

State Single-Payer

Author : Christina S. Ho

Date : December 3, 2019

Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 **U. Pa. L. Rev.** ____ (forthcoming 2020), available at [SSRN](#).

My first job out of law school was for then-Congressman [John F. Tierney](#), who represented the North Shore of Massachusetts. John Tierney believed in single-payer health care. He also believed in states as laboratories of democracy, and wanted to make sure Massachusetts had the latitude to undertake health reform and establish a model of universal health care for the nation. I was hired to write a bill that could accomplish that vision. Perhaps realizing that I was going to be overmatched, Tierney asked me—as my very first duty, even before I was officially on payroll—to meet with [Rashi Fein](#), the “father of Medicare.” The one detail I remember from that meeting was that Rashi warned I would need to write an ERISA waiver. I was terrified. I had just finished taking my last law school exam, commencement was still a few days away, and quite frankly, I had muddled my way through ERISA preemption in school without ever really understanding it. Consequently, my handiwork, [H.R. 4412 for the 107th Congress](#), was a bit, shall we say, rough.

I feel a special appreciation now, two decades later, when I read [Erin Fuse Brown](#) and [Elizabeth McCuskey](#)'s article, *Federalism, ERISA, and State Single-Payer Health Care*, giving the issue of ERISA preemption the masterful treatment it deserves. In the interim, the political gyre has turned one complete revolution, through Massachusetts' success in modeling health reform and the nation's subsequent adoption of that model, to unrelenting Republican efforts to tear down the Affordable Care Act (ACA), leading us once again to serious consideration of state-based single-payer health care in otherwise dark times. Rep. Ro Khanna has even introduced a [next-generation version of the Tierney bill](#).

The Fuse Brown-McCuskey article manages to accomplish so many important things in one neat package. First, it surveys all of the single-payer bills that have been introduced across the 50 states and identifies three characteristic mechanisms featured by these proposals. These three mechanisms are identified as Type A payroll taxes, Type B provider restrictions, and Type C subrogation/secondary payer mechanisms. Already, this article is a gift for health law scholars. Second, it calls out and analyzes the fundamental legal vulnerability that shapes the fate of these proposals: ERISA preemption. I'm sure I'm not the only one who feels enormous gratitude that someone out there performed this task so that I don't have to hurt my brain beating it against the painful body of ERISA jurisprudence. As if it were the Energizer Bunny of all law review articles, it's still not done—after that, the article cleanly and elegantly draws out specific proposals (including an ERISA waiver!) that would clear a path forward. Along the way, Fuse Brown and McCuskey include granular historical detail about these proposals and specific legislative language that they are already promoting with the National Council of Insurance Legislators.

This article is ostensibly about state single-payer health care and ERISA, and that is more than enough to furnish a rich, rewarding read. But the articles that we return to repeatedly are the ones with implications that keep radiating outward, beyond their topical focus, recontextualizing a whole range of other issues. The authors elaborate the implications of their findings for the broader federalism conversation, but this doesn't do justice to the many nuggets of insight they embed throughout the piece on the history of U.S. health reform, statutory interpretation, interagency collaboration, the politics of pay-or-play, the history of Hawaii's ERISA exception, the relation between cost of capital and

employer decisions to self-fund, and so much more.

Moreover, the article has implications for the health reform debate taking place at the national level during this Presidential election season. One aspect of the early Democratic primary debate has been the frustrating specter of single-payer purists attacking the public option proponents as neoliberal shills, while in return, the ACA 2.0 crowd demonizes the Medicare-for-All proposal as tax-and-spend socialism. It is distressing to watch when we all know that the real enemy is the right-wing project of shredding the ACA and all its hard-won health gains.

The state-based conversation revealed by Fuse Brown and McCuskey demonstrates just how [the division among primary candidates](#) is overdrawn, as I've also argued [elsewhere](#). The state bills that their article examines are recognizably single-payer proposals, but if judged by the rigid skirmish lines of the presidential campaign discourse, many of them might not qualify as such. First of all, the authors concede that many of the state plans seem to expect and even plan for the persistence of private employer-based plans. State single-payer bills thereby straddle the line between Medicare-for-All and [Medicare-for-America](#), the plan that anchors public option proposals such as the ones [Kamala Harris](#) and [Beto O'Rourke](#) have championed on the campaign trail. Yet the Medicare-for-America public option plan, like these state single-payer bills, employs the single-payer hallmarks of Type A income and payroll taxes, as well as stringent nonduplication and Type B provider restrictions. To illustrate, the Type B provider restrictions in Medicare-for-America stipulate that no participating providers can direct-bill individuals eligible for the public plan for any coverable services, nor may they bill any more than the prescribed rates. If providers elect not to participate in the public plan, they are then barred from re-joining for two years afterward. Some public option plans, then, are demonstrably intended to put us on the glide path to single payer.

Fuse Brown and McCuskey prompt an important discussion and I am eager to hear more. For instance, I'd love to hear the back-room history of who pushed the Type C subrogation/assignment feature, and how it propagated among state actors. For the uninitiated, these features are designed to help funnel money into the "single" payer, even when employer-sponsored coverage and other private plans persist. They do so by giving the single-payer the right to pay first for the service, and then recoup the money for that service collaterally from the private plans that would have covered that benefit otherwise. I'm not convinced that it is much likelier to survive preemption than pay-or-play, nor would it necessarily capture that much employer funding, especially as compared to a payroll tax, since under subrogation, employers could just drop coverage or revert to a wraparound plan, only covering items that the single-payer plan does not. Moreover, employers could easily side-step their collateral payment obligations by including an anti-subrogation term in their plans (whose prohibition among the self-funded plans would certainly be preempted).

Instead, I kept expecting that payment reform would figure more prominently in these state single-payer bills, especially since payment reform constitutes a big part of why we would want single-payer in the first place. Perhaps the bills do discuss global budgets and the article, which is already chock-full of fascinating detail, simply could not fit it in. Certainly, we get a whiff of all-payer rate setting around the margins of the discussion here. Perhaps what states need is a broadened policy discussion that fosters further evolution of these interesting state proposals. Fuse Brown and McCuskey have laid down a strong marker for this kind of polyglot conversation, one that spans state AND federal domains, that involves practitioners AND academics, that draws from the economics AND politico-legal discourses. Here's hoping that this article proves as fruitful in generating further scholarship as it is excellent in its own right.

Cite as: Christina S. Ho, *State Single-Payer*, JOTWELL (December 3, 2019) (reviewing Erin C. Fuse Brown

Health Law

The Journal of Things We Like (Lots)
<https://health.jotwell.com>

& Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 **U. Pa. L. Rev.** ____ (forthcoming 2020), available at SSRN, <https://health.jotwell.com/state-single-payer/>.