

Certificate of Need Laws: A Prescription for Higher Costs

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MERICA HAS STRUGGLED WITH THE cost of health care for decades. Un-

derstanding the proper balance of capital investment between state and federal power, there are some very good reasons to repeal state CON laws.

History and Original Intent

CON laws typically establish requirements for state approval before a new health care provider can enter a market or an existing provider can make certain capital improvements.² For example, if a hospital wants to build a new wing and add additional beds, it must seek approval from the state. The state will determine whether there is sufficient public “need” for the capital improvement and either grant or deny the provider’s application.

Normally, states are not directly involved in the market entry or capital improvement decisions of private firms. If a business wants to build a new factory, the state may require the business to conform to local zoning laws and other generally applicable regulations, but the state does not second-guess management’s decisions about the business need for the new facility. Instead, the free market mediates those decisions. If a company makes unwise capital investments, it will lose business to its more skillful rivals. Market forces will naturally push firms to optimize their capital expenditures without any need for state intervention.

So why did states start regulating decisions that they would normally leave to the private sector? It turns out that there is a long history here that commentators often ignore or sweep under the rug in the current debates over CON laws. Yet that history is critical to understanding not only how we got to where we are today on this contentious issue, but also whether these laws should continue to remain in force.

The story of CON laws stretches all the way back to the mid-1960s. At that time, there was a view that high health care costs were driven largely by wasteful, over-investment in duplicative health care facilities.³ A brief hypothetical best explains the concern that legislatures originally sought to address through CON laws.

Imagine that Metropolis is a city with four major hospitals of roughly equal size. Hospital A decides that it needs to buy a new, expensive MRI machine. Patients in Metropolis now have access to a brand-new diagnostic tool they did not have before. So far, so good, at least for Hospital A.

Things are not quite as rosy over at the other hospitals. Hospitals B, C, and D are now suddenly at a disadvantage

because their competitor, Hospital A, has important new capabilities they lack. Fearful that they will lose patients and prestige to Hospital A, the other three hospitals each decide to buy an MRI machine of their own. Unfortunately, Metropolis does not have enough people to utilize all four MRI machines fully. In fact, just one machine might adequately serve all the MRI needs of Met

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laws because they are less likely to be challenged by new
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ices and products covered and the severity of the approval requirements.

³ FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION ch. 8, at 2 (2004) [hereinafter DOSE OF COMPETITION], <https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice>.

⁴ Nat'l Conf. of State Legislatures, (Sept. 2015), <http://www.ncsl.org/research/health/con-certificate-of-need-state-laws.aspx>.

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⁶ ; Pub. L. 93-641, 88 Stat. 2225 (1975) (codified at 42 U.S.C. §§ 300k-300n-5), , Pub. L. 99-660, § 701, 100 Stat. 3799 (1986).

⁷ DOSE OF COMPETITION, note 3, ch. 8, at 1.

⁸ , David Salkever, , 1B HANDBOOK OF HEALTH ECONOMICS 1526-27 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000) ("At a minimum, it seems fair to conclude that direct CON effects on costs are not negative."); Patrick A. Rivers, Myron D. Fottler & Jemima A. Frimpong, , 36 J. HEALTH CARE FIN. 1, 11 (2010) (finding that CON laws "may actually costs").

⁹ , Michael D. Rosko & Ryan L. Mutter, , 71 MED. CARE RES. & REV. 280 (2014) (finding lower hospital cost-inefficiency in CON states than non-CON states but not controlling for the possibility that the observed differences are caused by the many other differences between states with and without CON laws). Analyzing the impact of CON laws on costs, prices, quality, or levels of indigent care is a very challenging empirical task. States that adopt (or repeal) CON laws may differ in many ways from states that do not. More importantly, those differences may influence which states decide to adopt or repeal CON laws. Although there are methods to control for these differences, those methods all have significant drawbacks.

¹⁰ Maureen K. Ohlhausen & Gregory P. Luib, M , J. ANTITRUST ENFORCEMENT (forthcoming 2015), <https://www.ftc.gov/public-statements/2015/14>