

Monopolies, Special Charters, and Professional Regulation:

An analysis of how democracies have historically addressed special government grants with suggestions on applying those lessons to improve competition in the American healthcare market.

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2016

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Response to question: What is the relationship between professional regulations and competition?
Would changes to professional regulations enhance competition among health care providers? If so,
what changes would be desirable?

The problem with regulating healthcare professions is that states rely on a spaghetti code of special laws to define and license professions, which is an ancient legal problem with a known cure: laws of general applicability. The established professions rely on special grants for economic protectionism, abusing the states' police powers to accomplish their goals. The state legislatures pass special acts that recognize this professional credential, refuse to recognize another, and generally rely on an ancient system of handling every request for state approval through the ancient practice of forcing everyone to go to the top for special dispensation instead of passing general laws that grant rights to all people who can prove they meet the qualifications. Ironically, the very tactics used by the established professions to protect their special grants recreates the very dangers that professional licensing and regulation was ostensibly created to remedy.

This situation has several historical parallels. England faced a similar crisis in the 17th century when the economy faced crisis from overuse of Royal Monopolies. Similarly, in the 19th Century, most American states realized that requiring a special act of the legislature to create a corporation created a system rife with monopolies, political corruption, and harm to consumers. And in the middle of the 20th century, American states realized that the spaghetti code of regulations and administrative review processes were fundamentally unfair. All of these crises were solved using a similar legal tool: the legislative bodies replaced confusing, disparate, and preferential special laws with rules of general applicability. The same solution could be applied here.

Each state could create appropriate rules of general applicability based on existing law and consistent with principles or rules of law that have been tested and shown to be effective. States already have some general laws that affect all, or at least most, professions in their various Administrative Procedures Acts, including standards for independent review, fair hearings, and legal standards for discipline. States could expand on these acts to define professions as a class, along with rights and privileges that all professions should enjoy. States could also create statutes outlining the path to the creation of new professions based on the legal principles found in the statutory provisions for students and developing professionals. Our legal system prefers laws of general applicability over special legislation, and there is good reason for that. From an economic standpoint, the primary benefit is that general laws allow for fair competition and reduce unnecessary barriers to entry while still allowing the state the necessary authority to regulate sensitive areas where the public must be protected from fraud and incompetence.

Each Statutory Chapter Defining and Granting Authority to License is a Special Grant of Monopoly

The historical precedent is important because there is a strong link between monopoly, economic protectionism, and special acts of the state. Special laws harm economic competition because it is political power and not consumers' that control consumers' options. In England, the economic protectionism was blatant. The King was permitted to hand out monopolies on anything from selling salt to ships. Economic interests were dictated by political favor, and the country was in crisis because those

who were granted a monopoly profited by driving up prices on the monopolized goods. In 1623, Parliament took action and dissolved all the monopolies, which allowed competition to return to the marketplace.

Similarly, we have replaced a special grant from the King with a special grant from the legislature, but each profession receives a special grant of monopoly along with the legal authority to protect that monopoly. Each state, usually under the medical practice act, makes the provision of health care services a crime without a license, usually a felony. Each state then has several chapters of statutes that outline the practice of medicine, nursing, psychology, and other professions. Included in each chapter is one or more provisions for how persons may be licensed to enter a specific profession, but no state has generally defined what is or is not a profession or how an occupational association would go about moving from an unlicensed association to a licensed profession. Established professions have a de facto monopoly and direct access to the police power of the state that they can, and do, use to protect their monopoly.

Because there is no legal standard for developing a profession, the state discourages competition in the marketplace because the statutes have a chilling effect on free speech. Each state has some form of general prohibition against the provision of services without a license, and that provision is enforced as a criminal statute, usually a felony. The standard procedure for recognizing a new profession is that the legislature will pass a new statute, recognizing a new profession that has been able to convince legislators of their competence and integrity. But to prove competency, a profession has to practice somewhere, and when the profession is first starting, they are committing multiple felonies in pursuit of legal endorsement. Not only are the professionals committing felonies, they are actually committing a felonious conspiracy to violate the law, and then the state requires them to publicly announce that felonious conspiracy in public hearings that are almost universally attended by the very professionals that have the legal authority to put them in jail. Midwives in Missouri, for example, depended for decades on the lobbying efforts of consumers because the Missouri Board of Registration for the Healing Arts was known for hunting and prosecuting midwives. No midwife could testify, lobby, or even publicly admit to her profession without fear of being put in jail by her competitors.

When one profession can use the government to restrain their competitors' legal rights and ability to enter the marketplace, consumers suffer. England learned that allowing political favoritism to determine who did or did not get to enter the market stifled the economy and put the entire country at risk. Health care costs are doing the same in this country today, and it is the same mix of political power and economic opportunity that creates this problem. The solution, likewise, is similar: states should create laws of general applicability that define professions and create paths to the creation of new professions that do not require well-intentioned people to engage in felony conspiracies.

The Historically Validated Solutions are Laws of General Applicability

England is not the only country to have faced special grants creating the kind of anti-competitive marketplace we see in health care professions today. Throughout the 19th century, American States

allowed the creation of corporations through special acts of the legislature, but as legislatures begin to realize the political corruption problems associated with this system, they began to move to the system of registration we have now. By comparison, health care regulation is a legally primitive system that desperately needs to be updated to modern standards of law.

States face strikingly similar challenges to passing individual corporate charters in the 19th century when lobbyists for multiple potential professions besiege legislators today. The first, and most obvious similarity is that both the corporations and the professions are looking for legal permission to make money doing something that would otherwise be illegal. In the 19th century, corporations were not well-loved because they were seen as somewhat of a danger to the public. Some of that distrust for corporations still survives in groups like Occupy Wall Street, and there has always been a concern that allowing people free reign to form corporate bodies erodes public safety, economic liberty, and democracy. In the early days of our legal system, requiring corporate charters seemed like a good brake on that system, similar to the justification of government regulation of healthcare professions. The problem with the system of special acts is the same one faced by professions: already established professions will lobby against introduction of competitors to protect themselves.

Established professions have an obvious advantage because they are already endorsed by the state, already organized, and they are earning income from their profession while the new professions are felons who are often unorganized and spending money they cannot replace through their chosen occupation. Despite this, some areas of professional regulation still seem to be fairly egalitarian; although, it depends more on the character of the established professions than anything else. For example, Missouri recognizes at least six relatively independent counseling professions.¹ However, Advanced Practice Nurses and Physician Assistants are tied to a competing profession through requirements that the "new" professions enter into Collaborative or Supervisory Practice Arrangements with individual private physicians in order to practice. The difference is that the medical associations have a history and reputation for prosecuting dissenters and other professions, while the psychologists have allowed other professions to develop in relative peace and quiet. The competitive outcomes are exactly as economic theory would predict: the physical health market is tightly controlled by established monopolies, has high prices, has limited consumer choice, and resists disruptive innovation. In contrast, the psychotherapy market is dominated by mid-level providers, competitive prices, new options for consumers, and openness to both adoption of new ideas and abandonment of old ideas that do not work. The economic lesson is that the legal barriers to competition increase dependence on monopolies and reduce consumer choice and benefit. Neither consumers, nor new professions should be limited by the unfair practices of established, self-interested competitors.

The major healthcare associations have learned, for the most part, not to compete in the open market. Instead, they rely on political access and the ability of legislatures to define and create special categories for them. New professions might be able to pursue a patchwork of anti-trust actions against

¹Psychiatrist (§ 334 RSMo), social worker (§ 337.600 et seq RSMo), psychologist (§ 337.010 et seq RSMo), behavioral analyst (§ 337.300 et seq RSMo), professional counselors (§ 337.500 et seq RSMo), and marriage and family therapists (§ 337.700 RSMo).

the major players, but it will not resolve the problem because large professional organizations are neither more evil or more virtuous than 19th century corporations. Just like in 17th century England, when a government creates an economic system that is dependent on political favor and allows for state granted monopolies, the consumer is harmed. The privileged companies and people are only rationally acting in their own best interest. The solution is a system that aligns that rational self-interest with the interests of consumers through competition. It worked in the 17th century; it worked in the 19th century. It would still work today.

Professions Say They Need Special Laws, but General Laws Actually Work Better

Professional regulation really got underway in the 20th century. Professional regulation predates 20th century development and the legal principles extend even further. But the 20th century saw an explosion and refinement of professional regulation. For an oversimplification, states legislatures and courts struggled to define the substantive legal underpinnings justifying government restriction and control of occupations and markets for the first half of the century, and for the second half, states clarified rules and dealt with procedural rules adjudication.

The blueprint for all professional regulation is the American Medical Association ("AMA"), following the advice laid out in Abraham Flexner's report for the Carnegie Institute.² At the end of the 19th and beginning of the 20th century, various state medical associations, in association with the AMA, set out to convince the various state legislatures that restrictive licensing and special grants of privilege were necessary to protect the public. The AMA's persuasive points in legislatures and in court were that licensing laws were necessary to protect the public from fraud and incompetence from inadequately trained providers. The Flexner Report made significant changes because it focused on the need of the state to do more than verify that providers had credentials. Flexner posited that the state should get into the business of examining not just the applicants, but also the credentials themselves.³ Not all credentials were equal, and some schools of medicine were either inadequate or unethical in their credentialing. Flexner also noted that the examination process was flawed and created a danger to the public, especially where the state certification was handled by a single person.⁴ Flexner and the AMA pushed for the creation of powerful state licensing boards which could raise the educational and professional standards of practitioners, and other professions, seeing the financial and social advantages, followed.

For most of the 20th century, states would create licensing boards for individual professions, which would promulgate regulations, inspect applicants, issue licenses, prosecute complaints,

² See generally: Flexner Report...Birth Of Modern Medical Education available at

<http://www.medicinenet.com/script/main/art.asp?articlekey=8795>

and The Flexner Report -- 100 Years Later available online at

<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3178858/>

Flexner's report available online at:

http://www.carnegiefoundation.org/sites/default/files/elibrary/Carnegie_Flexner_Report.pdf

³ Flexner, Chapter XI The State Boards

⁴ Flexner p 171, "As long as everything depends on the personality of a single individual, administration will be liable to marked fluctuations. There can be neither security nor continuity."

adjudicate complaints, and enforce discipline. But the combination of all of these government functions created problems. In 1964, Missouri's Board of Registration of the Healing Arts denied Dr. Harold Lischner's license because he was a pacifist and conscientious objector during WWII.⁵ Dr. Lischner challenged the fairness of his hearing because the Board had acted as prosecutor, judge, jury, and executioner. Missouri apparently agreed because the legislature created the Administrative Hearing Commission the following year to serve as an independent adjudicator. Administrative hearings where a professional board brings charges against licensees or applicants before a neutral hearing officer are now common in all states, and states commonly have one adjudicatory body for multiple or all professions. Initially, some professions protested that someone who was not a member of their profession would be unable to judge someone who was, but the experience of administrative hearing officers, professionals, and states shows that the opposite is true: professionals and their attorneys recognize the benefits of a fundamentally fair process.⁶

What makes the Administrative hearing process work is that the rules of evidence, fair hearings, and so on do not change across professions. Who is qualified to testify about scope of practice, industry standards, and so on does vary, but this is no different than a standard court that could hear a contract dispute one day and a tort the next. There may be different experts called to discuss how financial institutions create and understand contracts from those who testify about whether driving a particular speed on a particular curve is safe or dangerous, but the rules on expert witnesses, evidence, and fair hearing do not change. The same is true for professions, who it turns out can be, at least in part, regulated under the same set of general rules and principles.

The question then, is why states approach the creation and regulation of professions through the antiquated process of special legislation. States recognize the barrier to entry that would be created to individuals if there was no statutory provision allowing students to learn. These barriers are the same ones that professional associations face now. A student, applying for a first time license, would have to admit to the licensing agency that they had been illegally providing professional services in order to demonstrate that they were qualified for a license, so the states created exemptions for students in recognized educational programs. It would be more difficult to create the same kinds of programs for entire professions, but it is not outside the realm of possibility. The states would have to also include concrete standards a profession could meet in order to prove that it had, in fact, reached the level of an independent profession. Many of the professions that now face statutory restrictions on their scope of practice, geographical areas, or are required by law to receive authority from a competitor would likely be able to demonstrate sufficient competence for independence immediately. Which may lead established professions to resist such an effort.

Conclusion

Historically, the American legal system has moved away from allowing governments to act arbitrarily in most arenas, but the healthcare professional regulation remains a minefield of arbitrary

⁵ John Sandberg, Special Project, *Fair Treatment for the Licensed Professional: The Missouri Administrative Hearing Commission*, 37 Mo.L.Rev. 410, 438–39 (1972).

⁶ See Eugene Bushman, *The Origin of the Administrative Hearing Commission*, 62 J. Mo. B. 366 (2006).

decisions, political subterfuge, barriers to entry, and rapidly rising costs. The lessons of the past are clear: where the state employs special laws to grant special privileges, consumers suffer and political corruption becomes the norm. The solution is also just as clear: abolish special laws except where states make a showing of exceptional need, and replace them with rules of general applicability. States have sufficient experience with professional regulation, including student exemptions to create these laws and to enforce them in a fair and equitable manner. Laws of general applicability would improve competition among providers, but it is unlikely to create a massive wave of "new professions" because the cost associated with creating, certifying, and accrediting new credentials is sufficiently high to deter casual attempts to skirt the law. The general laws regarding healthcare professions would have to be more robust and require more proof than those for establishing new corporations, but many of the legal principles states have learned from that process could be employed.

The current system is not working because lack of competition is a significant portion of the rising costs of healthcare, which is now a crisis of national proportions. Creating generalized rules would create no more disruption in the system than passing administrative procedure acts did in the middle of last century. Current professions would remain essentially unchanged, and only a few new professions would be recognized immediately. However, over time, the liberty to choose to create something new will create a competitive check and balance on professional association's abuse of the legal system against competitors. Professional associations could quit fighting over scope of practice turf if the states would quit granting monopolies over it. Competition in overlapping areas would drive down costs and promote cooperation between professions because it would no longer be a financial advantage to prefer a professional from your association over an equally qualified, if differently credential colleague.

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