

Changing Certificate of Need Laws

M. Todd Rice, MD

AAPS Conference

St. Louis, MO

03 Oct 2015



Problem Based Learning Discussion

PBLD:

- There are millions of Americans that do not eat well, make poor diet choices, lack the financial resources to provide healthy diet, etc.
- Brainstorm ways to decrease hunger in America.



- Place corporate executives in charge of food decisions, determination of “need.” Revolving door of execs to gov agencies and boards.
- Impede farmers, grocers, restaurants from operating unless they provide for proven need
- Discourage innovation. Mandate compliance. “Quality.”
- Restrict farm and restaurant equipment, crop irrigation, food transportation, commerce according to “need.”
- Force increased pricing upon consumers in order to subsidize and protect the existing participants in exchange for their promises to provide charity food.



- Restrict menu options and grocery selections to the necessary
- Mandatory food clubs. Restrict consumers' food acquisition to certain “networks.”
- Everyone must have the same type and amount of food, otherwise it is unfair.
- Strict licensing and regulation, complicated and expensive compliances to protect the public.

THE FEDERAL BUREAUCRACY



Objective: Analyze the bureaucratic organization of the federal government



BURIAL OF GOVERNMENT PURCHASED & CONDEMNED LIVESTOCK NEAR ATKINSON, HOLT COUNTY, NEBRASKA. 45 16 42 - 9 34

Burial of government purchased and condemned livestock, near Atkinson, Holt County, Nebraska. Source - Nebraska State Historical Society.

- Add 10-12 layers of bureaucracy
- Create hidden price schemes
- No one knows what anything costs until they get an inflated bill, part of which the food network will cover. Maybe.
- Pay farmers to destroy crops and animals to support artificial pricing floors, control competition.
- When it all fails, blame free markets and greedy producers.

Certificate of Needs (CON) Laws

- **History/Premise**
- **Community-based planning, “needs”**
- **“Appropriate” allocation of resources**
- **May limit equipment, services, facilities, procedures, hospital beds,...**
- **Promote access to care**
- **Improve quality**
- **Decrease costs**


- **Reduce “leakage” of paying customers to outpatient centers leaving hospitals with poor reimbursements and indigent care**
- **Push new services and facilities into under-served areas**
- **National Health Planning and Resources Development Act, 1974: federal funding tied to states passing CON laws. States complied**
- **Began partial repeals in 1986.**

- **Quid pro quo: Big Gov decreases competition**
- **Grants monopoly status**
- **Purposeful market distortion**
- **Increase establishment hospitals profits in exchange for “charity” care.**

Dr Keith Smith's Blog Surgery Center of Oklahoma June 2015

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Certificate-of-Need Laws

June 3, 2015

Here is a link to a [study from the Mercatus Center at George Mason University \(PDF\)](#) that objectively shows what most honest people have always instinctively known: that the purpose of certificate-of-need (CON) laws are quite simply to limit the number of providers in the medical marketplace, all to the advantage of those already in business who want protection from potential competitors. One thing that is missing from the article is the fact that in many states, the panels that determine whether a certificate should indeed be granted are composed of the very folks, typically in the big hospital systems, benefiting from the rejection of these applications.

I have referred to the RBRVS (resource based relative value scale) as the "Rosemary's Baby" of the central planners at Harvard University. This was the "scientific" justification for the idea that central planners could accurately determine pricing in healthcare. The distortions resulting from this disaster have created healthcare shortages and surpluses for which the free market would have had no tolerance, all the while nudging government at all levels to flirt even more aggressively with default.

The central planners have no idea what prices should "be" any more than they know how many hospitals/physicians/MRI units there should "be," as the article shows. In every other industry, prices and competitor's emerge and result from the competitive process, matching the desires of the buyers and the sellers in a process that can only be described as dynamic and magical. Everywhere this process has been allowed in healthcare (Lasik, Cosmetic surgery), prices have trended downwards and quality has soared.

Kudos to the scholars at Mercatus for providing this important addition to the research literature, a study that objectively documents in the most painstaking fashion, the scam of these certificates of need. What an embarrassing chapter in the history of the provision of medical care in this country, that those who claimed the expertise to implement this central planning were actually given the

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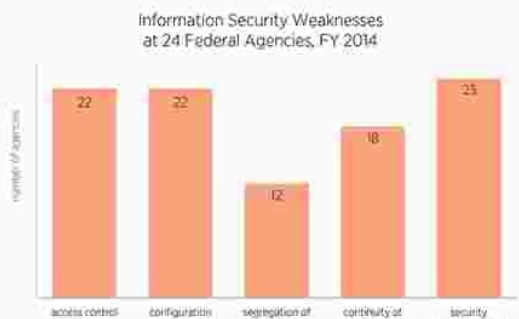
Edward Stringham Book Panel: Private Governance
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How Can Policymakers and

Information Security Weaknesses at 24 Federal Agencies, FY 2014



Weakness Category	Number of Agencies
access control	22
configuration management	22
segregation of duties	12
continuity of operations	18
security management	23

A new chart series by Eli Dourado and Andrea Castillo reveals that the federal government's cybersecurity weaknesses are not merely superficial issues that can be quickly resolved in a few short weeks; they are deep, pervasive, and systemic problems resulting from decades of poor information security practices. [Read More](#)

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No. 14-20
JULY 2014

WORKING PAPER

DO CERTIFICATE-OF-NEED LAWS INCREASE INDIGENT CARE?

by Thomas Stratmann and Jacob W. Russ

MERCATUS CENTER
George Mason University

The opinions expressed in this working paper are those of the authors and do not represent the views of the Mercatus Center at George Mason University.

Do Certificate-of-Need Laws Increase Indigent Care?
Thomas Stratmann and Jake Russ. Jul 15, 2014.

COMMENTARY

Removing State-Based Obstacles to Affordable Healthcare

By Jeffrey A. Singer

This article appeared in the *The Hill* (Online) on March 19, 2015.

As Americans continue to experience the painful consequences of Obamacare, look for mounting political pressure to replace it with reforms that make health care truly more affordable, enhance patient choice, and restore the patient-doctor relationship. But not all the action has to take place in Washington; much needs to happen in the states.

And there is no reason why it can't start now. States can begin by repealing "Certificate of Need" (CON) laws. These are outdated and counterproductive laws which encourage cronyism, increase costs, and detract from the quality of health care.

Certificate-of-need laws require anyone wanting to open or expand a healthcare facility to prove to a regulator that the community "needs" it. Once they prove such a need, the state grants them a certificate which lets them operate. In some states the micromanaging can extend down to the level of expanding offices or adding new equipment. In North Carolina, for example, the state Department of Health and Human Services must approve the addition of basic necessities such as hospital beds.

Click the link!
IJ's "CON Job" - 90 second spot
<https://youtu.be/vkopXpUOs3M>

Virginia Certificate of Need - Release: 10-27-2014

Read more on this case

Trial Court Upholds Virginia's "Certificate of Monopoly" for Medical Facilities

Medical professionals vow to appeal ruling that results in fewer choices and higher prices for patients

WEB RELEASE: October 27, 2014

Media Contact: J. Justin Wilson, jwilson@ij.org, (703) 682-9320 ext. 206 - www.ij.org/NACON

Virginia Certificate of Need

Colon Health Centers of America, LLC, et al. v. Hazel, et al.

CON JOB: How A Virginia Law Enriches Established Businesses by Limiting Your Medical Options, and How IJ Is Going to Stop It.

Ordinarily, if you want to start a new business or offer a new service there is a simple test to find out whether your new business is needed: You open the doors and tell the world. If people need your business, you will have customers. If they don't, you won't. That experience—of learning what people need and how new types of services can fit in—is familiar to anyone who has ever been an entrepreneur. Indeed, it is familiar to anyone who has ever been a customer.

It is also an experience that the state of Virginia turns entirely on its head for people who want to offer new healthcare services. If you want to offer new healthcare services, even something as routine as opening a private clinic, you have to obtain special permission from the state government. And permission is not easy to come by: Would-be service providers have to persuade state officials that their new service is "necessary"—and they have to do so in a process that verges on full-blown litigation in which existing businesses (their would-be competitors) are allowed to oppose them. Not surprisingly, this process can be incredibly expensive, and it frequently results in new services being forbidden to operate at all.

To be clear, this requirement (called a certificate-of-need or CON program) has nothing to do with public health or safety. Separate state and federal laws govern who is allowed to practice medicine and what kind of medical procedures are or are not permitted. Virginia's CON program only regulates whether someone is allowed to open a new office or purchase new equipment; it is explicitly designed to make sure new services are not allowed to take customers away from established healthcare services.

In short, Virginia's CON program is nothing but a government permission slip to compete. It ensures that more money flows into the pockets of established, politically connected businesses, and it accomplishes this by trampling entrepreneurs' economic liberty and reducing Virginians' choices for medical care.

But patients and doctors—not state officials—are in the best position to decide what healthcare services are needed. That is why Colon Health Centers of America, headed by Dr. Mark Baumel, MD, and Washington Imaging Associates Maryland, LLC, headed by Dr. Mark Monteferrante, MD, have joined forces with the Institute for Justice to challenge Virginia's protectionist CON program. The Constitution protects individuals' right to earn an honest living free from unreasonable government interference, and it prevents states from putting up unnecessary barriers to interstate commerce. The Virginia CON program does both, and that is why the federal courts should strike it down.



Institute for Justice client Dr. Mark Monteferrante.



Video: Government CON Job

HEALTH CAPITAL

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Topics

Jessica C. Burt, Esq., MHA - Senior Research Associate • Kati V. Williams - Editor

Certificate of Need (CON) Law Series: Part I - A Controversial History

The four-part *HC Topics Series: CON Laws* will provide an in-depth examination of Certificate of Need (CON) programs and their impact on the healthcare industry. The first installment provides an overview of states' CON programs and the history of their development, and Part II will discuss the current state of CON regulations. Part III will evaluate CON programs against the changing landscape of the healthcare industry, and Part IV will examine the impact of the *Patient Protection and Affordable Care Act (ACA)* on CON programs.

Certificate of Need (CON) laws are state-level regulatory initiatives that require individuals in the healthcare industry to obtain permission to make significant capital expenditures or to construct or expand facilities and services, based on the theory that controlling the supply of facilities, equipment, and services is the best method to restrain rising healthcare costs.¹ Most states' CON laws were introduced in the 1970s as part of the federal *National Health Planning and Resources Development Act*. Though the Act and its federal funding opportunities were later repealed in 1987, approximately 36 states have some form of a CON requirement today.² The usefulness of CON laws has been highly contested by many in the healthcare industry. Proponents argue these laws reduce waste and duplicative services, while opponents argue they do not effectively restrain rising healthcare costs and may actually result in higher prices because they limit consumer choice and serve as a competitive barrier to

hospital beds and the use of those beds.⁷ By the late 1960s and early 1970s, the state health policy planning initiatives required under the *Hill-Burton Act* had proven ineffective at controlling inflating healthcare costs and two additional federal laws were passed in an attempt to restrain this growth.⁸ *Section 1122* of the Social Security Act allowed the federal government to withhold Medicare and Medicaid capital payments for healthcare facilities and service expansions that had not received approval from their respective state health planning agencies.⁹ The *National Health Planning and Resources Development Act (NHPRDA)* of 1974 went even further, attempting to establish a health planning policy at the national level and withholding federal funds from states that did not pass CON laws as defined under the NHPRDA.¹⁰ By the following year, 20 states had enacted CON laws and by 1978, a total of 36 states had CON laws in place.¹¹

In the decade that followed the NHPRDA's enactment, national healthcare expenditures continued to rise dramatically and CON laws' effectiveness on controlling rising healthcare costs were called into question.¹² In a 1976 study, Salkever and Bice found that "no significant savings in hospital costs were achieved through certificate-of-need programs," and their results showed that in the first five states to adopt CON laws, the restrictions may have actually caused healthcare costs to increase.¹³ Schwartz and Joskow's 1980 study showed that duplicative services were only responsible for a small amount of the medical cost



www.healthcapital.com

Findings:

- “Financing a subsidy to the medically indigent”
- Create barrier to entry to increase profits for existing entities
- “Cross subsidize”
- Cost shifting by raising prices/costs to consumer
- Regardless, proponents still assert cost containment

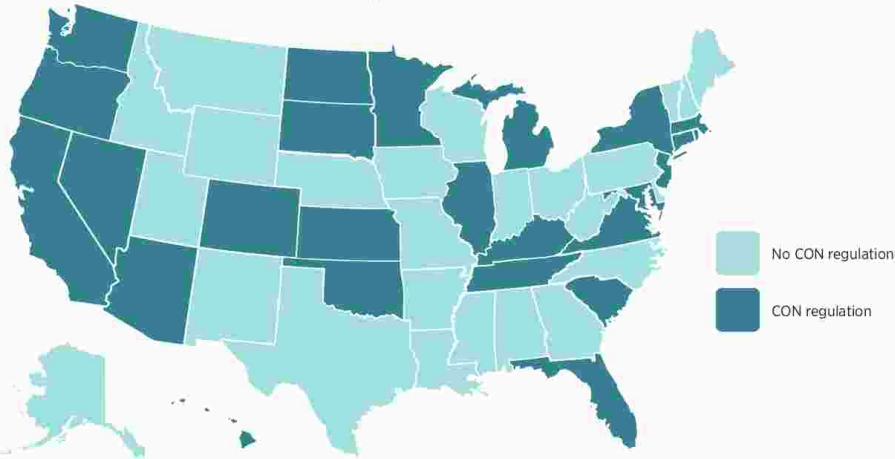
- Indigent access is not improved
- States that regulate hospital beds have 131 fewer beds per 100,000 population. (US avg is 362 per 100K)
- States that regulate MRIs have 2.5 fewer hospitals with MRIs
- Market distortion enacted to correct a market distortion (an attempt to decrease the MC/Medicaid FFS incentives)

- Incumbent providers protected from competition on price and quality
- New competitors are excluded. Effects on quality, costs, innovation? Fewer options, less access.
- Hospital corporations benefit by excluding physician-owned facilities, but tend to expand heavily. A crane for every hospital.
- “But what about the 'leakage' of premium payers?” How do we help maintain hospital funding?

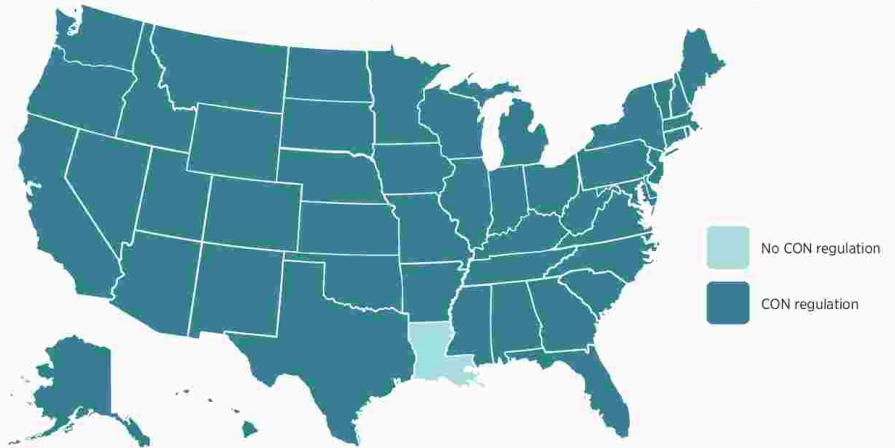
- Your poor business model is not my problem. The fact that your business requires constant subsidy is a glaring sign of its unsustainability and inefficiency.
- - Tom Woods (paraphrased), Mises Circle, Houston, TX, Jan 2015.

CON Law by State (1974 - 2000)

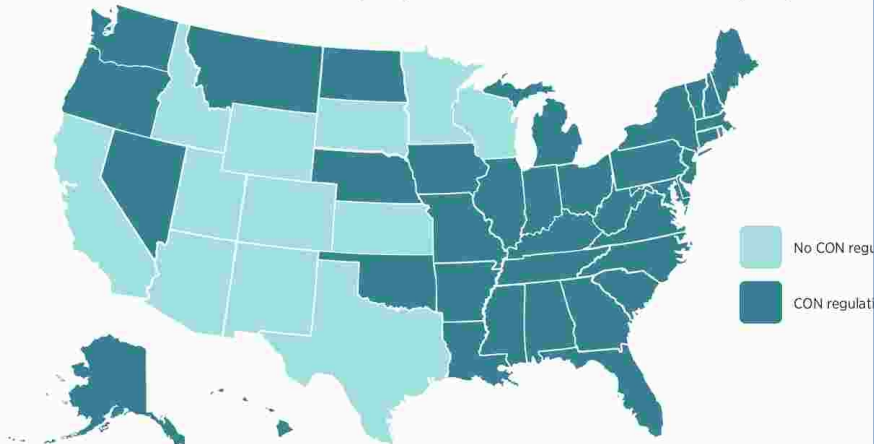
CERTIFICATE-OF-NEED (CON) REGULATION IN THE UNITED STATES (1974)



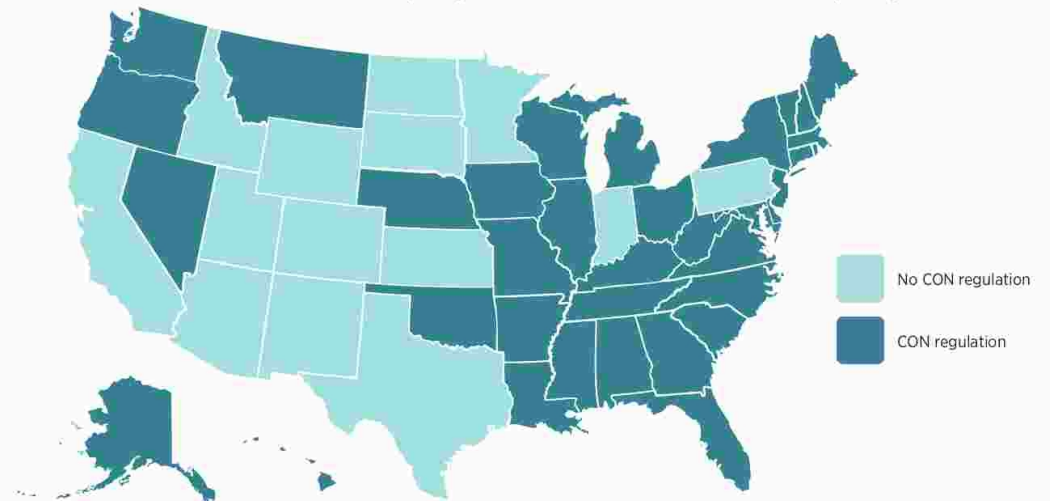
CERTIFICATE-OF-NEED (CON) REGULATION IN THE UNITED STATES (1980)



CERTIFICATE-OF-NEED (CON) REGULATION IN THE UNITED STATES (1990)

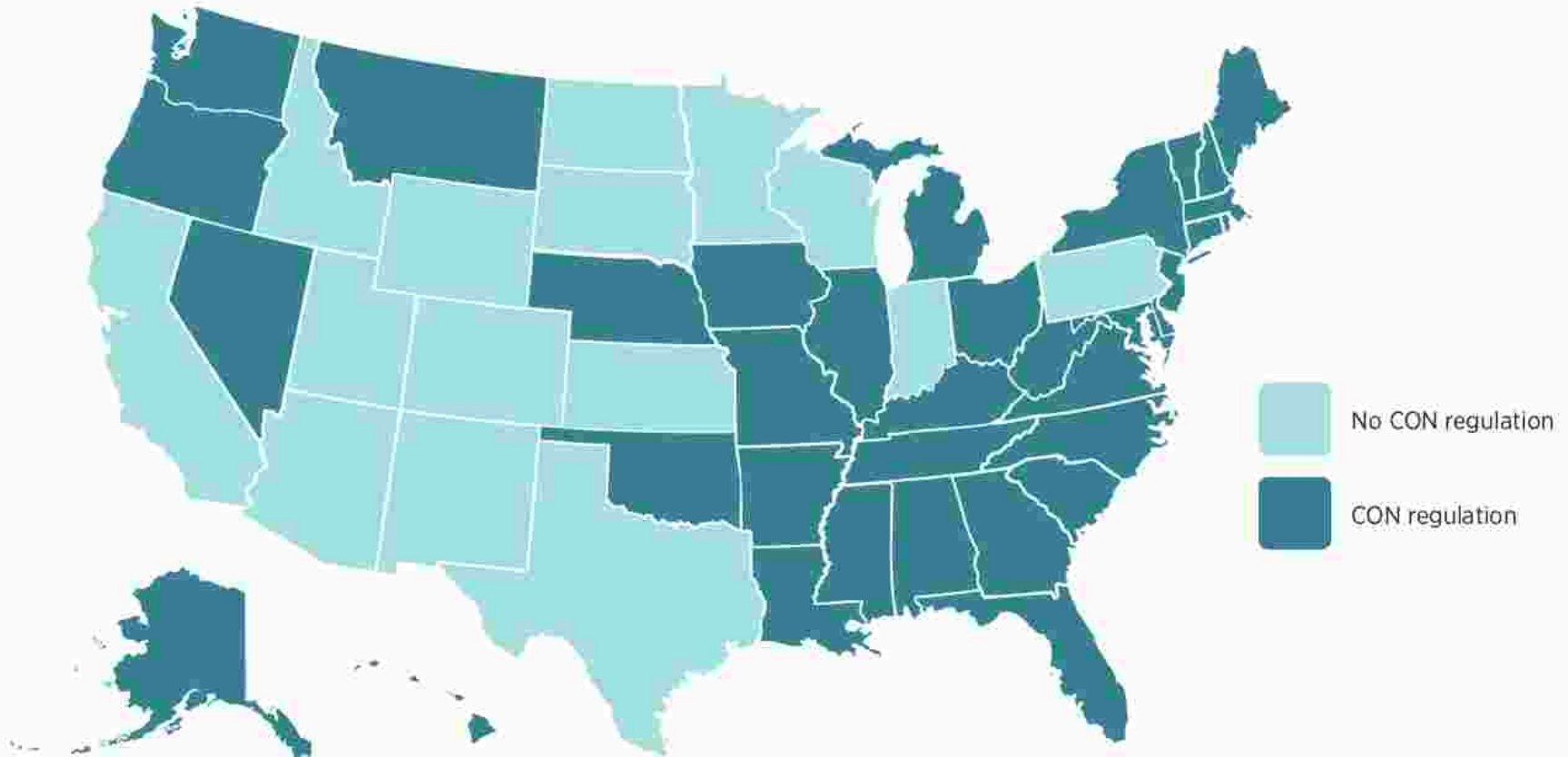


CERTIFICATE-OF-NEED (CON) REGULATION IN THE UNITED STATES (2000)



CON States as of 2012

CERTIFICATE-OF-NEED (CON) REGULATION IN THE UNITED STATES (Present)



Certificate of Need Matrix

American Health Planning Association

www.ahpanet.org

State	Acute Hospital Beds	Air Ambulance	Anesthesiology Services	Burn Care	Cardiac Catheterization	CT Scanners	Gamma Knives	Horse Health	Hospice	ICF/MR	L-TAC	Lithotripsy	Nursing Home Bed/TC Beds	Medical Office Buildings	Mobile HI Tech	MO Scanners	NICU	Oncologic Services	Open Heart Surgery	Organ Transplant	PET Scanners	Psychiatric Services	Radiation Therapy	Rehab	Renal Dialysis	Res Care/Assisted Living	Subacute Services	Substance Abuse	Swing Beds	Ultra-sound	Number of Services/Equip
Alabama	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	20	
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Delaware	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	8	
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Tennessee	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Vermont	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Virginia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
Washington	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
West Virginia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

Missouri Department of Health & Senior Services

Healthy Living Senior & Disability Services Licensure & Regulation

Certificate of Need

Home » Information » Boards, Commissions & Councils » Certificate of Need

- Missouri Health Facilities Review Committee
- Laws & Regulations
- Calendar & Events
- Applications & Forms

Certificate of Need (CON) is an effort to contain costs, improve quality, and ensure access to major health care services. This effort was established in Missouri as part of the Health Planning and Resource Development Act of 1973.

Services include preparing, reviewing, and revising rules and regulations; conducting special projects and studies on key health care issues.

Guidance and decision-making is provided by the volunteer Missouri Health Facilities Review Committee, which carries out its functions as the administrator of the Missouri CON program.

Mission:

To achieve the highest level of health for Missourians through cost containment and accountability.

Goals:

- Review proposed health care services;
- Contain health costs;
- Promote economic value;
- Evaluate competing interests;
- Prevent unnecessary duplications; and
- Disseminate health-related information to affected parties.

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Certificate-of-Need Laws: Implications for Missouri

Christopher Koopman, Thomas Stratmann, Mohamad Elbarasse | May 11, 2015

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Thirty-six states and the District of Columbia currently limit entry or expansion of health care facilities through certificate-of-need (CON) programs. These programs prohibit health care providers from entering new markets or making changes to their existing capacity without first gaining the approval of state regulators. Since 1980, Missouri has been among the states that restrict the supply of health care in this way, with 14 devices and services—including acute hospital beds, magnetic resonance imaging (MRI) and positron emission tomography (PET) scanners—requiring a certificate of need from the state before the device may be purchased or the service offered.

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CON restrictions are in addition to the standard licensing and training requirements for medical professionals, but are neither designed nor intended to ensure public health or ensure that medical professionals have the necessary qualifications to do their jobs. Instead, CON laws are specifically designed to limit the supply of health care and are traditionally justified with the claim that they reduce and control health care costs. The theory is that by restricting market entry and expansion, states will reduce overinvestment in facilities and equipment. In addition, many states—including Missouri—justify CON programs as a way to cross-subsidize health care for the poor. Under these “charity care” requirements providers that receive a certificate of need are typically required to increase the amount of care they provide to the poor. These programs intend to create *quid pro quo* arrangements: state governments restrict competition, increasing the cost of health care for some, and in return medical providers use these contrived profits to increase the care they provide to the poor.

However, these claimed benefits have failed to materialize as intended. Recent research by Thomas Stratmann and Jacob Russ demonstrates that there is no relationship between CON programs and increased access to health care for the poor. There are, however, serious consequences for continuing to enforce CON

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THOMAS STRATMANN



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Full Bio

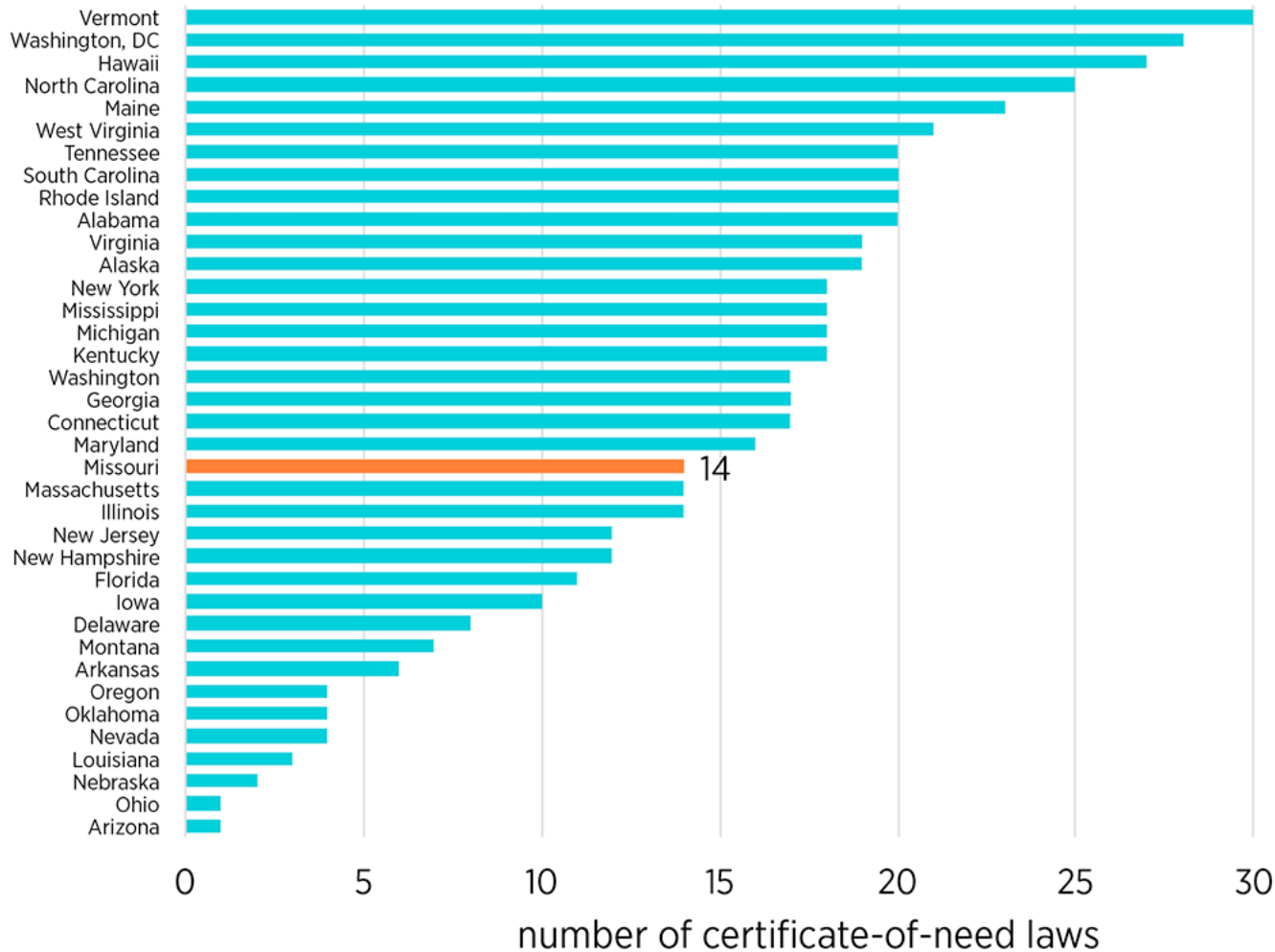
MOHAMAD ELBARASSE



Mohamad Elbarasse is the Director of the Project on Capitalism for the George Mason University.

Full Bio

FIGURE 1. RANKING OF STATES BY NUMBER OF CERTIFICATE-OF-NEED LAWS



Note: Fourteen states either have no certificate-of-need laws or they are not in effect. In addition, Arizona is typically not counted as a certificate-of-need state, though it is included in this chart because it is the only state to regulate ground ambulance services.

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Certificate-of-Need Laws: Implications for Missouri

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Mohamad Elbarasse

May 2015



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A few questions:

- **Will new federal health care laws make state CON laws worse, irrelevant, and/or replace them with something more constraining?**
- **Will PPACA, etc give rise to an entirely new set of cartel structures? (EMR, auditors, CME, MOC, ICD-10 billers, preferential reimbursements, acquisitions of private practice,...)**
- **Section 6001 of the ACA: restrictions on physician-owned specialty hospitals, expansion. A new form of federal CON?**

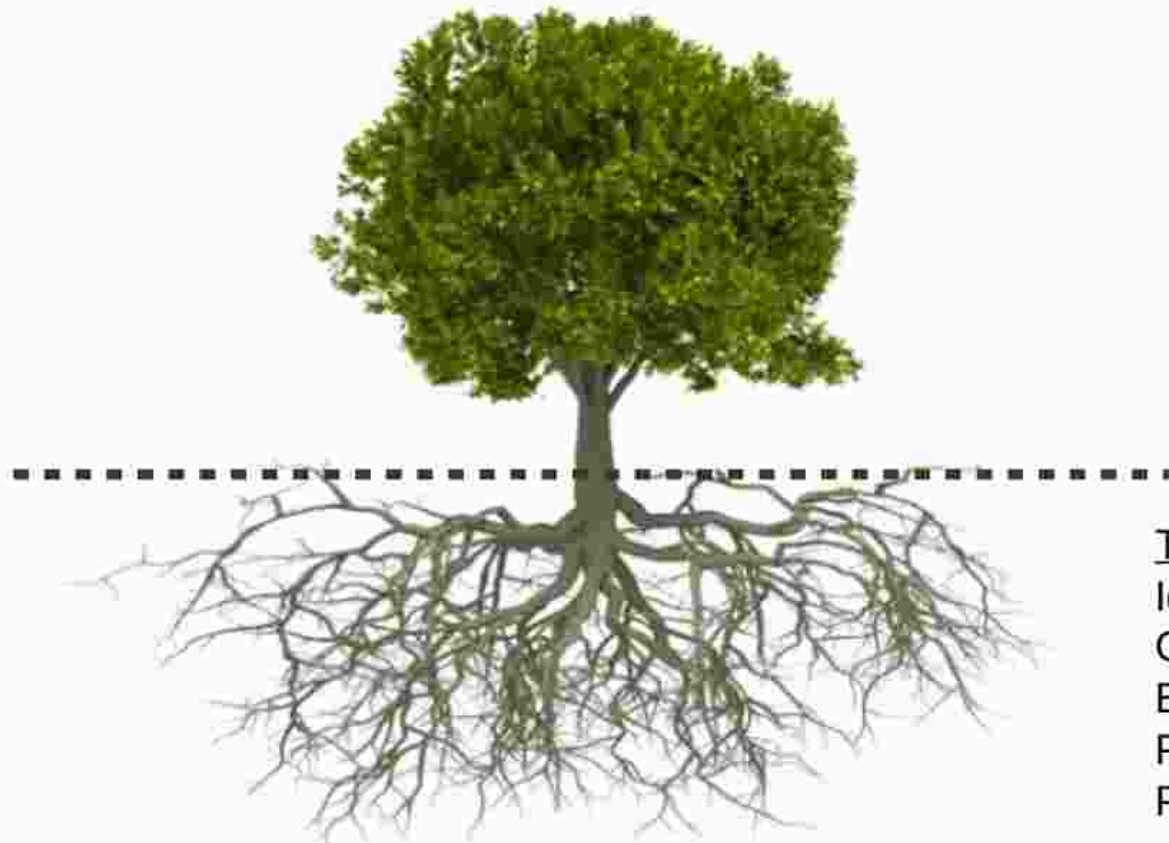
- **Even if not titled “CON,” of course every state has an array of laws, rules and regulations of varying complexity that limit medical practice, increase costs, decrease access, impede competition and quality.**
- **Utilitarian vs. philosophic argument**

Politics

(or The Tree of Liberty?)

What is Seen:

Taxes
Policy
Regulation
Legislation
Bureaucracy



The Unseen:

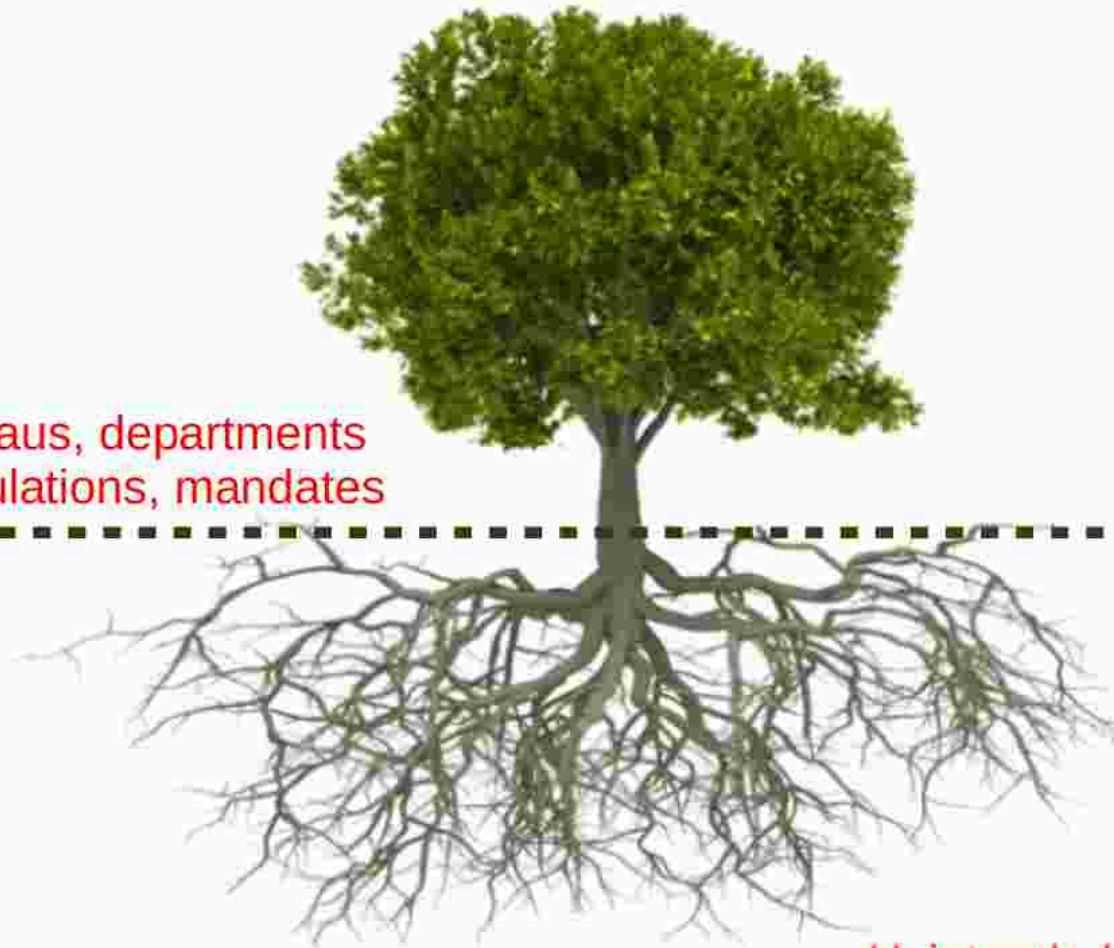
Ideas
Culture
Education
Philosophies
Public Opinion

How does one change CON laws?

What is Seen:

Taxes
Policy
Regulation
Legislation
Bureaucracy

430 agencies, bureaus, departments
100Ks of laws, regulations, mandates



The Unseen:

Ideas
Culture
Education
Philosophies
Public Opinion

Unintended consequences,
market distortions, opportunity
costs, stifled innovation,...





“The government is good at one thing. It knows how to break your legs, and then hand you a crutch and say, ‘See, if it weren’t for the government, you wouldn’t be able to walk.’”

~ Harry Browne

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Dr. Rice is a board certified anesthesiologist in private practice for 9 years prior to recently accepting a position with Washington University School of Medicine in St Louis. A native Texan, in 2013, he followed his general surgery resident wife to Missouri for her training. He is currently serving as Treasurer of the Missouri Chapter of AAPS, working on an MBA, and will be the anesthesia director of the South County Surgery Center slated to open in March 2016, as a joint venture between Wash U and Barnes-Jewish Hospital. All of this is with an eye towards the Doctors Rice owning or participating in a direct care model surgery center in a few years. In the meantime, Dr. Rice is enjoying the St. Louis microbrew culture, two high energy canine Boxers, and investigating the ramifications of politico-economics and government on self-ownership.

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