](#))

For those attorneys general, Senator Ron Wyden has a simple message: Read the bill.

During the deliberations over the Senate health care bill, Senator Wyden inserted a provision - first found in his Healthy Americans Act proposal - that gives states the right to opt out of the individual mandate if they can achieve the coverage and cost control goals of the mandate.

From the [Huffington Post's Sam Stein](#):

Speaking to the Huffington Post on Tuesday, Wyden discussed -- for one of the first times in public -- legislative language he authored which "allows a state to go out and do its own bill, including having no individual mandate."

It's called the "Empowering States to be Innovative" amendment. And it would, quite literally, give states the right to set up their own health care system -- with or without an individual mandate or, for that matter, with or without a public option -- provided that, as Wyden puts it, "they can meet the coverage requirements of the bill."

"Why don't you use the waiver provision to let you go set up your own plan?" the senator asked those who threaten health-care-related lawsuits. "Why would you just say you are going to sue everybody, when this bill gives you the authority and the legal counsel is on record as saying you can do it without an individual mandate?"

Wyden has long been an advocate for state waivers in health care policy, and Oregon has used them many times; most prominently, to set up the Oregon Health Plan.

Oregonian, March 26, 2010

Wyden amendment would allow states to devise their own plans, Jeff Mapes

Oregon Sen. **Ron Wyden** says he has an alternative for states seeking to overturn the new health reform bill in the courts: Develop your own health care plan.

The Democrat on Thursday touted an amendment, which he inserted in the new health care law, that allows states to opt out of the federal plan --including the contentious individual insurance mandate.

As long as states meet the general goals of the new law, "they can go off and do their own thing," **Wyden** said in a telephone interview. "This is ideal for reformers" from the political left and right who aren't happy with the final provisions of the bill, he said.

Critics, however, questioned whether **Wyden**'s provision will wind up being a practical alternative for state officials unhappy with the federal law --particularly since it wouldn't take effect until 2017, three years after the full new federal health reform is supposed to be in place.

"It's particularly ineffective if the flexibility only comes in in 2017," said Todd Gaziano, who directs the Center for Legal & Judicial Studies at The Heritage Foundation. Gaziano agrees with the 14 state attorneys general, including Washington's Rob McKenna, who think the new law is unconstitutional and plan to challenge it in court.

Wyden's amendment was drawn from the health care legislation he first introduced with Sen. Robert Bennett, R-Utah, in 2007. **Wyden** couldn't persuade the Obama administration or Democratic legislative leaders to adopt the bulk of his bill, which sought to give most consumers a wide range of insurance options.

But he did get some pieces of his bill in the final health care blueprint, including his "**waiver** for state innovation."

Wyden said he was particularly pleased that the Senate's legal counsel testified that with his provision, states could conceivably opt out of the requirement that individuals buy insurance or pay a fine.

That individual insurance mandate is at the heart of the pending legal challenge from the attorneys general --all but one of whom is a Republican. They maintain it is unconstitutional for the federal government to require individuals to buy something.

At the same time, **Wyden** said his amendment could be used by states that want to offer residents a public insurance option. Democratic legislative leaders sought without success to get a national public option, which was a chief goal of many liberal activists.

Wyden said his amendment could be of particular interest in Oregon, which has sought several federal **waivers** in the past to fashion the Oregon Health Plan. Former Gov. John Kitzhaber, who is running again for his old office, has made it clear he is interested in again using the new federal law to remake the state's approach to health coverage.

Wyden said he is trying to assemble bipartisan support to change the new law so that states can begin seeking **waivers** to devise their own plans as early as 2014. But, he admitted, "We will definitely have a fight on our hands" to accomplish this.

Some of **Wyden**'s philosophical allies are skeptical about letting states start working on their own plans at the same time the federal government is trying to implement the complex elements of the new health care system.

"We'd like to see states move forward with this model" before devising plans on their own, said Kathleen Stoll, director of health policy for Families USA, a consumer group pushing for universal health coverage.

Stoll said that while the **Wyden** provision could be a "safety valve" for some states, she did not see it leading to broad differences. "I don't see 40 states doing their own creative thing," she said.

The Bulletin (Bend), March 26, 2010

Senators regroup in wake of health measure - Merkley's just glad it's over and Wyden vows more reform action as House vote ends fight, Keith Chu

[Excerpt]

Wyden said Thursday that a provision in the bill modeled after a section of his Healthy Americans Act would give states a way out of the individual mandate. The section allows a state to get a waiver from the federal government, if the state can prove it will meet certain federal coverage guidelines.

That waiver would let states opt out of the individual mandate, and could also allow states to set up their own public insurance options.

"My message was what we ought to be doing instead of all this fighting between Democrats and Republicans is why don't we innovate rather than litigate," Wyden said.

One drawback to the plan: States can't get waivers until 2017, while the individual mandate goes into effect in 2014. That's something Wyden hopes to change before then, according to his spokeswoman.

Medford Mail Tribune, April 1, 2010

Oregon may revive public option, Sen. Ron Wyden's amendment in health bill is championed by state Sen. Alan Bates, a doctor, Damien Mann

A much debated public option that died amid the creation of a new national health care plan could be brought back to life in Oregon.

Oregon Sen. Alan Bates, D-Ashland, is spearheading an effort to create a state-run health care plan that would provide a public option, paving the way for universal coverage within three to four years.

An amendment to the federal health care plan by U.S. Sen. Ron Wyden, D-Ore., created a provision that allows states to enact their own health care program, including the creation of a public option. The provision allows states to apply for a waiver from the federal law as long as the state health plan has provisions for cost containment and improving delivery of services.

After studying Wyden's provision, Bates, a physician who practices in Medford, said he believed the amendment would allow Oregon to expand its progressive health care program, called the Oregon Health Plan.

"We really have a good chance of setting up a public option here," said Bates, who was involved in the creation of the Oregon Health Plan while serving on the state's Health Services Commission, which he chaired for three years. He began serving on the commission in 1989 and continued until resigning to run for public office in 2000.

Bates said he has had meetings with Wyden and state officials to lay the groundwork for universal health care coverage.

Universal coverage would feature a controversial mandate requiring everyone to pay for health care coverage, either through an insurance company or through some kind of state insurance pool.

Bates said he plans to meet again with Wyden and other state officials in the next two weeks to determine whether Oregon could forge its own plan and what steps would be needed to make it work.

"We are not asking to eliminate insurance companies, but we just want to look at a public option," Bates said.

Oregon would have to receive federal waivers to set up a state-run health care plan, Bates said. The state was successful in getting similar waivers to establish the Oregon Health Plan.

Jackson County Commissioner Dave Gilmour, a Central Point doctor, supports a public option, saying it would provide less-expensive insurance than is available through insurance companies.

Roma Sprung, a Phoenix general practitioner, said Oregon has a progressive history in providing health insurance to many of its citizens and the creation of a public option would expand on that philosophy.

"I don't know why we didn't get it before," she said.

Both Sprung and Gilmour are general practitioners, who would be in greater demand under a universal health care system that relies less on specialists.

Bates said that current health care plans steer patients to specialists when the diagnosis and treatment often could be better handled through primary care.

Bates said nurse practitioners who work with specialists and current emergency room doctors could be freed up to take on more responsibility for primary care. Bates doesn't see any significant cost impacts to the state through a universal plan, other than for increased administration.

He said the big stumbling blocks could be in receiving the approval for the federal waivers and the political climate. If Republicans win over the Oregon House this fall, it would make it far more difficult to pass a public option, he said.

Oregon Rep. Dennis Richardson, R-Central Point, said he would remain open minded about Bates' proposal, but worries about how it would be funded.

"I know there is a need to have access to health care," Richardson said.

Too often, he said, people rely on emergency rooms for primary care, which drives up the cost of insurance for everyone, he said. Families are often overwhelmed by out-of-pocket expenses under health plans, sometimes getting stuck with bills of \$20,000 or \$30,000, Richardson said.

The problem, Richardson says, is not the public option as much as the government's failure in controlling costs.

"Reform is often discussed, but rarely implemented," Richardson said.

Richardson also noted the state anticipates a \$2 billion shortfall going into its next biennial budget. If a public option were created, low-income residents would receive subsidies for coverage, which would have budget consequences.

Richardson said Oregon already has the legislative framework set up that could allow for universal health care coverage by 2015, if a workable plan can be developed.

Richardson said he didn't think Republicans would necessarily discount the public option idea, but would like the chance to sit at the table to help form the legislation.

"I think it could be worked out, but it will only be possible if the Republicans are involved in the crafting of the bill, rather than be ignored as often takes place," he said.

Reach reporter Damian Mann at 776-4476, or e-mail dmann@mailtribune.com.

Oregon Public Broadcasting, April 1, 2010 State Senator Seeks Public Health Care Option For Oregon, April Baer

Oregon State Senator Alan Bates has proposed creating a public health care option for Oregon, under the terms of the new federal law.

Bates is a physician. He says he started thinking about a public option when he heard Oregon's U.S. Senator, Ron Wyden, mention a provision in the new federal law.

Wyden's amendment lets states come up with their own plans for health care, provided they get the necessary waivers from the federal government.

Bates said his questions start there. "What do we legally have to do to have a chance to be considered to do this? Until you know what your criteria is [sic], what your benefit package is going to be, and what you think usage of it is going to be, you cannot do any kind of analysis of the cost," he said.

But Bates says the goal is to make it revenue neutral, which he thinks is possible.

Oregon has a track record of experimenting with federal health care dollars. The Oregon Health Plan involved getting waivers for the expanded use of Medicaid money.

Those reforms gradually deteriorated due to budget and political problems.

Bates says he'll meet with DHS director Bruce Goldberg and other legislative leaders soon, to see if an Oregon public option is feasible.

Slate Magazine, April 1, 2010,
Author, Author, Timothy Noah

[Excerpt]

Moffit's op-ed is Heritage's third attempt at damage control. "For us," Moffit explains, "the health insurance exchange is to be designed by the states [*italics mine*]." The federalist argument that health exchanges are good if created by states but bad if created by Washington is one Romney's tried, too. Moffit had better hope it sounds more plausible to the Conintern coming from him than it does from the former Massachusetts governor. Anyway, the idea that Heritage has never advocated a health exchange created by the federal government simply isn't true. As recently as Nov. 2008, Heritage's Stuart Butler described the exchange as "a nonprofit organization chartered by the government." The "government" Butler referred to was clearly the federal government. A 1993 Heritage paper by Butler offering an alternative to the Clinton plan ("Why Conservatives Need a National Health Plan") was similarly focused at the federal level.

Butler did caution that "it's better to have exchanges operate at the state level." But he added: "Sure, general goals could be set at the national level, but if state health experts can figure a better way to reach those goals, let them try." Under Obamacare, the exchanges operate at ... the state level. They must abide by national coverage standards that constitute more than "general goals." But under language inserted by Sen. Ron Wyden, D-Ore., the health-reform law further provides that if any given state can find a way to achieve the same outcome with some alternative mechanism, it is more than welcome to do so.* (See Section 1332, "Waiver For State Innovation.")

The Times-News (Twin Falls, Idaho), April 10, 2010
EDITORIAL: CSI protects students' ability to go to college

[Excerpt]

CHEERS: To Democratic gubernatorial candidate Keith Allred, for offering a compromise between the new national health care law and the lawsuit that Attorney General Lawrence Wasden filed to stop it in Idaho.

"States can get a waiver from the federal requirements if they establish alternative programs that control costs and increase access better than the federal legislation itself," Allred said this week.

The sponsor of the waiver, U.S. Sen. Ron Wyden, D-Ore., has suggested a state-run public option that would compete with private insurance companies and hold them accountable. The state could use the federal money it gets to subsidize coverage for low-income residents.

Like Wyden, Allred believes that states are better equipped to devise solutions to their own problems than the feds are.

The Oregonian, May 2010
Senator Ron Wyden's Primary Election 2010 Questionnaire

[Excerpt]

Now that the health care reform plan has become law, what should Congress do next on this issue?

Ron Wyden: We need to move up the state waiver provisions I authored so they begin in 2014 - letting states choose to move forward with their own models of reform rather than implementing the federal mandates. Under the waiver, states can explore a public option or an alternative to an individual mandate, as long as they ensure coverage for the same number of citizens and the same quality of care as provided in the federal plan. We also need to increase choice and competition to bring down costs. We can do that by expanding access to the health insurance exchanges so smaller businesses can shop for the low-cost, high-value plans that only extremely large firms enjoy today. At the same time, we need to expand the Free Choice Vouchers that I added to the law so workers can use their employer contribution to purchase insurance directly from the exchange. This would allow them to choose the plan that best fits their family's needs, just like Members of Congress can today.

Salem *Statesman Journal*, May 2010
Senator Ron Wyden primary election 2010 questionnaire

[Excerpt]

Question: What are the three most important issues you would address if elected? How?

Answer: Although we've made important progress, we need to continue reforming the health care system. We need to move up the waiver provisions I authored so they begin in 2014 - letting states adopt their own models of reform. We should increase choice and competition by expanding access to the health insurance exchanges so smaller businesses can shop for the low-cost, high-value plans. We also need to expand the Free Choice Vouchers that I added to the law so workers can use their employer contribution to purchase insurance directly from the exchange.

KBND (Bend Radio), July 12, 2010

Oregon Has Some Autonomy with Healthcare; Congressman Wyden says he was able to get a Federal Waiver for Oregon, Kelly Bleyer

Congress passed historic healthcare legislation in March, but states do have some autonomy on how their plans will look. Oregon Senator Ron Wyden says a provision he was able to get into the legislation will give states options. "I was able to get included in the legislation, a provision that would allow our state, or any other state to go get a Federal waiver; and in effect, set up our own approach. A number of legislators have already been talking about this idea. This would certainly create an opportunity of a public option. There are a variety of other approaches." Senator Wyden says he's heard a lot of interest from state lawmakers about getting this Federal waiver. He expects it will be discussed in the next legislative session.

The Lund Report, August 25, 2010

Oregon to Look at Single-Payer Bill Next Session; Advocates for a dedicated tax to pay for basic health coverage want to introduce a single-payer bill next session,

David Rosenfeld

August 25, 2010 -- A loose coalition of single-payer advocates in Oregon has taken the first steps toward developing legislation for the 2011 session

The bill would ultimately work in conjunction with the state's ongoing efforts to form a health insurance exchange and [possibly a public option](#), supporters say.

State Rep. Michael Dembrow, a first-term Democrat from northeast Portland, is interested in sponsoring a state-based single-payer bill, but first wants to give advocates a chance to reach consensus.

Groups involved in the effort include Portland Jobs with Justice, Physicians for a National Health Program with chapters in Corvallis and Portland, Health Care For All Oregon and the League of Women Voters.

"It's all very preliminary," Dembrow said. "There are many of us who feel that ultimately the best way to pay for healthcare is through a single-payer program – not deliver it, but pay for it. It's something that needs to remain in the conversation."

States including Vermont, Minnesota, Pennsylvania and California – where a Democratic-controlled legislature twice passed single-payer bills that were vetoed by Gov. Arnold Schwarzenegger – are also working on single-payer legislation this year.

A [recent letter from U.S. Sen. Ron Wyden](#) (D-Oregon) to Democratic and Republican leaders in the Oregon Legislature gave encouragement to the idea of seeking federal waivers so states can pursue innovative ideas that go further than the federal law. The letter did not, however, offer any specific concepts.

"I write to lend my support to your efforts to develop an Oregon-specific plan for our state to do health reform its own way," [the letter states](#). "I believe in the concept of 'state choice,' and that every state has the right to provide healthcare to its own residents in its own way, as long as the goal is to provide all citizens with quality, comprehensive coverage."

Wyden said he authored section 1331 of the Patient Protection and Affordable Care Act to give states the ability to continue working toward cost-effective healthcare while retaining access to federal funding.

“We don’t see ourselves as acting in contradiction to anything people are doing in Salem,” said Peter Shapiro, an organizer with Portland Jobs with Justice. “We just see it as part of the mix.”

While the details of the proposed bill haven’t been ironed out, the tenets are strong. There would be a dedicated tax based on ability to pay, universal access, and a shared risk pool to increase purchasing power and reduce administrative costs.

“The basic principle is equity,” Shapiro said. “Everybody should have the same access to treatment regardless of how much risk they are or how much money they have in the bank.”

The group will soon begin working with a consultant on the costs of such a plan and the barriers, including ERISA that governs employee benefits, that could be overcome with federal waivers.

The Oregon State Public Interest Research Group is also pushing state healthcare leaders to do more with what’s already allowed in the federal law passed earlier this year. OSPIRG’s efforts, however, have focused on strengthening the health insurance exchange and creating a strong state-based public health insurance option, not a single-payer plan.

Laura Etherton, OSPIRG’s healthcare lobbyist, is pleased Oregon is among the first states to get out of the blocks to establish an exchange where individuals and small groups can purchase insurance that’s highly regulated and possibly subsidized. But, thus far, the [draft plan which was released on Aug 14](#) falls short, Etherton said.

“Just an exchange by itself is not going to solve all the problems in healthcare,” she said. “But it’s a great tool to help us drive solutions.” Etherton said the draft plan doesn’t allow the exchange to negotiate premiums on behalf of its members. It could include small businesses with more than 50 employees earlier. It needs stronger public accountability. And it lacks adequate protections to prevent the insurance industry from undermining the exchange’s stability, she said.

According to OSPIRG, the exchange as currently drafted would “let insurers cherry-pick only the healthiest people, and enroll them in plans only available outside the exchange. This would leave older, relatively less-healthy people inside the exchange.”

“The details matter,” Etherton wrote in [comments to the draft plan on OSPIRG’s website](#). “Done right, the exchange will pool the buying power of hundreds of thousands of Oregonians, so all of us can get a better deal on healthcare. But done wrong, the exchange will just be a nifty website with the same expensive plans and spotty coverage.”

Single-payer advocates hope the state goes a whole lot further.

“There are a lot of people who want to see the conversation about single payer still happen,” Dembrow said. “I hope the federal plan will work. I’d like to see the state really seize the moment.”