

Oregon's Certificate of Need Program: Lessons from Research

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February 13, 2024

Distinguished committee members:

My name is James Bailey. As a health economist, I have spent much of the last decade studying Certificate of Need (CON) laws, and I appreciate the opportunity to share my findings with you. Please note that I am writing only on my own behalf, and do not intend to represent the views of my employer.

CON laws require health providers to obtain the permission of a state board before opening, expanding, or offering a new type of service. Most states passed their CON law in response to a 1974 federal mandate¹, though 15 states have repealed their laws since the federal requirement was dropped in the 1980's. Oregon's Certificate of Need program exists "In an effort to control the rapidly escalating costs of health care."² Academic research on CON, however, shows that if anything CON has led to higher costs and less access to care.

CON Decreases Access to Care and Increases Health Care Costs

With Dr. Christopher Conover of Duke University, I conducted a [systematic review](#) of the academic literature on CON laws³. Surveying the articles that provided original empirical estimates, we found that most research found that CON led to higher spending and worse access to care.

¹ The National Health Planning and Resource Development Act of 1974. See Conover and Bailey (2020) for a more detailed history: <https://bmchealthservres.biomedcentral.com/articles/10.1186/s12913-020-05563-1>

² From:

<https://www.oregon.gov/oha/ph/providerpartnerresources/healthcareprovidersfacilities/certificateneed/pages/index.aspx>

³ Conover, C.J., Bailey, J. Certificate of need laws: a systematic review and cost-effectiveness analysis. *BMC Health Serv Res* 20, 748 (2020). <https://doi.org/10.1186/s12913-020-05563-1>

The most straightforward and direct effect of CON is that these laws make it more expensive, time-consuming, and difficult to open or expand a health care facility and to acquire health care equipment. The academic literature confirms that this generally results in fewer facilities and less equipment in CON states. CON is associated with:

13 percent fewer hospital beds⁴

26 percent fewer hospitals offering MRI scans and CT scans⁵

30 percent fewer hospitals per capita⁶

14 percent fewer ambulatory surgery centers⁷

49 percent fewer neonatal intensive care beds⁸

My own research on how CON affects health care spending found that it leads to 3.1% higher spending overall⁹ and 13.1% higher spending by patients in less-than-good health¹⁰. This higher spending seems to be driven by higher prices more than higher utilization. In fact, health care prices are on average 13.8% higher in CON states¹¹.

CON Laws Decrease Access to Psychiatric Care

⁴ Stratmann T, Russ J. Do Certificate-of-Need Laws Increase Indigent Care?. Mercatus Center working paper

<https://www.mercatus.org/system/files/Stratmann-Certificate-Need.pdf>

⁵ Stratmann T, Russ J. Do Certificate-of-Need Laws Increase Indigent Care?. Mercatus Center working paper

<https://www.mercatus.org/system/files/Stratmann-Certificate-Need.pdf>

⁶ Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper

<https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory> (an older article finds a 48 percent decrease- see Eichmann TL, Santerre RE. Do hospital chief executive officers extract rents from Certificate of Need laws?. Journal of health care finance. 2011;37(4):1-4.)

⁷ Stratmann T, Koopman C. Entry Regulation and Rural Health Care: Certificate-of-Need Laws, Ambulatory Surgical Centers, and Community Hospitals. Mercatus Center working paper

<https://www.mercatus.org/publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory>

⁸ Lorch SA, Maheshwari P, Even-Shoshan O. The impact of certificate of need programs on neonatal intensive care units. Journal of Perinatology. 2012 Jan;32(1):39-44.

⁹ Bailey J. Can health spending be reined in through supply restraints? An evaluation of certificate-of-need laws. Journal of Public Health. 2019 Dec 1;27(6):755-60.

¹⁰ Bailey J, Hamami T. Competition and Health-Care Spending: Theory and Application to Certificate of Need Laws. Federal Reserve Bank of Philadelphia working paper 19-38 <https://www.philadelphiafed.org/the-economy/competition-and-health-care-spending-theory-and-application-to-certificate-of-need-laws>

¹¹ Bailey J, Hamami T, McCorry D. Certificate of need laws and health care prices. Journal of Health Care Finance. 2016 Jul 17;43(4).

I also published what I believe is the only study to evaluate the effect of CON on access to psychiatric care. The study was co-authored with Dr. Eleanor Lewin of the Providence Veterans Affairs Hospital, and was published in the *Journal of Mental Health Policy and Economics*¹². Controlling for a variety of factors, we find that CON is associated with a state having 20% fewer psychiatric hospitals, and those hospitals being 5.3 percentage points less likely to accept Medicare.

Substance Use Treatment Centers are Less Likely to Accept Private Insurance in States with CON Laws

I have also evaluated the effect of CON on access to substance use treatment. The [study](#)¹³ was co-authored with Dr. Thanh Lu of Weill Cornell Medical College and Patrick Vogt of Providence College, and was published in *Substance Abuse Treatment, Prevention, and Policy*. We find that substance use CON has no statistically significant effect on the number of substance use facilities, beds, or clients, and no significant effect on the acceptance of Medicare. However, it reduces the acceptance of private insurance by a statistically significant 6%.

The Federal Government Has Disavowed CON Laws for Decades

The weight of the research and experience with CON, along with changes to Medicare reimbursements, led to a dramatic change in the federal government's approach. They have gone from threatening to withhold Medicare funds to states without CON in the 1970's, to advocating that states repeal CON laws today. The Federal Trade Commission (FTC) and the U.S. Department of Justice have released joint statements supporting the repeal of CON laws in several states, including Virginia, Tennessee, and South Carolina¹⁴, arguing that CON laws "create barriers to entry and expansion, limit consumer choice, and stifle innovation." FTC Commissioner Maureen Olhausen went further, calling CON "A Prescription for Higher Costs" in

¹² Bailey, James, and Eleanor Lewin. "Certificate of Need and Inpatient Psychiatric Services." *The Journal of Mental Health Policy and Economics* 24, no. 4 (2021): 117-124.

¹³ Bailey J, Lu T, and Vogt P. Certificate of Need and Substance Use Treatment. *Substance Abuse Treatment, Prevention, and Policy* (2022) 17:38 <https://doi.org/10.1186/s13011-022-00469-z>

¹⁴ See here for the statements: <https://www.justice.gov/atr/page/file/1146241/download>

a [2015 article](#). The White House Council of Economic Advisors questioned the value of CON during both the Obama¹⁵ and Trump¹⁶ administrations.

The American Medical Association has also [argued](#) for repeal, saying that “Certificate of Need (CON) laws have failed to achieve their intended goal of containing costs,” “There is little evidence that CON laws improve access to care,” and “CON programs can impede patient choice,” concluding that “CON laws represent a failed public policy.”

Oregon’s CON Program

By one recent measure, Oregon currently operates the strictest CON program of any Western state. The Institute for Justice measured the number of different types of health facilities, equipment, and services regulated by CON laws in every state, noting that Oregon regulates 5 out of a possible 6 broad categories. Their report notes that the CON application process in Oregon can take up to 4 months and costs between \$5,000 and \$90,900 in direct fees. For any potential large project, the most important cost is that the CON application may be rejected entirely, and that the project could then not legally move forward. Making this particularly likely in Oregon is the fact that “Competitors can intervene in the application process and can offer evidence or argument as to why an application should be denied.”¹⁷ As a result, many providers may give up without ever applying for a CON.

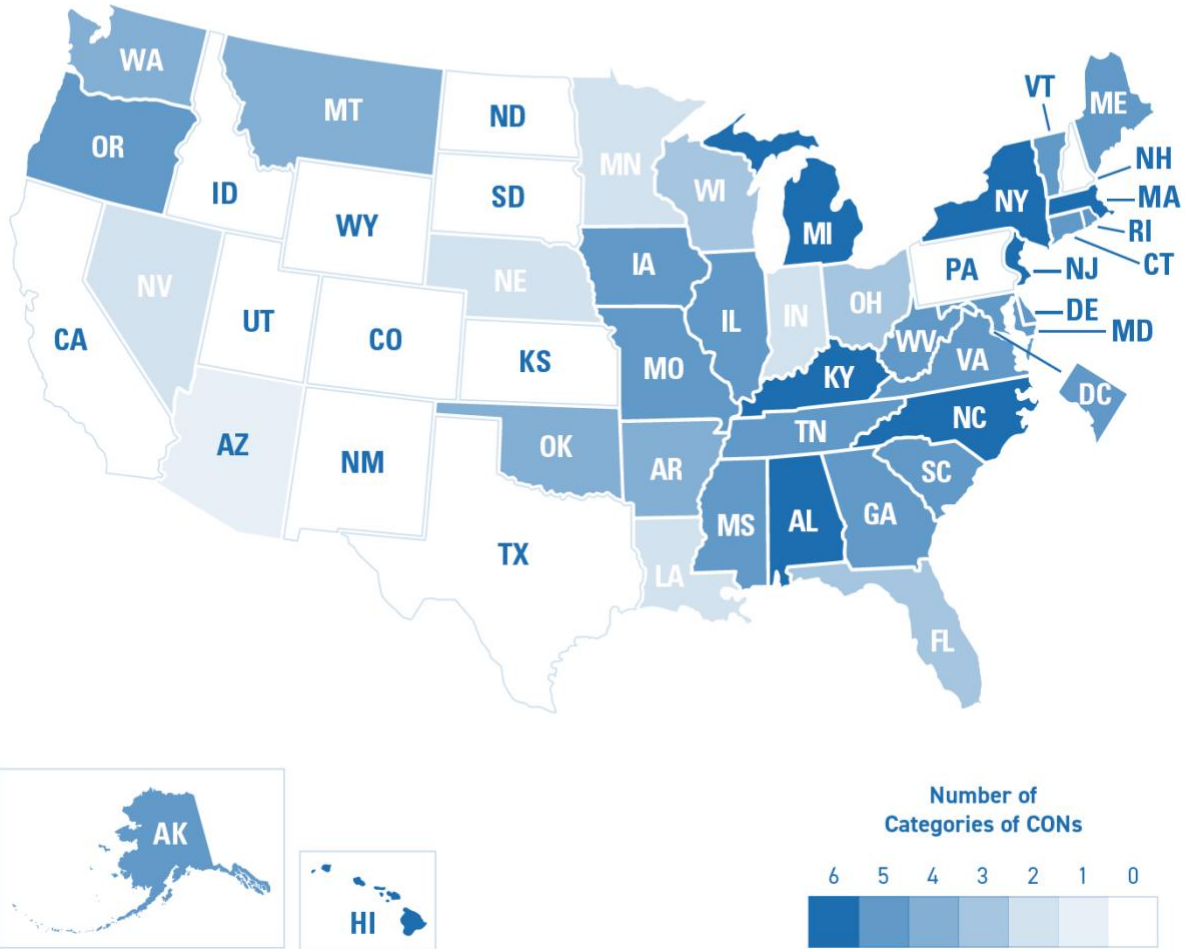
¹⁵ Benefits of Competition and Indicators of Market Power

https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf

¹⁶ “state-specific certificate-of-need laws could reduce provider access and create unnecessary monopoly pricing” p178, Economic Report of the President 2020 https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf?mod=article_inline

¹⁷ “Conning the Competition: A Nationwide Survey of Certificate of Need Laws”, Institute for Justice <https://ij.org/report/conning-the-competition/>

States That Regulate Healthcare Access in the Most Categories



Source: Institute for Justice, "Conning the competition"

Reform is possible. New Hampshire repealed its entire CON program in 2016; we have also seen near-complete repeal in Florida in 2019, Montana in 2021, and South Carolina in 2023. COVID and concern about full hospitals led many states¹⁸ to temporarily waive CON requirements, and save lives as a result.¹⁹

¹⁸[https://www.ftc.gov/system/files/documents/public_statements/1579079/summer_2020_wilson_deregulating_health_care_in_a_pandemic- and_beyond.pdf](https://www.ftc.gov/system/files/documents/public_statements/1579079/summer_2020_wilson_deregulating_health_care_in_a_pandemic-_and_beyond.pdf)

¹⁹ Choudhury, Agnitra Roy, Sriparna Ghosh, and Alicia Plemmons. 2022. "Certificate of Need Laws and Health Care Use during the COVID-19 Pandemic" *Journal of Risk and Financial Management* 15, no. 2: 76. <https://doi.org/10.3390/jrfm15020076>

Conclusion

Evidence from the academic literature suggests that CON reform along the lines of this bill would mean more health facilities, better access to care, and lower costs for health care in Oregon.