

In Search of Health Law Coherence

Author : Zack Buck

Date : January 28, 2021

Gabriel Scheffler, The Dynamism of Health Law: [Expanded Insurance Coverage As the Engine of Regulatory Reform](#), 10 **UC Irvine L. Rev.** 729 (2020).

Health law is [complicated](#), [unruly](#), and maybe even [incoherent](#). It lacks a simple universally understood narrative of [what, exactly, it is](#). On top of this complicated foundation, legal and policy reforms have taken effect over recent years with dizzying speed, only to be challenged, carved back, or reversed in later years. Annually, it seems that the whole field of health law hinges on some [major case](#) or dramatic [legislative effort](#). The previous year's class syllabus is never reusable. And it has even humbled our president, as he recently told us what we all already knew: it is [unbelievably complex](#). Seemingly in vain, health law scholars and legal academics search for a unifying theme. But maybe this so-called bug is truly a feature, and [its disjointedness may present us with many open lines of scholarly inquiry](#), giving us all lots of room to run.

That's why articles that are able to tell a story about the development of health law and about reasoned cause-and-effect of legal and policy development, are so helpful to the field and those of us who work within it. Drawing on historical analysis, interacting with a breadth of previous scholars' work, and pulling together a simple but edifying story about the development of health law is [The Dynamism of Health Law: Expanded Insurance Coverage As the Engine of Regulatory Reform](#), by Gabriel Scheffler.

Instead of telling of doctrinal development within a field that is haphazard and disconnected, Professor Scheffler argues that modern health law can best be understood through health care financing laws (that expand access) and health care delivery laws (that reform health care delivery). These two types of laws, according to Scheffler, are in a dynamic iterative process, where expansions in coverage lead to reforms in delivery. Scheffler focuses on the creation of the Medicare and Medicaid programs and the passage of the Affordable Care Act as his seminal "expansion" moves. He identifies scope of practice restrictions, the corporate practice of medicine doctrine, and certificate of need laws as key delivery reforms following those efforts, supporting the argument that government intervention to expand health care access reliably leads to a concomitant effort to make health care delivery work better.

Telling this cause-and-effect story allows him to make the argument that future expansions of health insurance may lead to increased pressure on legislators to make delivery more efficient, and that expanding health insurance coverage is often a positive catalyst for regulatory improvements. Scheffler says that this may be because during insurance access expansions, policymakers have been concerned about securing those finance gains as real access gains in doctors' offices and hospitals, with a specific worry that new demand will swamp the system and lead to quality retrenchment. It could also be that health insurance expansions are often publicly visible, he argues, putting more pressure on legislators to change outmoded delivery mechanisms. In this way, he presents a picture that health care regulation adapts in a reasonable, and perhaps even somewhat orderly, way.

Professor Scheffler's work builds on Kenneth Arrow's feedback loop, in which Arrow [argues](#) that non-market governmental and regulatory actions follow market failures and information asymmetries in health care. "The market's failure to provide health insurance to the public has necessitated government-provided health insurance, which has increased the demand for health care, which in turn

has created pressure for the government to change delivery system regulations,” Scheffler says. Consequently, governmental involvement and delivery regulation in health care operates as a sort of creeping force, acquiring more legitimacy and necessity as more Americans secure access to health care.

Scheffler’s argument is clear and straightforward, providing a compelling thesis in a foggy time. His work is helpful, much in the way a narrative accounting of the development of the field can be, even at the risk of sanding down some important rough edges. Because I appreciated the precision of his analysis, I would have enjoyed hearing how more recent health care delivery and regulatory changes like [physician reimbursement changes](#), [insurance regulations](#), and dramatic [recently enacted surprise billing regulation](#) would fit into his telling. Including more examples, however, may have risked losing the piece’s crisp and straightforward packaging.

In the end, the piece is an ode to health law and its rich history, tying together strands and scholarship from vast reaches of the field. And, although the piece’s thrust may leave the implication that delivery reform must wait for financing reform (which, as we know, is a rare and sacred thing within American law), it provides something that a new and scattered field like health law too often lacks: a clear story, a deep grounding, and a hopeful roadmap for future reform efforts.

Cite as: Zack Buck, *In Search of Health Law Coherence*, JOTWELL (January 28, 2021) (reviewing Gabriel Scheffler, *The Dynamism of Health Law: Expanded Insurance Coverage As the Engine of Regulatory Reform*, 10 **UC Irvine L. Rev.** 729 (2020)), <https://health.jotwell.com/in-search-of-health-law-coherence/>.