

States Opting-Out: Health Reform Challenges, Waivers, and Alternatives

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No Federal Right

“In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights...” including “[t]he right to adequate medical care and the opportunity to achieve and enjoy good health.”

State of the Union Address (FDR, 1944)

A Charter of Negative Rights

“The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”

Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.)

State Constitutions

- States with provisions on health or health care: 15
- Provisions that have been judicially interpreted: 7
- Direct challenges asserting individual right to health care: 1
- Proposed constitutional amendments on right to health: 6

Structural Limits

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

U.S. Constitution, 10th Amendment

Federalism Policies

“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (Brandeis, J., dissenting)

Pro: State health reform

- Reserved powers
 - Diffusion of power
 - Anticommandeering
 - Congressional affirmation
 - History and expertise
 - Individual rights
 - State experimentation
 - Voice, diversity, and exit
 - Accessibility and accountability
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Con: Federal health reform

- Commerce power
 - Taxing and spending power
 - Supremacy clause
 - Uniformity
 - Equality
 - Portability
 - Efficiency/economies of scale
 - Redistribution/risk-pooling
 - Race to the bottom/externalities
 - Resources and expertise
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