

A woman with blonde hair is sitting on the edge of a hospital bed, looking down with her hands clasped in a distressed or prayerful manner. In the background, a medical monitor displays vital signs: 73 (heart rate), 135/82 (blood pressure), and 98 (oxygen saturation). The room has a clinical, blue-toned lighting.

Dr. James Bailey

CERTIFICATE OF NEED IN NORTH CAROLINA

COST, ACCESS, TREATMENT

locke 

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Certificate of Need in North Carolina

Cost, Access, Treatment

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Executive Summary

North Carolina is one of 35 states with a Certificate of Need (CON) program, a law requiring health providers to obtain the permission of a state board before opening, expanding, or offering a new type of service. North Carolina's program is strictest in the Southeast and the third strictest in the country.

In this paper I review the recent academic research on CON, which finds that CON is associated with 30% fewer hospitals per capita, 13% fewer hospital beds, 14% longer emergency room wait times, and 3% higher spending. Reforming or repealing CON is therefore likely to bring more health care facilities, lower health care prices, and better access to care in North Carolina.

These are some of the reasons why organizations as diverse as the Department of Justice, the Federal Trade Commission, the White House Council of Economic Advisors, and the American Medical Association have called for the reform or repeal of CON laws, and why states like New Hampshire and Florida have recently reformed or repealed their CON programs.

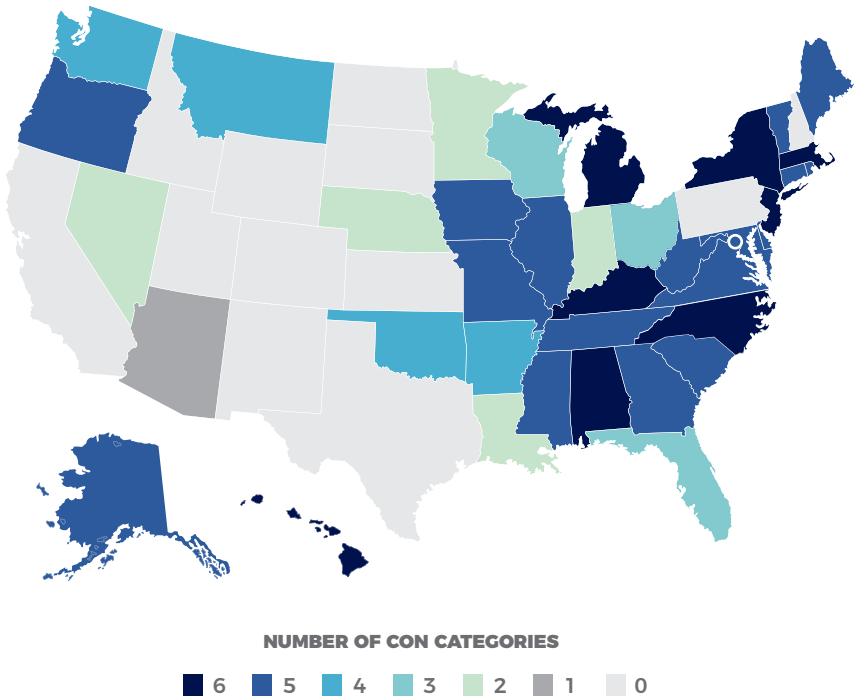
INTRODUCTION

North Carolina is one of 35 states with a Certificate of Need (CON) program. 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 Most states passed their CON law in response to a 1974 federal mandate¹, though 15 states have repealed their laws since the federal requirement was dropped in the 1980s. According to North Carolina's Certificate of Need program, "The fundamental premise of the CON law is that increasing health care costs may be controlled by governmental restrictions on the unnecessary duplication of medical facilities."² In this paper I review the academic research on CON, which shows that if anything CON leads to higher costs, along with less access to care.

1 The National Health Planning and Resource Development Act of 1974; see Conover and Bailey (2020) for a more detailed history

2 From the front page of the website of Healthcare Planning and Certificate of Need Section of North Carolina's Department of Health and Human Services <https://info.ncdhhs.gov/dhsr/coneed/index.html>

States That Regulate Healthcare Access Most Heavily



SOURCE: INSTITUTE FOR JUSTICE, "CONNING THE COMPETITION"

This research is part of what led to a dramatic change in the federal government's approach, from threatening to withhold Medicare funds to states without CON in the 1970's to asking states to repeal CON today. The Federal Trade Commission and the Department of Justice have released joint statements supporting the repeal of CON laws in several states, including Virginia, Tennessee, and South Carolina³, 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 a 2015 article. The White House Council of Economic Advisors questioned the value of CON

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

during both the Obama⁴ and Trump⁵ 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.”

North Carolina in particular has a relatively strict CON program. The American Health Planning Association tracked which of 26 different types of health services, facilities, and equipment were covered by various states through 2016. Their most recent data show that North Carolina required CON for 23 separate types of medical care, making it the third strictest state after Vermont (26) and Hawaii (25). Researchers at the Mercatus Center at George Mason University reached a similar conclusion in 2015⁶. The Institute for Justice compiled a more recent summary of CON laws in the 50 states, noting that “North Carolina is one of eight states to require CONs across all six broad categories — hospital beds, beds outside hospitals, equipment, facilities, services and emergency medical transport.” Their report notes that the CON application process in North

“The Federal Trade Commission and the Department of Justice have released joint statements supporting the repeal of CON laws in several states, including Virginia, Tennessee, and South Carolina...”

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- 4 Benefits of Competition and Indicators of Market Power https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf
 - 5 “state-specific certificate-of-need laws could reduce provider access and create unnecessary monopoly pricing” p178, Economic Report of the President 2020 <https://www.govinfo.gov/content/pkg/ERP-2020/pdf/ERP-2020.pdf>
 - 6 Certificate-of-Need Laws: Implications for North Carolina https://www.mercatus.org/system/files/Koopman-Certificate-of-Need-NC-MOP_1.pdf

Carolina typically takes about 90 days and costs between \$5,000 and \$50,000 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 North Carolina 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.”⁷

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

CERTIFICATE OF NEED: WHAT DOES THE RESEARCH SAY?

Dr. Christopher Conover of Duke University and I conducted a systematic review of the literature on CON laws published before 2010⁸. 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. Different researchers define “access to care” differently, but for example states that repealed CON were found to have shorter travel times for care⁹ and smaller racial disparities in care¹⁰.

For this report I update my review of the research to include articles published between the year our previous review ended (2010) and 2020. Google Scholar showed 120 publications with “Certificate of Need” in the title between 2011 and 2020. Of these, 55 conducted original empirical

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- 8 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>
 - 9 Kolstad JT. Essays on information, competition and quality in health care provider markets [PhD [dissertation]]. Cambridge, MA: Harvard University; 2009.
 - 10 Delia D, Cantor JC, Tiedemann A, Huang CS. Effects of regulation and competition on health care disparities: the case of cardiac angiography in New Jersey. *J Health Polit Policy Law*. 2009;34(1):63–91.

research estimating the effect of CON laws on some outcome of interest. I summarize the recent literature on four key outcomes here: health care facilities, health spending, access to care, and the quality of care. Typically, this research compares CON- and non-CON states using regression analysis to control for other differences between states, with some papers using fixed-effects or difference-in-difference analyses that focus on what happens when states pass or repeal CON.

CON and Facilities

The most straightforward and direct effect of CON is that it makes 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 beds¹¹

26 percent fewer hospitals offering MRI scans and CT scans¹²

30 percent fewer hospitals per capita¹³

14 percent fewer ambulatory surgery centers¹⁴

11 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>

12 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>

13 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-of-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.)

14 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/>

49 percent fewer neonatal intensive care beds¹⁵

42 percent fewer substance abuse treatment centers¹⁶

CON and Spending

Research on how CON affects health care spending found that it leads to 3.1% higher spending overall¹⁷ and 13.1% higher spending by patients in less-than-good health¹⁸. This higher spending seems to be driven by higher prices more than higher utilization - health care prices are on average 13.8% higher in CON states¹⁹, Medicaid spends 60% more per nursing home enrollee in CON states²⁰, and the price of spinal surgery has fallen 11% in non-CON states²¹.

publications/regulation/entry-regulation-and-rural-health-care-certificate-need-laws-ambulatory

- 15 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.
- 16 Noh S, Brown CH. Factors Associated with the Number of Substance Abuse Nonprofits in the US States: Focusing on Medicaid Expansion, Certificate of Need, and Ownership. *Nonprofit Policy Forum* 2018 Jun 7 (Vol. 9, No. 2).
- 17 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.
- 18 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>
- 19 Bailey J, Hamami T, McCorry D. Certificate of need laws and health care prices. *Journal of Health Care Finance*. 2016 Jul 17;43(4).
- 20 Rahman M, Galarraga O, Zinn JS, Grabowski DC, Mor V. The impact of certificate-of-need laws on nursing home and home health care expenditures. *Medical Care Research and Review*. 2016 Feb;73(1):85-105.
- 21 Ziino C, Bala A, Cheng I. Does ACDF Utilization and Reimbursement Change Based on Certificate of Need Status? *Clinical Spine Surgery*. 2020 Apr 27;33(3):E92-5.

CON and Quality

I focus on mortality here as the clearest and most important measure of quality, though many studies focused on other measures. Two articles studied the effect of CON on all-cause mortality. My own work, published in *Health Services Research*, found that CON states have 0.5% higher mortality but that the difference was not statistically significant²⁴. A more recent article found that mortality from natural causes is a statistically significant 5 deaths per 100,000 residents higher in CON states, and that when states had high ICU occupancy due to COVID, states that temporarily waived their CON requirements saw 40 fewer COVID deaths per 100,000 residents and 57 fewer natural causes deaths than states that maintained CON²⁵.

One article measured the effect of CON on more specific types of mortality, finding higher mortality rates for patients admitted to the hospital with pneumonia, heart failure, and heart attacks.²⁶

“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.”

24 Bailey J. The effect of certificate of need laws on all-cause mortality. *Health services research*. 2018 Feb;53(1):49-62. <http://onlinelibrary.wiley.com/doi/10.1111/1475-6773.12619/abstract>

25 Ghosh S, Roy Choudhury A, Plemmons A. Certificate-of-Need Laws and Healthcare Utilization During COVID-19 Pandemic. 2020 Working paper, summarized here: <https://www.mercatus.org/bridge/commentary/repealing-con-laws-saves-lives-non-covid-patients>

New Research on CON and Treatment for Substance Abuse and Mental Health

My review of the existing research found many articles on how CON affects the provision of physical health care (such as heart surgery and radiation therapy), but none on how it affects the provision of mental health care. To remedy this imbalance and discover how CON affects this important aspect of health care, I conducted two original studies.

In a study²⁷ co-authored with Dr. Eleanor Lewin of Women & Infants Hospital, we measure how CON affects psychiatric hospitals in the 25 states that require CON for psychiatric services (see map). 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. According to 2018 data from the National Mental Health Services Survey, North Carolina had 15 psychiatric hospitals, 12 of which accepted Medicare. Based on our estimates, if North Carolina repealed its CON requirement for psychiatric hospitals, it would be expected to have 18 psychiatric hospitals, of which 15 or 16 would accept Medicare.

In a study²⁸ co-authored with Dr. Thanh Lu of Weill Cornell Medical College and Patrick Vogt of Providence College, we measure how CON affects substance use treatment facilities in the 17 states that require CON for substance abuse treatment. 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

27 Bailey J and Lewin E. Certificate of Need and Psychiatric Services. 2021 Social Science Research Network working paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3757549

28 Bailey J, Lu T, and Vogt P. Certificate of Need and Substance Use Treatment. 2021 Social Science Research Network working paper https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3757059

statistically significant 1.85%, and the acceptance of Medicaid by a statistically significant 3.49%. According to 2018 data from the National Survey of Substance Abuse Treatment Services, 458 treatment facilities in North Carolina accept cash but only 326 accept private insurance while 349 accept Medicaid. Our estimates suggest that if CON were repealed, an additional 6 treatment facilities would accept private insurance and an additional 12 treatment facilities would accept Medicaid. The result would be more people struggling with substance abuse having access to treatment.

**CONCLUSION:
REFORM IS POSSIBLE**

The evidence that CON laws are, as the American Medical Association said, “a failed public policy” is overwhelming. But inertia and special interests make CON repeal challenging even when some state policy-makers understand the importance of reform. CON leads to costs that are dispersed across the whole population of patients, but its benefits are concentrated among a few incumbent health care providers that use it to keep out new competitors. Each of the handful of firms that benefits from CON benefits a lot, with hospital CEO compensation estimated to be \$91,000/yr higher due to CON²⁹, giving them a strong incentive to lobby for the status quo and for favorable rulings from CON boards³⁰. Politicians appreciate these contributions, though they must

29 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.

30 Stratmann T, Monaghan S. The Effect of Interest Group Pressure on Favorable Regulatory Decisions: The Case of Certificate-of-Need Laws. *Mercatus Research Paper*. 2017 Aug 29. <https://www.mercatus.org/publications/corporate-welfare/effect-interest-group-pressure-favorable-regulatory-decisions>

take care to avoid explicit quid pro quos such as the CON bribery scandal that set in motion the downfall and imprisonment of Illinois governor Rod Blagojevich³¹.

Meanwhile the costs of CON are dispersed, increasing health spending for a typical patient by 3%³² to 10%³³ and doing so in an opaque way - most voters don't know what CON is. Reform requires farsighted policymakers who are able to look past a handful of complaints from incumbent hospital lobbyists today to a future with more widely available and more affordable health care, new health care providers contributing to their district, and an answer to constituents who ask "what are you doing about health care costs?"

Reform is possible. New Hampshire repealed its entire CON program in 2016 and Florida repealed most of its CON requirements in 2019. COVID and concern about full hospitals led many states³⁴, including North Carolina³⁵, to temporarily waive CON requirements and save lives as a result.³⁶

31 "She dealt a death blow to Illinois 'pay to play'" <https://www.fraud-magazine.com/article.aspx?id=344>

32 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.

33 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>

34 https://www.ftc.gov/system/files/documents/public_statements/1579079/summer_2020_wilson_deregulating_health_care_in_a_pandemic_and_beyond.pdf

35 <https://www.carolinajournal.com/news-article/north-carolina-temporarily-lifts-restrictions-on-hospital-beds/>

36 Ghosh S, Roy Choudhury A, Plemmons A. Certificate-of-Need Laws and Healthcare Utilization During COVID-19 Pandemic. Working paper, summarized here: <https://www.mercatus.org/bridge/commentary/repealing-con-laws-saves-lives-non-covid-patients>

A recent report from the Mercatus Center provides a variety of options for reforms to CON that stop short of full repeal, while paving the path for a smoother transition to complete repeal. North Carolina's CON program is by far the strictest in the Southeast, and so a reform that made North Carolina's program normal would be a major improvement. CON reform in North Carolina would mean that health care providers, rather than state bureaucrats, could decide where new health services are needed. The evidence shows that this would mean more health facilities, better access to care, and lower costs.

About the Author



Dr. James Bailey is an Assistant Professor of Economics at Providence College, a Visiting Scholar at the Federal Reserve Bank of Philadelphia, and a Senior Affiliated Scholar with the Mercatus Center

at George Mason University. He holds a PhD in Economics from Temple University. His research has focused on the effects of regulations on health care, health insurance and labor markets. He has published 20 articles in academic journals, including four articles evaluating the effects of Certificate of Need laws.

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Our History

The John Locke Foundation was created in 1990 as an independent, nonprofit think tank that would work “for truth, for freedom, for the future of North Carolina.” The Foundation is named for John Locke (1632-1704), an English philosopher whose writings inspired Thomas Jefferson and the other Founders. The John Locke Foundation is a 501(c)(3) research institute and is funded by thousands of individuals, foundations and corporations. The Foundation does not accept government funds or contributions to influence its work or the outcomes of its research.

Our Vision

The John Locke Foundation envisions a North Carolina of responsible citizens, strong families, and successful communities committed to individual liberty and limited, constitutional government.

Our Mission

The John Locke Foundation employs research, journalism, and outreach programs to transform government through competition, innovation, personal freedom, and personal responsibility. JLF seeks a better balance between the public sector and private institutions of family, faith, community, and enterprise.



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