The Resurgence of Private Law in American Health Care

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As the regulatory landscape of American health care undergoes a transformation, private law is poised to play an increasingly central role in the health care system. Public law — the work of legislatures and administrative agencies — has long governed health care access, quality, and accountability in the United States. But recent deregulatory moves by the Trump administration have diminished its reach. Even if a future administration seeks to restore regulatory capacity, structural and political constraints will limit how quickly and thoroughly these changes can be reversed.

State-level public law — which includes insurance mandates and consumer-protection laws that apply to state-regulated health plans — remains operative, but private law is already being used to fill governance gaps in a system under strain. This body of law, which includes provisions that are typically established by courts or negotiated by individual actors and corporations and enforced by courts, governs relationships between private parties. Private law encompasses contracts, torts, and fiduciary duties, among other mechanisms.[1] Increased reliance on private law both presents opportunities for reform and raises concerns about the erosion of vital safeguards.

The Trump administration has aimed to stimulate innovation and economic growth in the United States by reducing regulatory burdens and increasing the reliance on markets in various domains. In January 2025, President Donald Trump signed an executive order mandating that federal agencies identify at least 10 existing regulations that can be repealed for every new regulation they introduce. The administration has also slashed the workforce at the Department of Health and Human Services, which will make it difficult to enforce health regulations that survive.[2] These moves are in keeping with a trend seen in Supreme Court decisions in recent years that has lessened the power of — and reliance on — agencies. Together, these changes are causing a seismic shift in health care governance. In the context of public law's decreasing influence, we expect the role of private-law mechanisms to be elevated in several ways.

First, contracts will increasingly serve as vehicles for governance. For example, with diminished Food and Drug Administration authority and reduced agency staffing, insurers may take on roles once reserved for regulators, tying reimbursement of products and services to the generation of post-marketing evidence on their safety or efficacy.[3] Similarly, states — especially those that purchase health care for large numbers of people — could embed public goals into their contracts with private payers and health care organizations, using their market leverage to promote cost containment or quality improvement. Although these roles aren't new, the erosion of public law will make them more prominent.

Second, the tort system, which covers medical malpractice, informed-consent, and product-liability claims, will most likely serve as a critical backstop for accountability and quality control in health care.[4] The role of tort law doesn't expand merely because regulations have been rescinded. But, as with contract law, tort law's relative importance grows under these circumstances. If courts or agencies neuter detailed federal rules governing clinical practice and the approval of technologies, courts may be called on more often to adjudicate whether a physician exercised reasonable care in adopting a new product, such as an artificial intelligence tool, or whether patients were properly informed of its associated risks. Although tort law can't provide the same clarity and advance notice regarding precisely what the law requires as regulations can, it does give injured patients a means of recourse, which can shape clinical care.

The weakening of public regulators also elevates the role of corporate governance and fiduciary obligations. For instance, private employers, especially large employers, have begun using their health plan offerings to make de facto policy decisions about access to reproductive health care, particularly in the wake of judicial curtailment of abortion rights. Shareholder resolutions, though rarely determinative, reflect investors' increasing concerns about the ways in which companies manage issues related to drug pricing and access and other health-related business decisions. In addition, the prospect of enforcing fiduciary duties, especially for certain health care entities, such as nursing homes that are owned by private

equity firms, could represent a meaningful shift in the application of legal accountability in the sector. If public oversight wanes, courts may face pressure to dial up enforcement of duties of care and loyalty in private-law frameworks. Deregulatory trends make such tools more visible as instruments for advancing accountability.

Finally, some of the most potent legal tools are hybrids of public and private law: public statutes with private rights of action. Laws such as the False Claims Act, antitrust statutes, and civil rights protections enable private plaintiffs to pursue systemic claims, even in the absence of agency action. Created to advance public interests, these mechanisms may become increasingly important in a system with constrained public enforcement capacity. Their effectiveness depends on private initiatives, not administrative priorities.

Despite the potential of private law to help fill the vacuum left by deregulation, reliance on private law comes with risk. In the context of a reduced focus on public law, clinicians and health care organizations will have increased autonomy and responsibility. They will need to develop robust policies and ethical codes; craft clear, comprehensive contracts governing their arrangements with patients and insurers; and innovate in care delivery, while maintaining high standards of quality and safety.

In addition, the role of health insurers in shaping health outcomes and spurring innovation will also become more pronounced. Their responsibilities will include designing coverage policies that balance costs and quality of care, developing effective care-management strategies, negotiating contracts that protect both their interests and those of their beneficiaries, and promoting innovation and evidence generation.

Patients, for their part, must adopt a "caveat emptor" (buyer beware) approach. They will need to scrutinize insurance policies and treatment options more closely, ask questions to support their exercise of informed consent, and potentially rely more heavily on legal action to address grievances.

A shift to private law will have real costs. Relying on contracts as a primary form of governance can exacerbate inequities, privileging well-informed or well-resourced actors. Tort litigation is reactive and episodic, resulting in slow change and inconsistent policies. It cannot replace regulation. Fiduciary duties are underdeveloped in many corporate settings. And bringing private claims depends on having access to counsel and navigating a complicated set of procedural hurdles. Whereas people accused of crimes have a right to legal counsel, which is facilitated by the public defender system for those who are indigent and at risk for incarceration, the Supreme Court hasn't created a similar right to publicly funded counsel for civil litigants.

Furthermore, some functions — such as monitoring public health threats or guaranteeing compliance with minimum standards of care — simply aren't well-suited to privatization. No contract or tort claim can replace the population-wide data-collection and intervention capacities of agencies such as the Centers for Disease Control and Prevention.

Private-law mechanisms must nonetheless be used to help fill the void in health care regulation left by a weakened administrative state. They offer avenues for redress, encourage improved compliance and accountability, and provide frameworks for innovation, even if they also reflect the fragmentation, inequity, and reactivity of a privatized system.[5] Policymakers, health care practitioners, and patients in the United States must understand private law's potential and its limitations. As public oversight diminishes — because of judicial skepticism, lack of political will, or resource constraints — private law will assume a larger role in shaping the future of the health care system. Regardless of whether the elevation of private law in health care represents a temporary stopgap or a durable shift, the time to reckon with its implications is now.

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