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STATE PRACTICE ACTS OF LICENSED HEALTH PROFESSIONS: SCOPE OF PRACTICE

*James W. Hilliard**
*Marjorie E. Johnson***

I. INTRODUCTION

State governments regulate the vast majority of the health professions. This regulation is accomplished through health profession practice acts, which recognize and enforce a health profession's scope of practice. The recognition and enforcement of the scope of practice of a health profession establishes and maintains boundaries that practitioners in other health professions may not cross. A state practice act enables a health profession to defend its state-recognized area of expertise from takeover by other health care practitioners. Such regulation is necessary and proper due to overlapping scopes of practice, which include services and treatment.

This article will discuss the indispensable role of government, specifically that of state legislatures, in furthering the goals of health care professions. The article will first explain the role of state government in regulating health professions. Next, the article will canvass the role of health care professional associations and how they represent their respective health care professions. The article will then examine a health profession's scope of practice and demonstrate the interaction of state government and health care professional associations in the example of the clash between chiropractors and physical therapists regarding a treatment known as spinal manipulation.

II. THE RIGHT TO PRACTICE

Every citizen has a constitutional right to engage in any legitimate occupation, including the health professions.[1] The Fourteenth

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Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."[2] Courts interpret the due process guarantee as securing not only reasonable procedures, but also substantive rights that are included in the concept of "liberty".[3]

The "liberty" protected by the due process guaranty of the Fourteenth Amendment embraces the right of citizens to freely enjoy all of their skills and aptitudes in all lawful ways; to earn their livelihood by any lawful calling; and to pursue any occupation or avocation.[4] The right to follow a lawful business or profession is also embraced by the "property" concept of the due process clause of the Fourteenth Amendment.[5] The right of a health care practitioner to toil in his or her profession, as well as that of all other citizens to labor in their chosen work, is both "liberty" and "property" within the meaning of the due process guaranty.[6]

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[1] Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897); Dent v. W. Va., 129 U.S. 114, 121-22 (1889).

[2] U.S. CONST. Amend. XIV. The Fifth Amendment, directed to Congress, likewise provides in part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[3] James W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process,* 30 J. MARSHALL L. REV. 95, 95 (1996); *accord* Kelley v. Johnson, 425 U.S. 238, 244 (1976) ("This section affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects substantive aspects of liberty against unconstitutional restrictions by the State."); Whitney v. Cal., 274 U.S. 357, 373 (1926) (Brandeis, J., concurring) (same).

Likewise, the due process guaranty contained in the Fifth Amendment to the Federal Constitution binds the federal government and is a limitation upon the powers of Congress. The due process clauses of both amendments impose the same restraint on federal and state legislation. The Fifth Amendment extends to individuals the same protection against arbitrary federal legislation as the Fourteenth Amendment extends against arbitrary state legislation. Hilliard, *supra,* at 102.

[4] Allgeyer v. La., 165 U.S. 578, 589 (1897); *accord* Truax v. Raich, 239 U.S. 33, 41 (1915).

[5] Dent v. W. Va, 129 U.S. 114, 121-22 (1889).

[6] Lawrence v. Briry, 132 N.E. 174, 176 (Mass. 1921); *accord* Dantzler v. Callison, 94 S.E.2d 177, 186 (S.C. 1956); Sherman v. State Bd. of Dental Exam'rs, 116 S.W.2d 843, 846 (Tex. Civ. App. 1938); People v. Love, 131 N.E. 809, 811 (Ill. 1921) ("A person's business, profession, or occupation is at the same time 'property' within the meaning of the constitutional provision as to due process of law, and is also included in the right to liberty and the pursuit of happiness.").

Likewise, "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." Greene v. McElroy, 360 U.S. 474, 492 (1959).

"It is sometimes said that the practice of . . . a profession of healing, or the right to practice thereof, is a mere privilege." 70 C.J.S. *Physicians & Surgeons* §6 384

III. THE POWER TO REGULATE

The possession of these liberty and property rights, however, does not mean that they cannot be affected by State legislation.[7] In the exercise of its "police power," government may regulate, restrain, or prohibit that which is harmful to the public welfare, even though the regulation, restraint, or prohibition might interfere with an individual's liberty or property.[8]

The "police power" of a State is an aspect of state sovereignty.[9] The term "sovereignty" refers to supreme, absolute, and uncontrollable power.[10] Sovereignty in government refers to the public authority that sets the limits within which one may act.[11] This public authority is the supreme power which governs all residents in the state, and is the person or body of persons in the state to whom there is no political superior.[12] In the American theory of government, people, through a state constitution, confer the law-making function of government to a state legislature. This sovereign power to enact laws is as full and unlimited as the ruler in any type of government.[13] This was the character of the thirteen original States prior to the formation of the United States of America. Upon establishing the Federal Republic, the States ceded fundamental elements of their sovereignty to the national government.[14] Accordingly, a state legislature does not rely on a state

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(1987); *see, e.g.*, Bohl v. Teall, 139 P.2d 418, 419 (Kan. 1943) (holding that "since the right to practice dentistry is a statutory privilege and not a natural right, the legislature may provide for the granting and revoking of licenses according to its own goodwill and pleasure"). However, such a holding is contrary to constitutional principles. *See, e.g.*, Dent, 129 U.S. at 121-22; Aitchison v. State, 105 A.2d 495, 498 (Md. 1954) (accepted doctrine); *See, e.g.*, Bd. of Med. Exam'rs v. Buck, 232 P.2d 791, 795-96 (Ore. 1951) (the weight of authority) (collecting cases).

[7] Potts v. Ill. Dep't of Registration & Educ., 538 N.E.2d 1140, 1144 (Ill. 1989), *quoting* Rios v. Jones, 348 N.E.2d 825, 829 (Ill. 1976); *In re* Polk License Revocation, 449 A.2d 7, 17 (N.J. 1982).

[8] Chi. Nat'l League Ball Club, Inc. v. Thompson, 483 N.E.2d 1245, 1250 (Ill. 1985); Commonwealth v. Mitchell, 355 S.W.2d 686, 688 (Ky. 1962); People v. Bunis, 172 N.E.2d 273, 274 (N.Y. 1961); People v. Warren, 143 N.E.2d 28, 31-32 (Ill. 1957); *accord* 2 WALTER CARRINGTON, COOLEY'S CONSTITUTIONAL LIMITATIONS 1228 (8th ed. 1927) ("The exercise of the [police] power . . . may inconvenience individuals, increase their labor, and decrease the value of their property").

[9] 3 CHESTER JAMES ANTIEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW §43.01 (2d ed. 1987).

[10] City of Bisbee v. Cochise County, 78 P.2d 982, 985-86 (1938).

[11] Hilliard, *supra* note 3, at 96-97.

[12] *Id.*

[13] *Id.* at 100.

[14] ANTIEAU & RICH, *supra* note 9, at 4.

constitution for authority to legislate. Rather, a state legislature looks to the state constitution and the Federal Constitution for restrictions upon its power to act. A state legislature may act in every area of government, subject to the state and Federal Constitutions.[15]

One scholar has described the police power as follows:

> The police power cannot be captured by a simple definition. It differs from the enumerated powers of the federal government because it includes all the residual power to protect the public welfare that has not been granted exclusively to the federal government, taken by legitimate federal action, or prohibited in order to protect individual rights.[16]

The "police power" of a State refers to the inherent power of government to promote the general welfare.[17] It covers all matters having a reasonable relation to the protection of the public health, safety, or welfare.[18]

The right to pursue a trade or calling is subordinate to the right of the State to limit such freedom where the public health, safety or welfare may require.[19] However, the State cannot arbitrarily deprive a person of the right to engage in a business or profession where its exercise is not permitted because of a failure to comply with conditions that the State imposes for the protection of society.[20]

Courts occasionally have found that state licensure of particular occupations lacked a rational basis under substantive due process analysis.[21] However, the importance and complexity of professional

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[15] Hilliard, *supra* note 3, at 100; *accord* 1 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION §2:1 (6th ed. 2002).

[16] ANTIEAU & RICH, *supra* note 9, at 8; *accord* CARRINGTON, *supra* note 8, at 1229 ("But the power is subject to the limitations imposed by the Federal and State Constitutions . . . and it will not be suffered to invade or impair the fundamental liberties of the citizen").

[17] In Interest of Reginald D., 533 N.W.2d 181, 185 (Wis. 1995); Sherman-Reynolds, Inc. v. Mahin, 265 N.E.2d 640, 642 (Ill. 1970); State *ex rel.* Appalachian Power Co. v. Gainer, 143 S.E.2d 351, 359 (W. Va. 1965); *accord* Nebbia v. N. Y., 291 U.S. 502, 524-25 (1934).

[18] *Id.*

[19] Klein v. Dep't of Registration & Educ., 105 N.E.2d 758, 761 (Ill. 1952); *accord* Grocers Dairy Co. v. McIntyre, 138 N.W.2d 767, 770 (Mich. 1966); State *ex rel.* Clark v. Brown, 205 N.E.2d 377, 379 (Ohio 1965); *See generally* CARRINGTON, *supra* note 8, at 1223-27 (collecting descriptions).

[20] Dent v. W. Va, 129 U.S. 114, 122 (1889); *accord* People *ex rel.* Dyer v. Walsh, 178 N.E. 343, 344 (Ill. 1931).

[21] *See, e.g.*, State *ex rel.* Wetsel v. Wood, 248 P.2d 612 (1952) (watchmakers); Sullivan v. DeCerb, 23 So. 2d 571 (1945) (photographers); S.S. Kresge Co. v. Couzins, 287 N.W. 427 (1939) (florists).

services have consistently justified state regulation against substantive due process attack.[22] Indeed, courts have recognized that States have a compelling interest in the practice of professions within their boundaries and, as part of their power to protect the public health, safety, and other valid interests, States have broad power to establish standards for licensing practitioners and regulating the practice of professions.[23]

This power to regulate specifically includes the health care professions. A state has broad power to establish and enforce standards of conduct within its borders regarding the health of its residents; it is a vital part of a state's police power. The state's discretion in this field extends naturally to the regulation of all professions concerned with health.[24] Indeed, "[t]here is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."[25] Thus, the rule is that the right of a citizen to practice in a health profession is subject to the paramount power of the state to impose such regulations as may be required, within constitutional limitations, to protect the people against ignorance, incapacity, deception, or fraud in the practice of that profession.[26]

Implicit in the state's power to require an individual to obtain a license to practice in a health profession is the power to determine the scope of the license and to specify conduct that the practitioner may not perform.[27] A health professional "has no constitutional right to practice in a particular manner or to provide particular services."[28] Likewise, patients have no right "to choose a particular form of health care

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[22] Stephen Rubin, *The Legal Web of Professional Regulation, in* REGULATING THE PROFESSIONS 44 (Roger D. Blair & Stephen Rubin eds. 1980).

[23] Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975); *See* Potts v. Ill. Dep't of Registration & Educ., 538 N.E.2d 1140, 1144 (Ill. 1989).

[24] Barsky v. N. Y. Univ., 347 U.S. 442, 449 (1954).

[25] Watson v. Md., 218 U.S. 173, 176 (1910); *accord* MICHAEL H. COHEN, COMPLEMENTARY & ALTERNATIVE MEDICINE 24 (1998) ("When health care providers assert a right to practice, they face the state's regulatory authority under the police power.").

[26] People v. Witte, 146 N.E.178, 180 (Ill. 1924); People v. Love, 131 N.E. 809, 811 (Ill. 1921); Lawrence v. Briry, 132 N.E. 174, 176 (Mass. 1921); *accord* Watson v. Maryland, 218 U.S. 173, 176 (1910); Hawker v. N. Y., 170 U.S. 189, 192-94 (1898); Dent v. W. Va, 129 U.S. 114, 122-23 (1889); Bd. of Med. Exam'rs v. Buck, 232 P.2d 791, 796 (Ore. 1951) (collecting cases).

[27] Edward P. Richards, *The Police Power and the Regulation of Medical Practice,* 8 ANNUALS OF HEALTH L. 201, 219 (1999).

[28] 1 BARRY R. FURROW *et al.*, HEALTH LAW §3.7, at 73 (2d ed. 2000); *See, e.g., In re* Guess, 393 S.E.2d 833, 839 (N.C. 1990).

treatment in the face of statutory prohibitions against the provision of health care services they desire."[29]

IV. LEGISLATIVE LEARNING

A. The Power to Inquire

Inherent in the power to legislate is the power to investigate. A legislature has the power to adequately inform itself concerning the administration of existing laws as well as proposed or possibly needed statutes.[30] The scope of this power of inquiry is as far-reaching and penetrating as the potential power to legislate.[31] This investigatory power constitutes an extremely important function of the legislative process. It helps prevent unwise legislation and enables the enactment of statutes which serve current societal needs."[32] Indeed, when the legislature enacts a law that regulates a profession, the legislature is presumed to have investigated the question for itself in ascertaining what is best for the good of the profession and for the practitioners of that profession.[33]

B. The Right to Lobby

The last clause of the First Amendment provides: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[34] This right of petition, along with the other First Amendment rights of speech, assembly, and association, are now considered to be included in a broad right to freedom of expression.[35]

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[29] FURROW, *supra* note 28, at 72; *See, e.g., Guess,* 393 S.E.2d at 840.

[30] Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 545 (1963), *quoting* Watkins v. U. S., 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 174-75 (1927); Murphy v. Collins, 312 N.E.2d 772, 784-85 (Ill. App. Ct. 1974) (collecting cases).

[31] *Gibson,* 372 U.S. at 545, *quoting* Barenblatt v. U. S., 360 U.S. 109, 111 (1959); *accord* Greenfield v. Russel, 127 N.E. 102, 105 (Ill. 1920) ("It must also be conceded that a state Legislature has power to obtain information upon any subject upon which it has power to legislate, with a view to its enlightenment and guidance.")

[32] SINGER, *supra* note 15, at 665.

[33] People v. Love, 131 N.E. 809, 812 (Ill. 1921).

[34] U.S. CONST. amend. I.

[35] 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §20.53 (3d ed. 1999); *See, e.g.,* Schneider v. Smith, 390 U.S. 17, 25 (1968). This right is included in the "liberty" that the due process clause of the Fourteenth Amendment protects against State infringement. Edwards v. S.C., 372 U.S. 229, 235 (1963); DeJonge v. Or., 299 U.S. 353, 364 (1937).

Individuals and groups exercise this right of petition when they attempt to influence public policy by expressing their viewpoint and proposing a course of action. Indeed, citizen participation is essential to the operation of democracy and is a vital part of the American governmental process.[36] Different techniques have been devised to accomplish this purpose. For example, corporations speak for their shareholders, unions speak for their workers, and professional groups speak for their members.[37]

Lobbying is one means of participation that provides access for the citizen to his or her government.[38] "Lobbying" refers to attempts, including personal solicitation, to induce legislatures to vote in a certain way or to introduce legislation. Lobbying includes scrutiny of all pending bills which affect one's interest or the interests of one's clients, with a view towards influencing the passage or defeat of such legislation.[39] Lobbying, *i.e.*, communicating the people's needs and wishes to the legislature, has been characterized as an indispensable element of the legislative process.[40]

Accordingly, those who lobby on behalf of groups make it possible for the members thereof to exercise their legal right to petition the government.[41] While the term "lobbyist" has developed negative connotations, every person or group engaged in trying to persuade legislative action is exercising the First Amendment right of petition.[42] The right of petition extends to lobbyists, who are paid to exercise the right, and to employers or clients, who pay lobbyists to exercise the right on their behalf.[43]

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[36] THOMAS P. MURPHY, PRESSURES UPON CONGRESS: LEGISLATION BY LOBBY 11 (1973). "Thus, attempts to influence the course of legislation should be accepted as normal." SINGER, *supra* note 15, at 714.

[37] MURPHY, *supra* note 36, at 62.

[38] *Id.* at 11.

[39] BLACK'S LAW DICTIONARY 938 (6th ed. 1990); *accord* Thiles v. County Bd. of Sarpy County, 200 N.W.2d 13, 18 (Neb. 1972) ("addressing or soliciting members of the legislative body, in the lobby or elsewhere, for the purpose of influencing their vote"); Chippewa Valley & S. Ry. Co. v. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 44 N.W. 17, 24 (Wis. 1889) (same).

[40] 51 AM. JUR. 2D *Lobbying* §1 (2000); *accord* Fidarque v. Or. Gov't Standards & Practices Comm'n, 969 P.2d 376, 379 (Ore. 1998) ("Lobbying is political speech, and being a lobbyist is the act of being a communicator to the legislature on political subjects").

[41] MURPHY, *supra* note 36, at 62.

[42] Liberty Lobby, Inc. v. Pearson, 390 F.2d 489, 491 (D.C. Cir. 1967); *accord* U.S. v. Sawyer, 85 F.3d 713, 731 n.15 (1st Cir. 1996); Kimbell v. Hooper, 665 A.2d 44, 46 (Vt. 1995).

[43] Moffett v. Killian, 360 F. Supp. 228, 231 (D. Conn. 1973); *accord* SINGER, *supra* note 15, at 744.

V. THE HEALTH CARE PROFESSIONAL ASSOCIATION

A. Interest Groups Generally

An "interest group" has been described as "any group that, on the basis of one or more shared attributes, makes certain claims upon other groups in the society for the establishment, maintenance, or enhancement of forms of behavior that are implied by the shared attitudes."[44] If such a group makes its claims through or upon any of the institutions of government, it becomes a political interest group.[45]

Political interest groups and lobbyists, perform important functions for their individual members and clients, and also for the well-being of the political community and the process of government policymaking.[46] Most basic, political interest groups and lobbyists represent the interests of constituents and clients and present those interests to government officials.[47] Also, political interest groups and lobbyists contribute significantly to the process of government policymaking. They assist in developing issues, including the drafting of legislation and regulations, for the attention of government officials.[48] They provide information and expertise to legislative committees and administrative agencies.[49] Also, interest groups are sometimes allowed to designate members to serve on bodies such as government advisory committees, commissions, and task forces, thereby more directly assisting in the policymaking process. Interest groups also serve as watchdogs during the implementation of public policy.[50]

A professional association reflects the provision of a service that embodies the application of special knowledge requiring long training, the exercise of discretion, and a commitment to a standard, to which the pursuit of self-interest is subordinated.[51] Associations generally are likely to operate as political interest groups. Associations realize that government, on all levels, plays an ever-increasing role in

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[44] DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION 33 (2d ed. 1971).

[45] *Id.* at 37.

[46] Mark P. Petracca, *The Future of an Interest Group Society, in* THE POLITICS OF INTERESTS 347 (Mark P. Petracca ed., 1992).

[47] *Id.*; *accord* KAREN SAGSTETTER, LOBBYING 27 (1978).

[48] *Id.*; *accord* SAGSTETTER, at 26.

[49] Petracca, *supra* note 46, at 347.

[50] Petracca, *supra* note 46, at 347-48.

[51] GRAHAM WOOTON, INTEREST GROUPS: POLICY AND POLITICS IN AMERICA 123 (1985); *accord* JERALD A. JACOBS, ASSOCIATION LAW HANDBOOK 9, 141-42, 161-62 (1981).

the business and professional endeavors of their members.[52] Professional associations are politically significant partly because of the leadership roles they have assumed. They serve as major interest groups that channel political communication and affect political decisions.[53] Consequently, professional associations have been consistently successful in the American political system. Their "organizational skills, such as leadership, communication, and information gathering, contribute to a dominant and continuing role in national policymaking. These interests though should not be thought of as a monolithic bloc; they do indulge in fractious struggles over such issues as . . . governmental regulation."[54]

B. Health Care Professional Associations

One type of professional association that is especially significant is the health care professional association. If this category "were interpreted broadly, hundreds of organizations would be on parade."[55] An examination of several such associations, *e.g.*, the American Physical Therapy Association (APTA), the American Chiropractic Association (ACA), the American Occupational Therapy Association (AOTA), and the National Athletic Trainers Association (NATA), reveals common characteristics.

As with all professional associations, the mission of these health care professional associations is to promote their respective professions and their practitioners. A health care professional association endeavors to establish educational requirements of the profession,[56] establish standards of practice,[57] and standards of professional conduct or ethics

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[52] JACOBS, *supra* note 51, at 224.

[53] WOOTON, *supra* note 51, at 123; *accord* TRUMAN, *supra* note 44, at 249-50.

[54] H.R. MAHOOD, INTEREST GROUPS IN AMERICAN NATIONAL POLITICS 144 (2000).

[55] *See* WOOTEN, *supra* note 51, at 127. Even considering physicians alone, "[o]rganizations of physicians and surgeons are dazzingly varied, corresponding to the seemingly endless specialisms and subspecialisms." *Id.*

[56] APTA BYLAWS, art. III.C. (physical therapy); *accord* BERNICE KRUMHANSL, OPPORTUNITIES IN PHYSICAL THERAPY CAREERS 99 (2000); *Bylaws of the American Chiropractic Association* [hereinafter ACA Bylaws], *art. II, §E in* ACA CHARTER 4 (chiropractic); MARGUERITE ABBOTT ET AL., OPPORTUNITIES IN OCCUPATIONAL THERAPY CAREERS 106-07 (1995) (occupational therapy). NATA EDUCATIONAL COUNCIL, http://www.cewl.com/ (last visited Feb. 25, 2004) (athletic training).

[57] APTA BYLAWS, art. III.C (physical therapy); ACA Bylaws, art. II, §E (chiropractic); *accord* R.C. SCHAFER & LOUIS SPORTELLI, OPPORTUNITIES IN CHIROPRACTIC HEALTH CARE CAREERS 114 (1994); AM. OCCUPATIONAL THERAPY ASSOC. (AOTA), STANDARDS OF PRACTICE FOR OCCUPATIONAL THERAPY, http://www.aota.org/general/otsp.asp (last visited Feb. 25, 2004) (occupational therapy); *accord* ABBOTT, *supra* note 56, at 106-07; NATA BD. OF CERTIFICATION,

for its members,[58] and to promote research in the profession,[59] and the professional welfare and growth of its members.[60] The advocate for its health profession, the association also endeavors to promote public recognition of the profession,[61] including influencing public policy.[62]

VI. HEALTH PROFESSION PRACTICE ACTS

Generally, interest groups "inevitably" become *political* interest groups, *i.e.*, they make claims on or through government.[63] This is particularly so in the case of associations.[64] In some areas, associations successfully impose claims on other groups without recourse to government action. For example, early craft unions for many years were able to protect their members by direct claims upon employers.[65]

STANDARDS OF PROFESSIONAL PRACTICE, http://www.nataboc.org/atc/docs/standards/ (last visited Feb. 25, 2004) (athletic training).

[58] APTA BYLAWS, art. III.B (physical therapy); ACA BYLAWS, art. II, §E (chiropractic); *accord* SCHAFER & SPORTELLI, *supra* note 57, at 114; AOTA, OCCUPATIONAL THERAPY CODE OF ETHICS - 2000 (2000), http://www.aota.org/general/coe.asp (last visited Feb. 25, 2004) (occupational therapy); NAT'L ATHLETIC TRAINERS ASSOC. (NATA), NATA CODE OF ETHICS, http://www.nata.org/publications/brochures/ethics.htm (last visited Feb. 25, 2004) (athletic training).

[59] APTA BYLAWS, art. III.D (physical therapy); *accord* DEAN P. CURRIER, ELEMENTS OF RESEARCH IN PHYSICAL THERAPY 11 (3d ed. 1990). ACA Bylaws, art. II, §F (chiropractic); *accord* SCHAFER & SPORTELLI, *supra* note 57, at 115; AM. OCCUPATIONAL THERAPY FOUND., CREATING OPPORTUNITIES THROUGH RESEARCH & EDUCATION, http://www.aotf.org/ (last visited Feb. 25, 2004) (occupational therapy); *accord* ABBOTT, *supra* note 56, at 107; NATA BYLAWS, art. 2(b) (athletic training); *See* NATA RESEARCH & EDUC. FOUND., MISSION STATEMENT, http://www.natafoundation.org/ (athletic training).

[60] APTA BYLAWS, art. III.K, L (physical therapy); *accord* KRUMHANSL, *supra* note 56, at 99; *ACA Mission Statement, in* ACA CHARTER PROVISIONS AND BYLAWS 2000-2001 at i (chiropractic); AOTA, *supra* note 57; *accord* ABBOTT, *supra* note 56, at 108-09 (occupational therapy); NATA BYLAWS, art. 2(d) (athletic training); *See, e.g.*, NATA, EMPLOYMENT, http://www.nata.org/employment/index.htm (last visited Feb. 25, 2004), (athletic training).

[61] APTA BYLAWS, art. III.I (physical therapy); ACA Bylaws, art. II, §H (chiropractic); *accord* SCHAFER & SPORTELLI, *supra* note 57, at 115-16; ABBOTT, *supra* note 56, at 106 (occupational therapy); NATA BYLAWS, art. 2(c) (athletic training); *See, e.g.*, http://www.nata.org/publications/publications.htm (last visited Feb. 25, 2004) (athletic training).

[62] APTA BYLAWS, art. III.J (physical therapy); *accord* KRUMHANSL, *supra* note 56, at 99; *ACA Mission Statement, supra* note 60, at i (chiropractic); ABBOTT, *supra* note 56, at 108 (occupational therapy); NATA BYLAWS, art. 2(c) (athletic training).

[63] TRUMAN, *supra* note 44, at 104-06.

[64] *Id.* at 106.

[65] *Id.* at 104.

However, as society grows increasingly complex, interest groups are less able to resolve, directly and privately, claims asserted on each other. The early years of the Grange, a farm group, illustrate an announced intent to avoid political activity. However, farm groups early resorted to political action.[66] Today, government is the principal mediator.[67] Modern government is the primary institution with sufficient power to control interest groups.[68] Government provides interest groups with the power necessary to assert their claims.[69]

Through licensing agencies and statutory training requirements, professional associations have found the institutions of government to be the primary means of strengthening an occupation, by limiting the number of those who enter it and by controlling unfair or destructive practices invited by economic insecurity and frustration.[70] Occupational licensing elevates the financial and social status of licensees.[71]

For health care professional associations, these issues are addressed primarily through state licensing statutes, also known as health profession practice acts.[72] These laws govern entry into the licensed health care professions.[73] Practice acts establish codes of conduct and procedures to discipline licensees.[74] These laws also prohibit the delivery of particular health care services by unlicensed persons.[75] Across the country, state practice acts share similar contours. However, beyond their general appearance, their detail and operation vary widely among states.

Many states have enacted separate practice acts for health care professions such as athletic trainers (AT), chiropractic (CHIRO), occupational therapy (OT), and physical therapy (PT). Practice acts in these states grant their respective professions the same recognition as the practice of medicine and hold the same legal status as medical practice acts.[76]

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[66] *Id.* at 105.

[67] *Id.* at 105-06.

[68] TRUMAN, *supra* note 44, at 105-06.

[69] *Id.*

[70] *Id.* at 97.

[71] COHEN, *supra* note 25, at 33.

[72] *See* 1 FURROW, *supra* note 28, §3.1, at 61; Rubin, *supra* note 22, at 36-37.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *See, e.g.*, IND. CODE ANN. §25-5.1 (West 2001) (Indiana, AT); *id.* §25-10 (CHIRO); *id.* §25-22.5 (physicians); *id.* §25-23.5 (OT); *id.* §25-27 (PT). IOWA CODE ANN. §148 (West 1997) (Iowa, physicians); *id.* §148A (PT); *id.* §148B (OT); *id.* §151 (CHIRO); *id.* §152D (Supp. 2003) (AT). MINN. STAT. ANN. §147 (West 1998)

In other states, a health care profession may not have its own practice act, but the profession is regulated through another statute, usually the state's medical practice act. In Illinois, for example, while AT, OT, and PT each has its own practice act,[77] CHIRO is subsumed and regulated by the state's medical practice act.[78] In some states, a health care profession may not be licensable at all.[79]

Another characteristic of state practice acts relates to their location in state codifications. Some states appear to recognize a difference between *health* professions and other professions and occupations. For example, in some state codifications, practice acts are located with statutes relating to "health" or "public health."[80]

In other state codifications, health profession practice acts are located with statutes relating to other professions and occupations.[81] In these codifications, health profession practice acts are located together.[82] At least, these statutes appear to recognize the difference between health care professions and other professions and occupations.[83] However, there are states that appear not to recognize any difference between health care professions and other professions and occupations.[84] In codifications from these states, health profession

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(Minnesota, physicians); *id.* §148.01 (CHIRO); *id.* §148.6401 (Supp. 2004) (OT); *id.* §148.65 (PT); *id.* §148.7801 (AT). MO. ANN. STAT. §324.050 (West 2001) (Missouri, OT); *id.* §331.010 (CHIRO); *id.* §334.010 (physicians); *id.* §334.500 (PT); *id.* §334.700 (AT). WIS. STAT. ANN. §446 (West 1998) (Wisconsin, CHIRO); *id.* §448.01 (physicians); *id.* 448.50 (PT); *id.* §448.95 (AT); *id.* §448.96 (OT).

[77] 225 ILL. COMP. STAT. ANN. 5/1 (West 1998) (AT); *id.* 75/1 (OT); *id.* 90/1 (PT).

[78] *Id.* 60/7(A) (one member of nine-person medical disciplinary board shall be doctor of chiropractic); *id.* 60/8(A) (one member of seven-person medical licensing board shall be doctor of chiropractic); *id.* 60/11(B), 14 (CHIRO education).

[79] Such appears to be the case with AT in Michigan. *Cf.* MICH. COMP. LAWS ANN. §333.16401 (West 2001) (CHIRO); *id.* §333.17001 (physicians); *id.* §333.17801 (PT); *id.* §333.18301 (OT).

[80] Title IV of the Iowa Code is captioned "Public Health." *E.g.*, IOWA CODE ANN. §147 *et seq.* (West 1997) ("Health-Related Professions). Chapter 333 of the Michigan Compiled Laws is captioned "Health." MICH. COMP. LAWS ANN. §333.16101 *et seq.* (West 2001) ("Occupations"); MINN. STAT. ANN. §148 *et seq.* (West 1998) (Minnesota, "Public Health Occupations, Licensing").

[81] *E.g.*, 225 ILL. COMP. STAT. ANN. 2/1 through 120/185 (West 1998) (Illinois, "Health"). MO. ANN. STAT. §324 *et seq.* (West 2001) (Missouri). WIS. STAT. ANN. §446 *et seq.* (West 1998) (Wisconsin).

[82] *Id.*

[83] *Id.*

[84] For example, in Title 25 of West's Annotated Indiana Code, captioned "Professions and Occupations," health profession practice acts are interspersed among laws regulating many occupations, in apparent alphabetical order, from accountants (IND. CODE ANN. §25-2.1 *et seq.* (West 2001)) and auctioneers (*id.* §25-

practice acts are located with laws regulating other occupations without distinction.[85]

Also, a health profession practice act is implemented by a regulatory board, on which members of the particular health profession sit.[86] "In fact, the licensing of health professionals in the United States is often described as a system of professional self-regulation, even though the boards usually include lay members; are governed by procedures and standards set by the legislature; and make decisions subject to review by the courts."[87] In many states, the particular health profession usually controls, or at least has significant impact, in the implementation of its practice act.[88]

If a practice act is not administered by its own regulatory board, then members of the particular health profession advise the regulatory body on the act's implementation.[89] Both scenarios exist not only among states, but also among health care professions in the same state.[90] For example, in Indiana, AT and CHIRO each has a separate board that implements its respective practice act.[91] However, OT and

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6.1) to timber buyers (*id.* §25-36.5), transient merchants (*id.* §25-37), and water well drillers (*id.* §25-39).

[85] *Id.*

[86] 1 FURROW, *supra* note 28, §3.1, at 61.

[87] *Id.*

[88] *E.g.*, 225 ILL. COMP. STAT. ANN. 5/5, 5/6 (West 1998) (Illinois, AT); *id.* 75/4, 75/5 (OT); 90/3, 90/6 (PT); IOWA CODE ANN. §147.13.1 (West 1997) (Iowa, physicians); *id.* §147.13.5 (CHIRO); *id.* §147.13.6 (OT & PT); *id.* §147.13.20 (AT). MICH. COMP. LAWS ANN. §333.16421 (West 2001) (Michigan, CHIRO); *id.* §333.17021 (physicians); *id.* §333.17821 (PT); *id.* §333.18305 (OT). WIS. STAT. ANN. §15.405(5) (West 1998) (Wisconsin, CHIRO); *id.* §15.406(4) (Supp. 2002) (AT); *id.* §15.406(5) (OT).

[89] *See infra* note 105.

[90] In Minnesota, CHIRO and PT have separate boards that implement their respective practice acts. MINN. STAT. ANN. §148.03 (West 1998) (CHIRO); *id* §§148.66 *et seq.* (Supp. 2004) (PT). AT is implemented by the state's medical practice board, which appoints an "advisory council" for that profession. *Id.* §§148.7804, 148.7805 (AT). OT is implemented by the state's health commissioner, who appoints an OT "advisory council." *Id.* §148.6450 (Supp. 2004).

Similarly, in Missouri, CHIRO has a separate board that implements its practice act. MO. ANN. STAT. §331.090 (West 2001). AT and PT each has an "advisory committee" to the medical practice board, which implements their respective practice acts. However, the PT advisory committee is appointed by the governor, *id.* §334.625, while the AT advisory committee is appointed by the medical practice board. *Id.* §§334.706, 334.717. OT has its own board, appointed by the governor, which administers its practice act "in collaboration with the state's division of professional registration of the department of economic development." *Id.* §324.063.

[91] IND. CODE. ANN. §25-5.1 (West 2001) (AT); *id.* §25-10 (CHIRO).

PT each has an advisory committee to the state's medical licensing board.[92]

Courts afford broad deference to these regulatory boards as they exercise the police power of the state in promulgating rules governing entry into their respective health care professions and prohibiting the delivery of particular health care services by unlicensed persons.[93] Courts also defer to regulatory boards in reviewing disciplinary proceedings of licensees.[94]

There are several justifications for judicial deference. A health profession regulatory board has special expertise.[95] The regulatory board is more flexible in accommodating change than is a court; judicial decisions can be modified only by legislation or further litigation.[96] A court, in the context of a single case, has limited ability to design a cohesive regulatory strategy. Also, the ability to resolve conflicts among a large number of competing interests is essentially a political process.[97]

Generally, licensure offers non-physician health care professionals several benefits. Initially, it protects licensees from the prohibitions of medical practice acts. Also, licensure creates professional standards, elevates a professional image , and eases public concern over quality control.[98] In some measure, practice acts express the legislature's acceptance of selected practices as valid, or at least licensable, health care modalities.[99]

However, the professional self-regulation embodied in state practice acts has been criticized:

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[92] *Id.* §25-23.5 (OT); *id.* §25-27 (PT).

[93] *See, e.g.* Timer v. D.C. Dep't of Consumer & Regulatory Affairs, 703 A.2d 833, 836 (D.C. App. 1997); Abrahamson v. Ill. Dep't of Prof'l Regulation, 606 N.E.2d 1111, 1121-22 (Ill. 1992); Last v. Va. State Bd. of Med., 421 S.E.2d 201, 205 (Va. Ct. App. 1992); Cox v. State Med. Bd. of Ohio, 83 N.E.2d 648, 650 (Ohio Ct. App. 1948); *See generally* 2 AM. JUR. 2D *Administrative Law* §§ 240, 523, 524, 527 (1994); 73 C.J.S. *Public Administrative Law & Procedure* §95 (1983).

[94] *See, e.g.*, Pons v. Ohio State Med. Bd., 614 N.E.2d 748, 751 (Ohio 1993); Joseph v. D.C. Bd. of Med., 587 A.2d 1085, 1088 (D.C. App. 1991); *See generally* 2 AM. JUR. 2D *Administrative Law* § 528 (1994); 73A C.J.S. *Public Administrative Law & Procedure* §213 (1983).

[95] *See* 1 FURROW, *supra* note 28, §3-5, at 67; Sandra H. Johnson, *Regulatory Theory and Prospective Risk Assessment in the Limitation of Scope of Practice*, 4 J. LEGAL MED. 447, 448 n.4, 450-52 (1983).

[96] *Id.*

[97] *Id.*

[98] COHEN, *supra* note 25, at 35.

[99] Michael H. Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV. 83, 92 (1996).

> "Professional entry requirements are viewed as homogenizing treatment approaches through mandating uniformity in professional education. The authority to define and implement restrictions on the delivery of health care services by unlicensed and competing licensed individuals, gives the dominant health care professions anticompetitive control over their markets, raising the cost of health care. Critics argue that the restrictive entry and practice controls of professional licensure, as implemented by the profession-dominated agencies and as supported by the judicial deference afforded these administrative agencies, do not produce an adequate gain in the quality of health care services to offset their negative effects."[100]

Also, critics of the dominance of the health care professions in disciplinary matters argue that the professions are lenient and ineffective in monitoring the behavior and competence of their colleagues. "Still, licensing generally is viewed as an important player in quality control while it is understood that it is as well a significant public concession to the professions."[101]

VII. THE SCOPE OF PRACTICE OF A HEALTH CARE PROFESSION

As observed above, the state's power to require an individual to obtain a license to practice in a health profession includes the power to determine the scope of the license and to specify conduct that the practitioner may not perform.[102] Under the prevailing legal view, only physicians "diagnose" and "treat" patients. In contrast, non-physician health professionals address particular functions.[103] Accordingly, a physician is generally licensed to diagnose and treat disease, but a non-physician health professional is granted a specific scope of practice.[104]

Scope-of-practice restrictions in state practice acts seek to ensure that health care professionals offer services according to their skill and training.[105] A state practice act usually provides a general definition of the profession's practice and specifies certain acts within

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[100] 1 FURROW, *supra* note 28, §3-1, at 62.

[101] *Id.*

[102] Richards, *supra* note 27, at 219.

[103] COHEN, *supra* note 25, at 46.

[104] *Id.* at 40. "Although biomedical physicians are said to have an unlimited scope of practice under state medical practice acts, their departure from conventionally accepted medical standards . . . creates the risk of medical board discipline for 'unprofessional conduct.'" *Id.* at 87.

[105] *Id.* at 46.

the scope of practice.[106] If a non-physician health professional exceeds the scope of practice authorized by the controlling state practice act, both the relevant professional licensing board and the state medical board may investigate and discipline the professional. Further, the professional may be found to have unlawfully practiced another licensed health profession.[107] "The licensed professional, in contrast to the unlicensed practitioner, will have a defense against prosecution to the extent that the actions identified as the unauthorized practice of medicine fall within the legitimate scope of practice allowed under his or her license."[108]

Scholars have criticized the current approach to scope of practice established in state practice acts. According to critics, current statutory definitions of scope of practice of health professions preclude the effective and efficient development of regulations that maximize consumer choice while assuring quality care.[109]

Current statutory definitions are premised on the assumption that "the enterprise of healing can be carved into neatly severable and licensable blocks."[110] However, "definitions that attempt to allocate particular functions to particular professions, while excluding others, fail because they ignore the essentially overlapping nature of many of those functions."[111]

Scope of practice definitions must be sufficiently broad to permit innovation and creativity, yet be sufficiently precise to keep providers within the bounds of professional knowledge and skill.[112] A broad scope of practice can create professional "turf battles" between health care professions if a group lobbies for exclusive control of a particular modality.[113] Such a turf battle is seen in the clash between chiropractors and physical therapists regarding spinal manipulation.

A. Chiropractic and Spinal Manipulation

Chiropractic is especially concerned with the biomechanics of the spine, and how its interaction with the nervous system affects body functions. Chiropractic recognizes that nerve compression can disturb body functions, which can result in increased susceptibility to

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[106] *Id.* at 40.
[107] COHEN, *supra* note 25, at 46.
[108] 1 FURROW, *supra* note 28, §3-8, at 73.
[109] Johnson, *supra* note 95, at 454.
[110] COHEN, *supra* note 25, at 109.
[111] Johnson, *supra* note 95, at 455.
[112] COHEN, *supra* note 25, at 54.
[113] *Id.* at 55.

disease.[114] One chiropractic publication has described this system as follows:

> "The [vertebrae of the spinal column] stack together in a precise way which allows a 'canal' between them, aptly called the 'neural canal.' It is through this small canal that the primary nerve bundles branch off the spinal cord and make their way to all parts of the body.
>
> If we didn't have to bend, those bones could have been locked into place. But the spine has to be flexible, so its design incorporates a thick, fibrous cushion of cartilage, called an intervertebral disk, that acts as a shock absorber, in the joint between each pair of vertebrae. This allows us to bend, turn, flex and move with relative freedom.
>
> Unfortunately, this need for flexibility means that the size of the canals can be made larger or smaller by movement. . . .
>
> . . .
>
> Your nerves pass through the opening in the "doorway" between the vertebrae. Usually, we manage to move freely without ever closing the doorway on these nerves. But, sometimes, our vertebrae become misaligned and the door shuts too far. Maybe not all the way ... just enough to create abnormal pressure—enough to make a difference to the flow of nerve impulses through that nerve fiber. The longer the door is left partially closed, the worse the damage will be.
>
> When vertebrae become stuck in an abnormal position, it's called a vertebral subluxation. . . . [T]he misalignment is causing a change in the flow of normal nerve impulses. The nerve 'short circuits' and is being disrupted in some way because of the misaligned bones."[115]

According to chiropractic, vertebral subluxation impairs body function and induces disease."[116]

Thus, according to one scholar: "The definition of chiropractic is simple: a health care field dedicated to the detection and correction of vertebral subluxation in order to eliminate spinal nerve interference which can adversely affect health."[117] Chiropractic care consists primarily of spinal "adjustments" to correct vertebral subluxation.

The chiropractic adjustment is a physical manipulation of the spine "applied with the objective of mobilizing a fixated joint. The

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[114] SCHAFER & SPORTELLI, *supra* note 57, at 2-3; *accord* William C. Meeker & Scott Haldeman, *Chiropractic: A Profession at the Crossroads of Mainstream and Alternative Medicine*, 136 ANNALS OF INTERNAL MED. 216 (2002).

[115] TERRY A. RONDBERG & TIMOTHY J. FEULING, CHIROPRACTIC: COMPASSION AND EXPECTATION 19-20 (1998); *accord* SCHAFER & SPORTELLI, *supra* note 57, at 45-46.

[116] SCHAFER & SPORTELLI, *supra* note 57, at 45.

[117] RONDBERG & FEULING, *supra* note 115, at 23.

adjustment is a gentle, yet dynamic thrust applied to a particular spinal joint in such a way as to generate movement in a specific direction. Basically, it is an attempt to 'coax' a restricted joint to begin moving."[118]

The repositioning of the vertebrae results in the reduction of nerve interference and, as a result, restoration of optimum nerve function.[119]

Modern chiropractic differentiates between "adjustment" and "spinal manipulation." According to chiropractors, manipulation "describes generally the use of any of a variety of manipulative procedures by the various practitioners of the healing arts."[120] Manipulation "is often a nonspecific, generalized procedure that mobilizes joints, increases range of movement, or realigns joint structure with the intent to stimulate or inhibit body functions."[121]

Further, chiropractors warn against blurring the distinction between a chiropractic adjustment and spinal manipulation therapy offered by others including physicians and physical therapists.[122]

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[118] RICHARD E. DEROECK, THE CONFUSION ABOUT CHIROPRACTORS 79 (1989); *accord* RONDBERG & FEULING, *supra* note 115, at 58.

[119] *See* NATHANIEL ALTMAN, EVERYBODY'S GUIDE TO CHIROPRACTIC HEALTH CARE 40-42 (1990).

[120] ROBERT A. LEACH, THE CHIROPRACTIC THEORIES: PRINCIPLES AND CLINICAL APPLICATIONS 16 (3d ed. 1994).

[121] ALTMAN, *supra* note 119, at 9.

[122] See RONDBERG & FEULING, *supra* note 115, at 58; ALTMAN, *supra* note 119, at 37. Indeed, one chiropractor exhorted:

"*[P]hysical therapists* are now receiving specialized training in 'spinal mobilization,' and have begun to advertise this service. Since physical therapists function primarily by medical prescription, this represents another way in which the services of a chiropractor can be duplicated. . . . We can expect the day when the American Medical Association lays claim to the 'discovery' of this extremely efficacious form of treatment, followed by the assertion that only [physicians] and physical therapists that have been 'medically trained' are qualified to perform this highly specialized procedure.

Don't you believe that. No other health professional has anywhere near the caliber of training in the dynamics or manipulation of the spine that the chiropractor does, and it is safe to say that none ever will. [Physicians] pay the spine little heed, and the physical therapist's training in spinal mobilization is all too brief and sketchy. Even orthopedic surgeons and neurosurgeons have little appreciation for this marvel of natural architecture, nor do they understand how to prevent or resolve its mechanical problems. Only the chiropractor understands these things.

Chiropractors have a meaningful relationship with the human spine. The spine is very much the foremost object of the chiropractor's affection and attention . . . The spine is the chiropractor's heritage; it is his legacy. It is what every chiropractic physician knows best, and no one will ever know it quite as well."

Consequently: "There is and always will be an important place on the health care team for the chiropractor."[123]

B. Physical Therapy and Spinal Manipulation

Physical therapy as a profession was born in response to war. During World War I, the United States Surgeon General's Office formed the Division of Special Hospitals and Physical Reconstruction. This agency employed "reconstruction aides" in military hospitals in the United States and overseas. Mary McMillan, the first reconstructive aide, [124] was the impetus behind the establishment of the American Women's Physical Therapeutic Association in 1921. From this time through World War II and into the 1950s, physical therapists tended primarily to soldiers in rehabilitation and to those across the nation who were becoming disabled as a result of polio epidemics.[125]

Naturally during this time, physical therapists were advancing the sophistication of clinical practice and developing their own professional identity."[126]

By the late 1940s, APTA called for the enactment of state practice acts and state licensure. In 1954, APTA developed a professional competency examination that was made available to state licensing boards. Throughout the 1950s, a growing number of states developed state practice acts for physical therapy, along with state licensure for physical therapists.[127]

According to physical therapists, state practice acts and professional licensure have protected the term "physical therapy," and have empowered physical therapists to halt the claims of other professions, such as chiropractic and massage therapy, that they provide "physical therapy."[128]

A learned physical therapist has observed:

> "The physical therapy profession is commonly thought of as a rehabilitation discipline; however, from its inception, it has always encompassed health care activities that fall outside the scope of physical rehabilitation, such as wound care, cardiopulmonary

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[123] DEROECK, *supra* note 118, at 148.

[124] Ellen Woods, *Opportunity Out of Adversity: Physical Therapy's Unique Legacy,* PT MAG., July 2002, at 48-49.

[125] *Id.* at 49-50.

[126] *Id.* at 49.

[127] Ellen Woods, *Opportunity Out of Adversity: Physical Therapy's Unique Legacy (Part II),* PT MAG., September 2002, at 47. For similar versions of this history, see KRUMHANSL, *supra* note 56, at 16-21, and RON SCOTT, FOUNDATIONS OF PHYSICAL THERAPY 5-10 (2002).

[128] Woods, *supra* note 127, at 47.

> intervention, preventive interventions, and patient/client education, among many other activities. As such, 'physical therapy' is difficult to define."[129]

APTA attempted a definition of the profession in its "Guide to Physical Therapy Practice" (PT Practice Guide).[130] According to the PT Practice Guide: "*Physical therapy* is defined as the care and services provided by or under the direction and supervision of a physical therapist. Physical therapists are the only professionals who provide physical therapy."[131] Physical therapists diagnose and manage movement dysfunction and enhance physical and functional abilities.[132] Physical therapists restore, maintain, and promote optimal physical function, optimal wellness and fitness, and optimal quality of life as it relates to movement and health.[133]

Also, physical therapists prevent the onset, symptoms, and progression of impairments, functional limitations, and disabilities that may result from diseases, disorders, conditions, or injuries.[134]

Physical therapy uses a five-element model of patient management: examination, evaluation, diagnosis, prognosis, and intervention.[135]

"Intervention," broadly speaking, refers to the purposeful interaction of the physical therapist with the patient, using various methods and techniques, to produce changes in the patient's condition that are consistent with the examination findings, and the evaluation, diagnosis, and prognosis.[136] Physical therapy intervention consists of three components: (1) coordination, communication, and documentation; (2) patient instruction; and (3) procedural interventions.[137]

Procedural interventions include a wide range of methods, procedures, and techniques. These include therapeutic exercise, functional training in home or work management, physical agents and

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[129] SCOTT, *supra* note 127, at 3.

[130] APTA, GUIDE TO PHYSICAL THERAPIST PRACTICE (2d ed. 2001). See pages 15-17 for a history of the Guide. APTA emphasizes: "*The Guide does not provide specific protocols for treatments, nor are the practice patterns contained in the Guide intended to serve as clinical guidelines. . . . The Guide is not intended to set forth the standard of care for which a physical therapist may be legally responsible in any specific case.*" (Emphasis in original.) *Id.* at 17.

[131] *Id.* at 31. (Emphasis in original.)

[132] *Id.* at 13.

[133] *Id.*

[134] PT PRACTICE GUIDE, *supra* note 130, at 13.

[135] *Id.* at 34-40; SCOTT, *supra* note 127, at 76-78.

[136] PT PRACTICE GUIDE, *supra* note 130, at 38, 97.

[137] *Id.* at 38-39, 97.

mechanical modalities, electrotherapeutic modalities, the use of devices and equipment, and manual therapy techniques.[138]

"*Manual therapy techniques* are skilled hand movements intended to improve tissue extensibility; increase range of motion; induce relaxation; mobilize or manipulate soft tissue and joints; modulate pain; and reduce soft tissue swelling, inflammation, or restriction. Procedures and modalities may include . . . manual traction, massage, mobilization/manipulation . . ."[139] Physical therapists perform mobilization or manipulation on soft tissue and spinal and peripheral joints.[140]

In applying manual therapy, there is no consensus on appropriate approaches to evaluation and treatment. However, despite this lack of agreement, "all of the approaches have encouraged clinicians to thoroughly know their neuromusculoskeletal anatomy and consider the implications of structural interactions. This increased demand for this intricate knowledge level has provided the incentive for many to move beyond their initial training to develop additional expertise."[141] Physical therapists have historically utilized manipulation at least since 1928.[142]

Spinal manipulation, while the "primary therapeutic tool" used by chiropractors, "also is practiced by . . . physical therapists . . ."[143] This discussion reveals that physical therapy and chiropractic have very different views of spinal manipulation as a therapeutic procedure. Chiropractic focuses on the spine and chiropractic care emphasizes spinal manipulation.[144] In contrast to chiropractic, "[t]he clinical practice of physical therapy parallels that of medicine, with congruous general practice and practice specialty categories."[145] Physical therapy views spinal manipulation as only one of many available procedural interventions.[146] Indeed, recent evidence indicates that spinal

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[138] *Id.* at 98, 104-21.

[139] *Id.* at 110.

[140] *Id.* at 111.

[141] SCOTT, supra note 127, at 106.

[142] Kim Wynn-Gilliam, *APTA Mobilizes on Manipulation,* PT MAG., Feb. 2000, at 36.

[143] Wilk v. AMA, 719 F.2d 207, 213 & n.4 (7th Cir. 1983); *accord* CHIROPRACTIC MANIPULATION, HARVARD WOMEN'S HEALTH WATCH (1995) ("Chiropractors perform the greatest number of spinal manipulations in the United States although physical therapists, osteopaths, and orthopedic surgeons do them as well").

[144] See *supra* notes 129 through 135 and accompanying text.

[145] SCOTT, *supra* note 127, at 84.

[146] Indeed, the PT Practice Guide suggests spinal manipulation as a possible therapeutic technique in relatively few scenarios. See, *e.g.*, PT Practice Guide, *supra* note 130, at 156 (impaired posture), 191 (impaired joint mobility, motor function,

manipulation is not more or less effective or expensive if delivered by either a chiropractor or a physical therapist.[147] Both professions should continue to develop clinical decision making models to better predict who will benefit from spinal manipulation.[148]

C. Conflict

Naturally, chiropractors and physical therapists turned to state legislatures as the primary forums to assert and protect their respective interests in spinal manipulation.[149] For the past several years, bills have been regularly introduced in state legislatures that would prohibit physical therapists from performing spinal manipulation as a part of physical therapy care.[150]

A 2000 article in an APTA publication described bills then pending in state legislatures that would restrict the practice of spinal manipulation.[151] Such efforts have continued. This recent proposed legislation has taken several forms. For example, some bills would restrict the performance of spinal manipulation to those who have completed chiropractic training requirements.[152] Other bills would restrict the performance of spinal manipulation to chiropractors and physicians. These bills either authorize chiropractors and physicians exclusively to perform spinal manipulation[153], or prohibit physical therapists from performing spinal manipulation[154], or both.[155]

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muscle performance, and range of motion associated with connective tissue dysfunction), 209 (impaired joint mobility, motor function, muscle performance, and range of motion associated with localized inflammation), 227 (impaired joint mobility, motor function, muscle performance, range of motion, and reflex integrity associated with spinal disorders).

[147] *See* Daniel C. Cherkin et al., *A Review of the Evidence for the Effectiveness, Safety, and Cost of Acupuncture, Massage Therapy, and Spinal Manipulation for Back Pain*, 138 ANNALS OF INTERNAL MED. 898, 905 (2003); *See also* Elisabeth I. Skargren et al., *One-Year Follow-up Comparison of the Cost and Efectiveness of Chiropractic and Physiotherapy as Primary Management for Back Pain: Subgroup Analysis, Recurrence, and Additional Health Care Utilization*, 23 SPINE 1875 (1998).

[148] *See* Timothy Flynn et al., *A Clinical Prediction Rule for Classifying Patients with Low Back Pain Who Demonstrate Short-Term Improvement With Spinal Manipulation*, 27 SPINE 2835 (2002).

[149] See notes 81-84 and accompanying text.

[150] Justin Moore, *Manipulation: Still Hot in the Statehouse*, PT MAG., May 2000, at 24; Wynn-Gilliam, *supra* note 142, at 34.

[151] Moore, *supra* note 176, at 27-29.

[152] *See, e.g.*, H.D. 1641, 91st Leg. (Mo. 2002); H.R. 1378, 210th Leg. (N.J. 2002); H.D. 455, 77th Leg. (Tex. 2001) (legislature adjourned—no carryover).

[153] *See, e.g.*, S. 660, 210th Leg. (N.J. 2002); H.R. 1894, 224th Leg. (N.Y. 2001) & S. 2348, 224th Leg. (N.Y. 2001).

[154] *See, e.g.*, H.R. 1498, 58th Leg. (Wash. 2003) (passed House Feb. 11, 2004; referred to Senate Committee on Health & Long-Term Care Feb. 16, 2004).

Additional bills would restrict the performance of spinal manipulation exclusively to chiropractors.[156]

According to APTA officials: "Any legislation that infringes on the practice of physical therapy would have a negative impact on the profession and the public that we serve. APTA is committed to halting any profession's attempt to encroach on a physical therapist's scope of practice."[157] Indeed: "Any legislative effort to restrict physical therapy practice is a serious issue for APTA, and the Association is taking strong action against the infringement efforts."[158] APTA explained its position on the spinal manipulation issue in terms of consumer choice: "Typically, the purpose of this legislation is to limit consumers' access to and choice for manipulation to chiropractors, which simply is not in consumers' best interest. Consumers should have the ability to select from all providers with the education and clinical ability to perform manipulative interventions, including physical therapists."[159]

APTA developed "strategies and essential resources to assist states in preserving a physical therapist's ability to use manual therapy techniques, including mobilization and manipulation."[160] Such resources included background information on the manipulation issue and physical therapists' scope of practice, the history of manual therapy in the profession, and physical therapists' education requirements.[161]

D. Resolution

State legislatures have reached different conclusions in resolving the dispute between chiropractors and physical therapists regarding the spinal manipulation issue. Some states have not only declared that chiropractors are the exclusive practitioners of spinal manipulation, but also have expressly barred physical therapists from performing spinal manipulation.[162] Other states simply exclude spinal manipulation from physical therapy's scope of practice as defined in state practice acts.[163]

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[155] *See, e.g.*, H.R. 1174, 113th Leg. (Ind. 2003) (passed House Feb. 26, 2003; referred to Senate Committee on Health & Provider Services).

[156] *See, e.g.*, H.R. 3269, 114th Leg. (S.C. 2001).

[157] Wynn-Gilliam, *supra* note 142, at 35.

[158] Moore, *supra* note 150, at 25.

[159] *Id.* at 24.

[160] Wynn-Gilliam, *supra* note 142, at 35.

[161] *Id.* at 35-36.

[162] *E.g.*, ARK. CODE ANN. §17-81-303 (Michie 2002) (Arkansas - restricts performance of spinal manipulation solely to chiropractors and physicians); *id.* §17-93-102(6)(B)(i)(*c*) (excludes spinal manipulation from definition of manual therapy); MICH. COMP. LAWS ANN. §333.16261(3) (West Supp. 2003) (Michigan - restricts advertisement of chiropractic adjustment or manipulation solely to chiropractors); *id.* §16411(1) (restricts performance of chiropractic adjustment or manipulation solely to

However, many states do not bar physical therapists from performing spinal manipulation. In Idaho, for example, the chiropractic practice act expressly does not prevent or restrict the activities or services of any other licensed or registered health care profession; further, the physical therapy practice act expressly includes manual therapy in the scope of practice.[164] A few states impose physician prescription[165] or advertisement[166] restrictions.

VIII. CONCLUSION

The growing number of health care professions is producing overlapping scopes of practice, which include duplicative services and treatment. The clash between chiropractors and physical therapists regarding spinal manipulation is only one example of the primary and indispensable role of state government in furthering the goals of health care professions.

This article has explained the role of state government in regulating health professions; and discussed the role of health care professional associations and how they represent their respective professions. With a greater understanding of these relationships and processes, health care professional associations can better represent their respective professions. In turn, state governments can ascertain

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chiropractors); *id.* §17801(2) (incorporating spinal manipulation restriction into physical therapy practice act); MONT. CODE ANN. §37-12-101(3) (2003) (Montana - chiropractic includes spinal manipulation); *id.* §37-12-301 (unlawful to practice chiropractic without license); *id.* §37-11-103 ("Nothing in this chapter shall be construed as authorizing a physical therapist, whether licensed or not, to practice . . . chiropractic").

[163] *E.g.*, FLA. STAT. ANN. §486.125(1)(j) (West 2001) (grounds for physical therapy discipline include practicing or offering to practice beyond scope of practice "including, but not limited to, specific spinal manipulation"); 225 ILL. COMP. STAT. ANN. 90/1(1) (West 1998) ("Physical therapy does not include . . . chiropractic technique"); IOWA CODE ANN. §148A.5 (West 1997) ("A license to practice physical therapy does not authorize the licensee to practice . . . chiropractic manipulation"); MINN. STAT. ANN. §148.76 (West Supp. 2004) ("No physical therapist may . . . use any chiropractic manipulative technique whose end is the chiropractic adjustment of an abnormal articulation of the body"); NEV. REV. STAT. §640.024(1)(c) (Michie 2000) (physical therapy practice includes "the mobilization of joints by the use of therapeutic exercise without chiropractic adjustment").

[164] IDAHO CODE §§ 54-705(F), 54-2203 (Michie 2003).

[165] *See, e.g.*, ME. REV. STAT. ANN. tit. 32, §3113-A (West 1999) (practice of physical therapy does not include spinal manipulation unless prescribed by a physician); N.C. GEN. STAT. §90-270.24(4) (2003) (same).

[166] *See, e.g.*, WIS. STAT. ANN. §448.522 (West Supp. 2002) ("A physical therapist may not claim that any manipulation service that he or she provides in any manner a chiropractic adjustment that is employed to correct a spinal subluxation").

more accurately what is best for the good of health care professions and the public.