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The March 24, 1894 edition of the *Boston Evening Transcript* contained a letter to the editor titled “The Medical Registration Act.”¹ The author began: “I have just signed a petition . . . begging our legislature not to pass a bill now pending, of which the purpose is to ‘regulate’ the practice of medicine and surgery.”

The writer of this letter—William James, M.D., of Cambridge—is remembered today as the father of American academic psychology and as a co-founder of the American philosophical school known as “pragmatism.”² Although he had produced only a small portion of his influential body of work by 1894, he was already a familiar figure to much of the *Transcript*’s Brahmin readership. The 52-year-old Harvard professor’s orations on a variety of topics attracted large and enthusiastic audiences. Though increasingly identified as a philosopher, James’s scientific credentials were also impressive. He had earned a medical degree from Harvard, had started his academic career teaching anatomy and physiology, and had established the country’s first experimental psychology laboratory. James was thus a persuasive commentator on matters of medical policy.³

The measure that James attacked would have prohibited any person from practicing medicine in Massachusetts unless he either possessed a degree from a “reputable” medical

school or passed an examination administered by a state board of examiners. In his letter, James offered various objections to the creation of such a medical licensing regime. First of all, he explained, the bill “is too grandmotherly, and goes against the best political habits and traditions of our state.” It would be a “grotesque and puerile anomaly,” he declared, for the commonwealth to stand between a citizen and the therapeutic advisor of his choice. “If the word ‘sacred’ can be applied to any personal right, surely the right to treat one’s own body as one chooses may claim the title.”

Second, James maintained that the proposed scheme offered little actual protection to citizens, for the “*serious* therapeutic inadequacy which the population of Massachusetts . . . is exposed to is the inadequacy of the regular educated profession.” He observed that despite undoubted advances in anatomy and diagnosis, treatment remained a matter of guesswork for doctors—a task “still beyond their powers.” James remarked, “There is no more epigrammatic [sic] instance of that combined greatness and littleness of man’s mind . . . than this capacity to give interminable clinical lectures over patients to whom we are radically unable to afford real help.” Although he did not directly claim that drugless approaches, such as Mind Cure and Christian Science, produced results superior to those of Regular medicine, he came close. The truth of the alternative practitioners’ *theories* might be uncertain, James remarked, but “their *facts* are patent and startling.”

Finally, James reached perhaps his most important point: “The suppression of certain practitioners will hinder the progress of therapeutic knowledge as a whole.” The drugless healers’ “brilliant” results demonstrated that “the agency of the patient’s mind” was a critical aspect of the treatment of disease. If the proposed Medical Registration Act suppressed these

practitioners' treatments, scientists would lose the opportunity to observe and study them, and a "public calamity" would result.

James and his allies ultimately prevailed. Although the legislature passed a revised version of the bill, the enacted statute expressly exempted "clairvoyants [and] persons practising [sic] hypnotism, magnetic healing, mind cure, massage methods, christian [sic] science, cosmopathic, or any other method of healing."⁴

These developments in Massachusetts were typical of the American experience generally following the Civil War. Although almost every state embraced medical licensing during the Gilded Age, the legislation was written and implemented in ways that largely preserved citizens' ability to choose their preferred therapeutic approach. And the struggle to shape this second wave of medical licensing laws generated its own rich body of medical liberty literature.

Medical Practice in the Gilded Age

Gilded Age arguments about the regulation of medical practice were not merely a reprise of the antebellum debates. The scientific and professional contexts had changed in ways that significantly shaped the dispute.

Over the course of the nineteenth century, Regular physicians increasingly questioned the efficacy of the depleting therapies—the profuse bleeding and liberal administration of purgatives, emetics, and blistering agents—that characterized early American "heroic" medicine. Even before the Civil War, doctors in the United States—under the influence of the "Paris clinical school"—began embracing a more empirical, scientific approach that led them to doubt the usefulness of such treatments.⁵ After the war, some elite physicians developed an extreme therapeutic skepticism and advocated reliance primarily on nature's healing power.

In practice, even the skeptics never rejected conventional therapeutics to the extent their rhetoric suggests. Nonetheless, the Regular profession as a whole undeniably embraced a more humble and flexible attitude as the century progressed. Doctors virtually abandoned bloodletting, administered depleting drugs less frequently and in smaller doses, and added stimulating therapies to their armamentarium. On the one hand, these changes made it increasingly difficult for the Regulars' rivals to paint them as doctrinaire bleeders and poisoners. On the other hand, they also complicated orthodox physicians' efforts to portray themselves as indispensable healers, uniquely qualified to conquer disease.⁶

During the Gilded Age, even those Regulars most skeptical of orthodox therapeutics had reason to hope for scientific breakthroughs. As American doctors were aware, European laboratory researchers had been making significant discoveries since mid-century. The most important of these was the development, proof, and elaboration of the germ theory of disease by Louis Pasteur and Robert Koch. Although American physicians were slower than their European counterparts to accept the germ theory, many did by the 1890s.⁷ By the end of the century, research science was arguably the most important source of Regular medicine's professional authority.⁸

But clinical research was a relatively weak foundation for authority so long as scientific discoveries did not lead to actual therapeutic advances. Unfortunately, few important therapeutic breakthroughs occurred during this period—most notably, antiseptic surgery, aspirin, and diphtheria antitoxin. According to one modern commentator, only about six “reliable and effective pharmaceutical preparations” existed at the start of the twentieth century.⁹ This dearth of effective orthodox remedies proved to be an important rhetorical weapon for alternative sects in the Gilded Age medical licensing wars.

Meanwhile, alternative practice itself changed in ways that made it harder for mainstream physicians convincingly to cast all unorthodox practitioners as uneducated quacks. The dominant irregular sects after the Civil War were the Homeopaths and Eclectics.¹⁰ In stark contrast to the antebellum Thomsonians, these movements embraced the need for medical education and rigorous training, evinced a growing willingness to borrow remedies from other schools, and—particularly in the case of the Homeopaths—attracted many well-off followers.¹¹

Homeopathic medicine, the brainchild of German practitioner Samuel Hahnemann, was based on two main principles: (1) the “law of *similia*,” which stated that diseases could be cured by drugs that produced symptoms in healthy individuals resembling those appearing in people suffering from the disease in question, and (2) the “law of infinitesimals,” according to which a drug’s efficacy rose as the dose was reduced through extreme dilution to the point where the active ingredient was undetectable. After reaching America’s shores in the 1820s, Homeopathy grew steadily more popular, and by the time of the Civil War, it was orthodox medicine’s largest rival. Homeopaths viewed themselves as professional and scientific, and they established numerous schools, associations, and journals. Eventually, the movement fragmented between Hahnemannian purists, on the one hand, and “eclectic” Homeopaths who abandoned the law of infinitesimals and used some non-homeopathic remedies, on the other. The latter dominated the field by the 1880s.¹²

The other leading sect, Eclectic medicine, focused on botanical cures. Eclectic medicine derived from a botanical healing movement founded in the 1820s by Wooster Beach, a New York doctor, as well as from Alva Curtis’s Independent Thomsonianism. As its name indicates, it was generally nondogmatic and willing to borrow therapies from other schools. Like the Homeopaths, the Eclectics embraced professionalization and founded numerous medical

colleges. Although never as popular as Homeopathy—or as respectable among elites—Eclectic medicine also had many followers during the Gilded Age.¹³

In short, after the Civil War, the Regulars, Homeopaths, and Eclectics became increasingly similar with respect to their practices, professional ethos, and institutional structures. More and more, they borrowed approaches from and referred patients to each other.¹⁴ And they mutually disdained the growing popularity of drugless healing approaches such as magnetic healing, Mind Cure, and Christian Science.

The founders of these drugless sects shared an interest in the theories and practices of Franz Anton Mesmer, a German physician who effected cures by supposedly transferring a universal spiritual force to his patients—an invisible “fluid” he dubbed “animal magnetism.” Whereas Mesmer sought to provoke violent convulsions in his patients, his followers refined his technique to induce a peaceful, trance-like state. This “hypnotic” form of mesmerism, commonly known as magnetic healing, became extremely widespread in the United States by the 1840s and remained on the scene until the early twentieth century.

In the Gilded Age, the combination of mesmerism with mystically-infused belief systems such as Swedenborgianism, Transcendentalism, and Spiritualism spawned a variety of additional healing schools emphasizing immaterial, and sometimes divine, forces.¹⁵ Many of these drugless healers, under the influence of American mesmerist Phineas Parkhurst Quimby, began to emphasize the mind’s power over the body and the importance of healthy mindedness and “right belief.”¹⁶ In the late nineteenth century, two of Quimby’s followers launched important Boston-centered mental healing movements. In 1879, Mary Baker Eddy founded the Church of Christ (Scientist), whose practitioners rejected the use of drugs and surgery and purported to cure disease by persuading their patients of God’s goodness and the unreality of sin, sickness, and

death.¹⁷ Around the same time, Quimby disciple Warren Felt Evans helped forge a spiritual (though less explicitly scriptural) school of thought known as the Mind Cure or New Thought movement, which stressed the healing power of positive thinking.¹⁸

Like the Homeopaths, many followers of Christian Science and Mind Cure were highly educated, urbane, and economically privileged, and thus difficult for the Regulars to dismiss as gullible rubes. In 1898, one sympathetic observer remarked that “no theory of cure in the history of the healing art has grown in favor so rapidly among intelligent people as mental therapeutics.”¹⁹ Another remarked, “[T]he mental scientists and the healers are among the most reputable people in [Massachusetts].”²⁰

As the late-nineteenth-century battle over licensing raged, American medicine was thus divided into three main clusters of practitioners: (1) the Regulars, (2) the Homeopaths and Eclectics, and (3) practitioners of various types of mental, spiritual, and religious healing approaches. The Regulars were the driving force behind the return of medical licensing. The latter two camps and their followers fought, with great success, to ensure that the new licensing regimes would not discriminate against them.

The Resurgence of Medical Licensing

As we saw in the previous chapter, by 1861 most states had revoked their medical practice laws, and the few remaining statutes were dead letters. The nationwide re-embrace of medical licensing after the Civil War thus represents a remarkable U-turn. States first began enacting new medical licensing schemes in the late 1860s. About seventeen states had such laws on the books by 1880 and about forty did by 1890. By 1901, every single state and the District of Columbia had a medical licensing regime of some sort in effect.²¹

The Gilded Age saw not only the proliferation of medical licensing systems, but also their inexorable strengthening. The only prerequisite for obtaining a license under the earliest postbellum laws was a diploma from a medical school—any medical school, including one of the inferior or wholly fraudulent institutions that arose to exploit this lack of standards. In the early 1880s, states began to require that the diploma be from a “reputable” institution, as determined by a state board of examiners. Many states also permitted candidates without a medical school diploma to earn a license by passing a uniform examination administered by the board. During the final decades of the century, all but a few states began to mandate that *every* aspiring physician pass such an examination, regardless of his education. Consequently, by 1900, the majority of states required *both* a diploma from a reputable medical school and passage of an examination.²²

A variety of explanations have been advanced for the wide adoption of medical licensing during this period. Some medical freedom activists of the time ascribed the trend to the evil designs of the American Medical Association, the national organization for Regular physicians founded in 1847.²³ Although the AMA certainly encouraged the surge in licensing, it was, at the time, neither large nor powerful enough to play a significant direct role in the state legislative arena.²⁴ Some modern scholars have attributed this second wave of licensing to revolutionary developments in medical science—particularly the rise of the germ theory—and the accompanying recognition that physicians must be well-educated.²⁵ As others have pointed out, however, the germ theory did not achieve widespread acceptance among American doctors until most states had already adopted licensure.²⁶

A combination of other factors probably impelled the proliferation and strengthening of licensing laws during the Gilded Age. One was the growing political influence of state medical

societies dominated by orthodox physicians. These organizations supported licensing as a means of limiting competition in the medical marketplace and boosting the Regulars' self-identification as an exclusive and learned profession.²⁷ The return of medical licensing during this time was also a manifestation of an increasing fondness among the country's professional and business classes for specialized expertise, in particular for appointed boards of scientific experts.²⁸

Regardless of its cause, the postbellum resurgence of medical licensing might lead one to conclude that the American ethos in favor of freedom of therapeutic choice, so evident before the Civil War, faded away afterward. But in fact, late-nineteenth-century Americans still broadly favored allowing patients free choice among practitioners of different schools. Legislation creating or strengthening licensing schemes regularly elicited fierce protests by common citizens, particularly when these schemes appeared to favor orthodox medicine. The public preference for nondiscrimination among different theories of medicine—often voiced through direct, street-level activism—was reflected both in the content of the licensing statutes themselves and in the conduct of juries applying these statutes.

The Legal Impact of Popular Opposition

Legislation

Late-nineteenth-century medical practice laws were overwhelmingly drafted in ways that protected the interests of alternative practitioners and their patients. This preservation of freedom of therapeutic choice reflected the views of the citizenry as voiced in petition campaigns, mobbed legislative hearings, and medical liberty literature. The participants in this genuine social movement represented a broad swath of Americans. Reginald Fitz, a supporter of strong medical licensing regimes, complained: “[The] opposition is diverse On the one hand is to be found

the entire class of those likely to be shown to be ignorant, unskillful, dishonest, or corrupt. . . . On the other hand we see intelligent theorists and educators, at time leaders in thought and morals, who object to the infringement of personal rights. . . .²⁹

In some states, the widespread commitment to medical freedom successfully thwarted the passage of licensing legislation of any type—at least for a while. For example, mass opposition defeated an 1880 medical licensing bill in Massachusetts, even though the measure accommodated the interests of Homeopaths and Eclectics.³⁰ A proponent of the law snidely described its adversaries as “deceitful clairvoyants, long-haired spiritualists, necromancers, wizards, witches, seers, magnetic healers, [and] pain charmers.”³¹ But a modern scholar’s research demonstrates that the petitions against the bill were signed by a wide variety of people, ranging from laborers to professionals and businessmen.³²

Under pressure from medical freedom forces, some legislatures included explicit nondiscrimination clauses in the licensing bills they enacted. For example, Virginia’s 1884 law instructed that no applicant for a medical license be rejected for his “adherence to any particular school of medicine or system of practice, nor on account of his views as to the method of treatment and cure of diseases.”³³ Rhode Island’s 1895 measure stated, “Nothing in this chapter shall be so construed as to discriminate against any particular school or system of medicine.”³⁴ Texas elevated medical nondiscrimination to a constitutional principle: its 1876 state constitution provided, “The Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and to punish persons for malpractice, but no preference shall ever be given by law to any schools of medicine.”³⁵

Legislatures that did not enact broad nondiscrimination clauses protected the rights of alternative practitioners and their patients in other ways. For example, almost all late-nineteenth-

century medical practice acts gave Homeopaths a role in administering medical examinations and issuing licenses, and most gave Eclectics a place at the table as well. Indeed, these sects often had their *own* tables; almost a quarter of states created either two boards (Regular and Homeopathic) or three (Regular, Homeopathic, and Eclectic).³⁶ And more than two-thirds of states with a single board guaranteed sectarian representation on that body.³⁷

These developments did not arise primarily from any newfound tolerance among Regular physicians, although an authentic decline of dogmatism may have facilitated cooperation.³⁸ A more important factor was probably the orthodox medical establishment's recognition that in light of the Homeopaths' and Eclectics' popular appeal, any viable medical licensing regime had to include them.³⁹ Regulars also had a monetary motivation for entering this alliance; they increasingly received referrals from doctors in the other sects.⁴⁰ Whereas the impulse to preserve orthodox purity was once so strong that the original AMA Code of Ethics, written in 1847, effectively banned consultation with irregular doctors, the authors of the 1903 amended Code omitted this provision because they deemed it to be unreasonable, anachronistic, and impractical.⁴¹

Some states also accommodated nonorthodox practitioners by omitting topics of fundamental controversy between the different schools from licensing examinations. The most commonly excluded subjects were therapeutics and materia medica (therapeutic substances). In most other states, applicants from the alternative sects were examined on these subjects, or on all subjects, by representatives of their own school. The authors of a 1907 AMA survey of state licensing laws noted a widespread conviction "that an examination for a license should be purely a test of technical knowledge and of facts which are established beyond dispute . . . and that, having demonstrated a sufficient knowledge of the composition and functions of the human

body, the applicant should be allowed perfect freedom in the choice of remedial agents or choice of treatment.”⁴²

Developments in New York State illustrate the dynamics of legislative battles over medical licensing in the Gilded Age. The state legislature, which revoked medical licensing in 1844 in an episode recounted in Chapter One, revived it in 1874. The new statute was nondiscriminatory; it mandated that applicants have either a diploma from *any* chartered medical school or a certification of qualification from *any* of the state’s “several medical societies” (including the Homeopathic and Eclectic societies).⁴³

In 1885, the Regular-dominated Medical Society of the State of New York began pressuring the legislature to create an Examining and Licensing Board that would administer a single general examination to all candidates.⁴⁴ The *New York Times*, while praising this proposal as a “discreet and well-considered attempt” to suppress quackery, expressed concern that it would founder because of quarreling between the “zealots” of different schools. The bill indeed failed, apparently because the Regulars insisted that their society have the power to appoint six of the board’s nine members and that the mandatory examination cover therapeutics.⁴⁵ According to one observer, “[E]very attempt to secure legislation made by regular practitioners [was] strenuously opposed by homeopaths and eclectics, as well as by an army of Christian scientists, clairvoyants, magnetists, mind curers, faith curers, truss-makers, and all those wishing to engage in the business of healing the sick without training or study.”⁴⁶

The Regulars renewed their efforts in 1889, promoting a bill that would have established a board composed of five members nominated by their society, three nominated by the Homeopathic Society, and one nominated by the Eclectic Society. The bill further provided that a graduate of a Homeopathic or Eclectic college could choose which board member would

examine him on certain topics.⁴⁷ The alternative sects were still not satisfied; they did not trust any board with a Regular majority. They successfully pressured the Senate committee to shelve the bill.⁴⁸

When the Regulars presented a similar bill in 1890, the alternative practitioners had already introduced a competing measure that would create separate Allopathic (Regular), Homeopathic, and Eclectic boards of examiners. The Regulars dismissed this approach as “ridiculous on its face.”⁴⁹ The *New York Times* disagreed, opining: “The homeopaths and the eclectics claim the same right to license their own graduates that the different churches possess, and there does not seem to be any good reason why it should not be conceded to them.”⁵⁰ Following the failure of the Regulars’ bill, the orthodox Medical Society grumbled: “Throughout the length and breadth of the State, circulars and petitions had been scattered, pledges had been exacted; and when we appeared before the legislative body with our bill, we found the greatest stumbling-block in the fact that almost every member had been solicited . . . to vote against any bill which did not include three separate Boards of Examiners.”⁵¹

The legislature instead passed an amended version of the bill pushed by the alternative sects. The 1890 law established three distinct boards.⁵² It mandated a uniform examination for all license applicants, but with a critical proviso: “in the department of therapeutics, practice and materia medica the questions shall be in harmony, with the tenets of the school selected by the candidate.”⁵³

Interestingly, the Homeopathic and Eclectic schools failed to flourish following their triumphs in the nation’s licensing wars. With the exception of purist Hahnemannian Homeopaths, practitioners of these systems essentially melted (both methodologically and organizationally) into the great mass of Regular physicians. A leading scholar observes: “When

homeopathic and Eclectic doctors were shunned and denounced by the regular profession, they thrived. But the more they gained access to the privileges of regular physicians, the more their numbers declined. The turn of the century was both the point of acceptance and the moment of incipient disintegration.”⁵⁴

Meanwhile, drugless practitioners and their supporters waged their own largely successful battle for freedom from licensing restrictions. Unlike the Homeopaths and Eclectics, Mind Curers, Christian Scientists, and other drugless healers sought total exemption from the licensing regimes rather than a role in administering them. In their eyes, the requirement that mental and religious healers be educated and examined in subjects like anatomy and physiology was self-evidently pointless and thus a barely disguised ploy to suppress their practices altogether. Judge Clifford Smith remarked: “Of course no one expects that Christian Scientists will betake themselves to medical colleges to study a system which they do not intend to practise [sic], and go before a board of medical doctors to ask their official permission to practise Christian Science. That is not the purpose of such a law.”⁵⁵

The legislatures of many states were receptive to such arguments and carved out exceptions for drugless practitioners in their licensing laws.⁵⁶ Four New England states—Connecticut, Massachusetts, Maine, and New Hampshire—provided the broadest range of exemptions. The story in Connecticut is illustrative.

On March 8, 1893, the Connecticut House of Representatives held a public hearing on a licensing bill that provided for a mandatory examination administered by separate Allopathic, Homeopathic, and Eclectic boards. Prior to the event, a Boston-based organization called the “National Constitutional Liberty League” disseminated a circular throughout Connecticut urging “those who would maintain their constitutional liberty of choice of physician or healer [to]

personally appear to signify their determination to defend this inherent and inalienable right.”⁵⁷ Opponents of the bill flooded the hearing. A reporter observed that “Christian scientists were there, and those of the faith cure school, and the auditors of the gentler sex were very audible in their applause.”⁵⁸ The bill’s enraged author attacked the Liberty League as the shadowy puppeteer of the opposition forces.⁵⁹

During the hearing, most witnesses testified in support of the bill, emphasizing the need to protect patients. The exasperated secretary of the Connecticut Board of Health asked, “How could there be objections to such a bill?”⁶⁰ A Homeopathic doctor, speaking in favor of the law, forcefully rejected the charge that his school “was persecuting others after having been persecuted itself.” He insisted, “[A]ny physician should know how to detect diseases, to make a diagnosis and discriminate.”⁶¹ But the hearing was dominated by lawyer, politician, and orator Joseph L. Barbour, who blasted the bill as a monopolistic plot by regular physicians and an infringement of personal liberty. He waved petitions against the bill signed by “hundreds of remonstrants.”⁶² The National Constitutional Liberty League later asserted that Barbour’s presentation “rightfully elicited round after round of irrepressible applause.”⁶³ The *Hartford Courant* observed that “Mr. Barbour . . . made the ‘regulars’ wince.”⁶⁴

After the hearing, thousands more signed petitions opposing the bill.⁶⁵ One such petition declared it “unnecessary and unwise to legally forbid further improvement in the healing art, and deny to posterity the constitutional liberty of choice and the possible benefit of such improvement.”⁶⁶ Additional hearings were similarly mobbed by adversaries of the law. After the final hearing, the *New York Times* reported, “The Medical Practice bill . . . has excited greater interest and opposition than the whole lot of public acts that have been considered since the session began.”⁶⁷

In the face of such antagonism, supporters of the measure made major amendments so as to enable its passage. As finally enacted in May 1893, the Connecticut medical licensing law explicitly stated that it did not apply “to any chiropodist or clairvoyant who does not use in his practice any drugs, medicines or poison, nor to any person practicing the massage method, or Swedish movement cure, sun cure, mind cure, magnetic healing, or Christian science, nor to any other person who does not use or prescribe in his treatment of mankind, drugs, poisons, medicine, chemicals, or nostrums.”⁶⁸

Similar events transpired elsewhere in New England. When the Massachusetts legislature in 1894 considered a bill requiring healers of all types to be licensed, the protests of William James and others led it to table the measure and instead pass one with an exemption clause, similar to Connecticut’s, releasing drugless healers from examination and registration.⁶⁹ In 1898, the Massachusetts legislature considered a bill that would have revoked the exemption for drugless healers, but following a thronged two-day hearing before the Committee on Public Health—a hearing highlighted by Williams James’ and William Lloyd Garrison II’s appearances as witnesses against the amendment—the committee unanimously voted against this change, and the bill’s supporters backed down.⁷⁰ Maine and New Hampshire passed medical practice acts that echoed Massachusetts’s exemption language almost exactly.⁷¹

Although no medical licensing statutes outside New England included similarly broad exceptions for drugless practitioners, a growing number of jurisdictions expressly exempted treatment by prayer generally, or Christian Science in particular. By 1907, Christian Scientists were exempted from medical licensing in eleven states—a number that would grow to twenty-eight by 1917.⁷²

This is not to say that Christian Science's escape was a smooth one. During this same period, many state legislatures considered—and six enacted—bills designed to suppress the practice of Christian Science and other drugless therapeutic systems, most commonly by broadening the range of practitioners subject to their medical practice acts' examination and licensing requirements.⁷³ Moreover, states sometimes prosecuted practitioners and parents for manslaughter when the Christian Science treatment of a child tragically failed.⁷⁴ Nonetheless, the clear trend was toward noninterference with Christian Scientists and other religious, spiritual, and mental healers. Indeed, governors vetoed three of the six laws directed against such practitioners that state legislatures passed.⁷⁵ Their veto messages—one of which we will examine later in this chapter—contained harsh condemnations of medical trusts and ringing defenses of the right to choose one's own physician.⁷⁶

Juries

Despite activists' broad success in persuading state legislatures—and, if necessary, governors—to preserve a zone of freedom for alternative practitioners and their patients, in various states at various times the licensing laws effectively outlawed much irregular healing. When practitioners who could not qualify for a license in these jurisdictions chose to continue to treat patients nonetheless, they faced criminal liability. Fortunately for them, juries tended to be sympathetic, and few sincere followers of alternative medical approaches were ever actually fined or imprisoned for practicing without a license.

An analysis of popular views about medical licensing must take into account enforcement and conviction patterns as well as the law in the books. Because of jurors' attitudes, Gilded Age prosecutors had great difficulty convicting, or even indicting, unlicensed alternative

practitioners.⁷⁷ An 1899 treatise on law and medicine observed: “[S]ometimes, especially in rural districts and small towns . . . both grand and petit jurors, swayed by personal predilections, decide the issues in violation of their oaths, not upon the testimony, but upon their sentiments or information extraneous to the case.”⁷⁸ One modern researcher has identified only about thirty criminal cases of any type brought against Christian Scientist practitioners between 1887 and 1915, compared with “scores of others” in which coroners and grand juries failed to indict.⁷⁹ Of the seventeen juries that issued verdicts in cases charging Christian Scientists with the unlicensed practice of medicine, only ten found the defendant guilty—even though the state usually had little trouble establishing the facts in these matters.⁸⁰ And these figures do not reflect the uncountable number of prosecutors who—because of their own sympathy for unlicensed practitioners or a sense of futility—did not pursue indictments in the first place.

Legislatures responded in various ways to the lax enforcement of medical licensing statutes. In 1876, the Texas legislature—clearly exasperated by jury nullification—amended its medical practice act to provide that “it shall be the duty of the Judge . . . to charge the grand jury with the necessity of preserving this act inviolate, and to admonish them of their duty to find presentments against any and all persons guilty of its infraction.”⁸¹ Other legislatures appear simply to have given up; the enactment of many statutory provisions accommodating or exempting alternative practitioners likely reflected, at least in part, lawmakers’ recognition that the statutes were not being enforced against them, anyway.⁸²

The Role of the Courts

Judges, meanwhile, were almost uniformly unreceptive to claims that medical licensing laws unconstitutionally violated the liberties of practitioners and patients. Elite lawyers and

judges were, during this era, engaged in their own campaign to control access to the legal profession through examinations and licensing, and they were thus likely predisposed to support the parallel efforts of their medical brethren.⁸³ And even if some judges were nonetheless willing to find medical licensing statutes unconstitutional, the United States Supreme Court largely extinguished this possibility with its momentous 1889 decision in *Dent v. West Virginia*.⁸⁴

According to an 1881 West Virginia statute, three categories of individuals were entitled to receive a certificate to practice medicine from the state Board of Health: (1) doctors who had practiced medicine in the state for at least ten years prior to enactment, (2) graduates of any “reputable medical college,” and (3) individuals who passed a state examination. When the law took effect, Dr. Frank Dent and his father were partners in a thriving Newburg, West Virginia, medical practice founded by Frank’s great-grandfather.⁸⁵ Because Frank had been practicing for only six years and had never attended medical school, he faced the unpleasant prospect of taking an examination.

Rather than subject himself to such an ordeal, Dent migrated to Kansas and ministered to patients there. Although he considered himself a Regular physician, he then briefly attended and earned a degree from the American Medical Eclectic College of Cincinnati (AMEC) in Ohio. Diploma in hand, he returned home and resumed his Newburg practice. When he presented his medical degree to the West Virginia Board of Health and demanded a certificate, the board, populated by Regulars, refused because it deemed AMEC to be not a “reputable medical college.” Dent continued to treat patients nonetheless and was tried and convicted for the unlawful practice of medicine. He challenged his conviction on constitutional grounds, contending that the statute deprived him of his property—his “vested rights and estate in his profession”—in violation of the Due Process Clause of the Fourteenth Amendment.⁸⁶ The trial

court and the West Virginia Supreme Court both rejected this argument, so the beleaguered doctor appealed the matter to the Supreme Court of the United States.

Dent had reason to be optimistic that the nation's highest tribunal would rule in his favor. Three years before, the Court had declared, "[T]he very idea that one man may be compelled to hold his . . . means of living . . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."⁸⁷ Justice Stephen Field, in particular, seemed a likely supporter, for he had repeatedly emphasized the constitutional right of citizens to practice their professions.⁸⁸ For example, in his influential dissent in the 1873 *Slaughterhouse Cases*, Field had emphatically asserted a fundamental right of every citizen "to pursue his happiness by following any of the known established trades and occupations of the country."⁸⁹

Nevertheless, the Court affirmed Dent's conviction unanimously and without hesitation in an opinion written by Justice Field himself. Field's decision is not as surprising as it might seem. Despite his celebrated paeans to economic liberty, he gave significant latitude to state legislatures when he concluded they were genuinely trying to protect the safety, health, or morals of the community pursuant to their valid "police power."⁹⁰ Field's true aversion was to "special legislation" or "class legislation"—statutes that, though disguised as neutral exercises of the police power, were in fact intended to economically advantage particular people or groups.⁹¹ He simply did not perceive the West Virginia medical practice act to be such a statute.

In *Dent*, Field reaffirmed "the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose."⁹² He acknowledged, however, that states could limit this right if the restrictions were "general in [their] operation," "appropriate to the . . . profession," "attainable by reasonable study or application," and imposed "for the protection of

society.”⁹³ In Field’s view, the West Virginia licensing statute met these tests and was thus legitimate. He explained:

Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.⁹⁴

Dent virtually destroyed the theory that medical licensing unconstitutionally violated a physician’s property rights in his trade.⁹⁵ Afterward, few litigants even bothered to raise the point.⁹⁶ But *Dent* did not address the distinct question of whether a medical licensing statute might be unconstitutional if, as written or applied, it *discriminated* in favor of the Regulars and against alternative medical approaches.

At first glance, one might assume that *Dent* extinguished this theory, as well. After all, orthodox physicians in West Virginia had championed licensing precisely to drive nonorthodox practitioners from the field.⁹⁷ But a closer look shows that neither the parties nor the justices viewed the case as having anything to do with discrimination between different medical theories. The West Virginia statute at issue was explicitly nondiscriminatory; under pressure from concerned citizens, the legislature in 1882 had amended it to state that a qualifying diploma be issued by a “reputable medical college *in the school of medicine to which the person desiring to practice belongs*.”⁹⁸ Furthermore, *Dent* never claimed that the Board of Health, in violation of

this provision, had rejected his diploma because it was from an *Eclectic* institution. Consequently, the question of unconstitutional discrimination between sects was never before the Court.

It is unclear why Dent did not advance such a claim.⁹⁹ Perhaps Marmaduke Dent, Frank's cousin and attorney, concluded that any focus on AMEC's "reputability" would harm rather than help his client. The real problem was that AMEC was at best a fly-by-night, second-rate institution and perhaps a completely fraudulent diploma mill.¹⁰⁰ Marmaduke might have framed the case differently—indeed, the board might not have denied Frank's application in the first place—if Frank had earned his degree from the Eclectic Medical Institute, Cincinnati's largest medical school and the most respected Eclectic institution in the country.¹⁰¹

It is interesting to imagine how Justice Field, the nemesis of special legislation, would have ruled if Dent had presented a well-supported medical discrimination claim. A careful reading of the passage from *Dent* quoted above suggests that while Field recognized the validity of requiring physicians to have a minimum extent of experience or knowledge, he would not have endorsed a licensing scheme that privileged doctrinaire orthodox medicine. The opinion refers to medicine not as a settled or certain science, but rather as one concerning "subtle and mysterious influences." Field's reference to "vegetable and mineral substances" implies that he deemed the former, favored by the Eclectics, to be as useful as the latter, preferred by the Regulars. Furthermore, his obscure, perhaps inverted, reference to the body's "influence upon the mind" indicates that he recognized the potential validity of non-materialistic approaches to disease like Mind Cure and Christian Science.

Stephen Field's personal medical history made him skeptical about, and perhaps downright contemptuous of, the Regular profession. As a young man, he bashed his knee against

a cart wheel and developed a serious infection. His physician—apparently a Regular doctor with a “heroic” bent—dosed him with calomel, a mercury-based purgative commonly used in orthodox medicine. The treatment almost killed him.¹⁰² The damaged knee bothered and hobbled Field for the rest of his life, and, according to his family, he always believed that the injury’s severity resulted “principally . . . from the medicine taken.”¹⁰³ The “eminent surgeons” Field consulted provided him “very little relief.”¹⁰⁴ Field thus resorted to hydropathy, visiting “different watering-places whose waters were supposed to possess healing virtues.”¹⁰⁵

In short, there is good reason to suspect that Justice Field—personally distrustful of orthodox medicine, disdainful of discriminatory special legislation, and suspicious of anticompetitive schemes disguised as public health measures—would have deemed a medical licensing scheme to be unconstitutional if it reserved the profession for Regulars. He never confronted such a measure, however.

After *Dent*, some lower court judges, unlike Field, had the opportunity to rule on claims of unconstitutional medical discrimination. They were not as sympathetic as Field might have been. For example, a magnetic healer argued that Indiana’s medical educational requirements represented unjust and arbitrary discrimination in violation of the Due Process and Equal Protection Clauses.¹⁰⁶ A Christian Science practitioner contended that Ohio’s licensing law was unconstitutional because “it discriminates against Christian Science, or in favor of certain schools of medicine” by requiring “the Christian Scientist . . . [to] take the same examination as the regular practitioner, in other words, [to] understand the use of drugs and medicines, none of which, according to his system, does he ever use.”¹⁰⁷ These challenges all failed. Even the few courts that recognized or assumed that medical nondiscrimination was a cognizable

constitutional interest refused to hold that uniform educational and testing mandates actually constituted unconstitutional discrimination.¹⁰⁸

The judiciary's general resistance to medical discrimination claims is epitomized by the 1898 case *Dowdell v. McBride* in the Texas Court Appeals. Dowdell, an Eclectic doctor, attacked the state's licensing statute as unconstitutional because it required that the board of medical examiners be composed entirely of graduates of medical schools endorsed by the AMA. He seemed particularly well positioned to win such a claim. Unlike Dent, he had earned his diploma from the respected Eclectic Medical Institute of Cincinnati. Moreover, he based his claim not on the U.S. Constitution, but on a provision of the Texas Constitution which explicitly mandated that "no preference shall ever be given by law to any school of medicine."¹⁰⁹ Nevertheless, Dowdell lost too.

Outside the constitutional context, courts occasionally demonstrated sympathy for freedom of therapeutic choice. Their instrument for doing so was statutory interpretation. In cases in which unlicensed drugless practitioners were prosecuted for the unauthorized practice of medicine, some judges held that the defendant's conduct did not constitute the "practice of medicine." State licensing laws contained a variety of definitions of this phrase, and in many instances no definition at all.¹¹⁰ When faced with either ambiguity or silence, courts tended—especially in cases involving Christian Scientists—to interpret this language so as to acquit unlicensed healers.

Judges initially did not exercise such leniency. In an 1894 case called *State v. Buswell*, the Nebraska Supreme Court held that Christian Science practitioners were covered by the state's medical practice act.¹¹¹ That statute imposed licensing on anybody "who shall operate on, profess to heal, or prescribe for or otherwise treat any physical or mental ailment of another."

Rejecting the defendant's argument that the law regulated only practitioners of "medicine, surgery, or obstetrics, as generally or usually understood," the court concluded that the statute's "provisions are not limited to those who attempt to follow beaten paths and established usages."¹¹²

Shortly afterwards, however, a Christian Science practitioner achieved a favorable result in a similar case in Rhode Island. In *State v. Mylod*, decided in 1898, the Rhode Island Supreme Court limited the meaning of the "practice of medicine" in the state's licensing statute to its "popular understanding." The court explained that in common parlance, the "practice of medicine" requires "a knowledge of disease, its origin, its anatomical and physiological features, and its causative relations; and, further, it requires a knowledge of drugs, their preparation and action." Therefore, "Prayer . . . does not constitute the practice of medicine in the popular sense."¹¹³ The court further opined that a nondiscrimination clause in the statute ("nothing in this chapter shall be so construed as to discriminate against any particular school or system of medicine") compelled an exemption for Christian Scientists. In light of this provision, it would be "absurd," the court concluded, to subject members of a healing system to requirements with which they could not comply, "thus adopting a construction which would operate not as a discrimination only, but as a prohibition."¹¹⁴ Fortunately for Christian Scientists and other mental and religious healers, the *Mylod* decision proved to be far more influential than *Buswell*.¹¹⁵

On occasion, a judge construing the meaning of the "practice of medicine" would transcend the technical analysis of statutory interpretation and declare the importance of medical liberty. For example, in *Bennett v. Ware*, the Georgia Court of Appeals justified its holding that a "Magic Healer" was not "practicing medicine" by asserting that limiting the phrase to those who

prescribed drugs was “the better rule and one more in consonance with reason and in harmony with the republican character of our institutions.”¹¹⁶ The North Carolina Supreme Court, in *State v. Biggs*, concluded that the federal and state constitutions dictated that the state’s licensing requirement not apply to a drugless practitioner who treated patients with physical manipulation and dietary advice. The court proclaimed: “In the cure of bodies, as in the cure of souls, ‘orthodoxy is my doxy, heterodoxy is the other man’s doxy’ This is a free country, and any man has a right to be treated by any system he chooses.”¹¹⁷

Biggs may be the only judicial decision of the Gilded Age to conclude that mandatory licensing of drugless practitioners violated the United States Constitution. This is not to say, however, that the era’s battle against medical licensing was not a successful “constitutional” movement. Medical liberty advocates routinely advanced constitutional arguments outside of court, and there they often found receptive audiences.

Constitutional Rhetoric Outside of Court

According to Larry Kramer, “the years between Reconstruction and the New Deal were . . . a kind of golden age for popular constitutionalism: a time rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized—and often denied—imperial judicial authority.”¹¹⁸ The Gilded Age struggles over medical licensing strongly support Kramer’s assertion. The courts’ refusal to strike down licensing on constitutional grounds did not dissuade campaigners for medical liberty from articulating explicit constitutional arguments in legislative chambers and the public sphere. For example, opponents of the 1893 medical licensing bill in Connecticut claimed, in the words of an observer, that the law “would trespass upon the rights of the individual; that its purport

[sic] is hostile to the spirit of our institutions, and that its enactment would be illegal and its enforcement unconstitutional.”¹¹⁹ In his magazine *The Arena*, Benjamin O. Flower—one of the period’s leading proponents of medical freedom—characterized medical licensing statutes as “unjust and un-American legislation which makes unfair distinctions and unconstitutional discriminations.”¹²⁰ The constitutional essence of the anti-licensing cause was reflected in the very name of one of its leading organizations: the National Constitutional Liberty League.

In these extrajudicial arenas, Gilded Age anti-licensing activists invoked the nation’s fundamental values much more frequently than particular constitutional proscriptions. But like their antebellum forebears, they considered themselves to be making “constitutional” arguments when doing so. Their Constitution was not simply the collection of provisions contained in the document itself, but also the broad principles of freedom and equality that the Founding Fathers proclaimed in the Declaration of Independence, fought a war to vindicate, and reiterated in the Constitution’s preamble. One modern scholar, Mark Tushnet, has influentially called this bundle of foundational values the “thin Constitution.”¹²¹

Gilded Age medical freedom literature contained ubiquitous references to the Declaration of Independence’s “inalienable rights” of “life, liberty, and the pursuit of happiness.” Henry Wood, for example, characterized these rights as “constitutional guarantees” that embraced “the right of individual judgment in regard to . . . interior, sacred, personal experiences and choices.” He concluded, “Society robs one of all these when . . . it makes one’s irregular healer . . . a criminal.”¹²² When Alzine A. Chevaillier declared that “the right of a man to save his body from disease and death . . . certainly is ‘a pursuit of happiness,’” she mistakenly assigned this phrase to the Constitution itself.¹²³

Like their antebellum counterparts, Gilded Age medical licensing foes often portrayed their cause as a continuation of the American Revolution. After the anti-licensing forces' 1898 victory in Massachusetts, the *Boston Transcript* cheered: "The regulars are as signally whipped as they were at Bunker Hill."¹²⁴ Benjamin Flower proudly asserted that "the spirit of '76 was still abroad in the land."¹²⁵ J. W. Lockhart reached back even further in history. He wrote that the notion that "people are not capable of choosing their own medical advisers" was "refuted at Runnymede when the Magna Charta was forced from King James, . . . at Independence Hall when the Liberty Bell pealed forth the joyous proclamation of political, religious and social freedom; when the Declaration of Independence proclaimed the 'inalienable rights of man' and when the Fourteenth Amendment was incorporated into the organic law of this country."¹²⁶

Some anti-licensing advocates proceeded more legalistically. Robert Chapin Bayly, for example, cited a grab-bag of specific constitutional provisions in his writings. He invoked the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Article I's prohibition against ex post facto laws.¹²⁷ He contended that Article IV's Full Faith and Credit and Privileges and Immunities Clauses prohibited one state from denying the right to practice to a physician authorized to do so in another.¹²⁸ He even unconvincingly contended that medical licensing violated the Article IV provision that obligates the United States to "guarantee to every state . . . a republican form of government."¹²⁹ Ultimately, however, even Bayly favored broad incantations of American's fundamental rights—the "great principles of organic law transmitted to us by the Fathers of the Republic." He argued that state medical practice acts were illegitimate under guarantees "emphatically declared in the Declaration of Independence before the Constitution was made."¹³⁰

The Four Strands of Medical Freedom

When elaborating on such arguments, Gilded Age medical licensing opponents invoked the same four strands of liberty as did their antebellum forebears: bodily freedom, economic freedom, freedom of belief, and freedom of inquiry. The rhetoric of the two periods differed, however, particularly with respect to the relative emphasis given to these different themes.

Bodily Freedom

Before the Civil War, an important trope in anti-licensing literature was the appalling image of a patient who, denied access to botanical cures, had no choice but to subject his or her body to the brutal, debilitating, and “unnatural” remedies administered by Regular doctors. As orthodox medicine became less “heroic” during the course of the nineteenth century, this scenario became increasingly implausible and licensing foes raised it much less often. It did not vanish altogether, however. An opponent of the 1893 Connecticut measure extending licensing to drugless practitioners fretted, “I am anxious for the defeat of this bill that I may have the liberty ... of employing a doctor who, I feel sure, will give me no arsenic, strychnine, corrosive sublimate, rattlesnake virus, nor any other deadly thing.”¹³¹ Alexander Wilder, a physician, journalist, and prominent medical libertarian, warned: “If it is imagined that the blood-letting practise [sic] has disappeared, not to return, we have only to remember that there are recurrences of epidemic ‘fads’ among medical men.”¹³²

Increasingly, though, those opposed to licensing alternative practitioners focused less on the right to *avoid* unwanted remedies and more on the right to *access* one’s preferred treatments

and advisors. Wilder remarked, “It would be an act of tyranny to force a person to take medicine if he did not believe in its efficacy, and it is equally such to compel him to do without advice and service where he does so believe.”¹³³ Christian Scientist Herbert W. Packard contended: “When we come to the right to seek and preserve health, we come to a right than which there is none more sacred, for it is an axiom that self-preservation is the first law of nature.”¹³⁴ In his 1894 letter to the *Transcript*, William James condemned “paternalism so solicitous . . . as to stand between [the citizen] and the therapeutic adviser whom he would naturally select.”¹³⁵

Sometimes, activists linked medical freedom to a broader vision of bodily freedom, as well as to a general right of personal autonomy. Herbert Packard insisted that the state had no more right to interfere with one’s choice of medical advisors than “to prescribe the kind of food a man shall eat, the clothes he shall wear, or the work he shall engage in.”¹³⁶ Reverend Benjamin Fay Mills, testifying against the extension of medical licensing at the 1898 Massachusetts hearing, proclaimed: “You might as well say that a man should not walk on the slippery part of the sidewalk, or that he should eat boiled meat and not fried.”¹³⁷ More than a century before adversaries of the 2010 Affordable Care Act compared that law’s health insurance mandate to requiring people to eat broccoli, these men were voicing similar arguments against medical licensing.¹³⁸

The Gilded Age literature foreshadowed modern bodily freedom rhetoric in other ways, as well. For example, in his letter to the *Transcript*, James declared: “If the word ‘sacred’ can be applied to any personal right, surely the right to treat one’s own body as one chooses may claim the title.”¹³⁹ Similar language would reappear some seventy years later in the arguments of the abortion rights movement. For example, in 1973, an *amicus* brief filed by pro-choice groups in

Roe v. Wade asserted, “Surely none of the rights can be seen as more basic, fundamental or worthy of protection than a woman's right to control her body”¹⁴⁰

It is thus important to take special note of this strain of advocacy in the Gilded Age anti-licensing literature, for such arguments retain a currency today that most of the others advanced then do not.

Economic Freedom

Many Gilded Age political reformers were inveterately suspicious that statutes, regardless of their ostensible goals, were “special legislation” or “class legislation” intended mainly to benefit the legislators’ wealthy patrons. These reformers routinely opposed state interventions in the free market that they perceived to be promoting the interests of particular individuals or groups. Examples of such legislation included laws restricting trade, distributing bounties to industry, or creating artificial monopolies. Like the Jacksonians before them, Gilded Age reformers condemned special legislation not only as unwise policy, but also as a violation of Americans’ fundamental liberties.¹⁴¹

This is the lens through which late-nineteenth-century medical freedom activists viewed medical licensing. They considered the postbellum proliferation of medical practice acts to be a corrupt plot by Regular physicians to exclude competitors from the market. Alexander Wilder asserted that “legislators who vote for such enactments are little else than dupes of those who seek them” and that “many of the bills were stolen through the legislatures when no one was on the watch.” The licensing laws, he said, reflected nothing more than “[l]ust of power and lust of gain.”¹⁴² R. C. Bayly described these statutes as “a sample of the worst and most damnable class legislation on record in any free country.” He asserted that “legalized cormorants . . . have

entered into a conspiracy, widespread as the United States, to maintain a kind of medical trust.”¹⁴³

The allegation of a “medical trust” was a common and significant feature of Gilded Age medical freedom literature. Resistance to government-supported monopolies in private trades had deep roots in American libertarian thought.¹⁴⁴ Hence, when William Lloyd Garrison II (the son of the great abolitionist) testified against expanding licensing requirements at the 1898 Massachusetts hearing, he drew from a deep well of indignation when he contended: “Ostensibly an act to protect the community from malpractice, in reality its motive is to restrict competition and secure the monopoly of treating disease to those who bear the credentials of an established and recognized school.”¹⁴⁵ In an article titled “Socialistic Medical Legislation,” J. W. Lockhart made clear that basic liberties were at stake. “The medical monopoly, like all other monopolies, is socialistic . . . in the matter of preventing competition and maintaining large fee bills, and despotic in regard to all other matters pertaining to the public health.”¹⁴⁶

As illustrated by Justice Field’s opinion in *Dent*, even those fiercely opposed to special legislation acknowledged there was a sphere of legitimate police power. But laissez-faire constitutionalists frequently dismissed the purported public health goals of legislation and ascribed its passage to selfish ulterior motives instead. For instance, in the famous 1905 case *Lochner v. New York*, the Supreme Court struck down a maximum hours law for bakers, observing: “[M]any of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health and welfare, are, in reality, passed from other motives.”¹⁴⁷

Medical freedom activists expressed similar suspicions about medical licensing statutes. Indeed, Herbert Packard attacked them by quoting this very passage from *Lochner*.¹⁴⁸ Wilder

similarly observed: “When protection [of the people] is talked about it is time to be on the lookout for jobbery and trickery.”¹⁴⁹ Bayly maintained: “I have not known of one instance where [medical licensing] laws were enforced for the protection of the people. Such laws are always championed through the legislature by political scoundrels in the interest of some nefarious combination or trust directly opposed to the welfare . . . of people and to all free government.”¹⁵⁰ Such cocksure rejections of the possibility of a genuine health motivation for medical licensing may seem paranoid to us today, but it is important to remember that at the time, orthodox medicine was not clearly more efficacious than its rivals. Moreover, most states did not prohibit unlicensed practitioners from providing services *for free*, and this curious exception heightened suspicions that the medical practice acts’ true purpose was to protect the Regulars’ market share, rather than the public health.¹⁵¹

Medical freedom proponents also contended that licensing laws violated the individual economic rights of practitioners and patients. In the late-nineteenth-century, opposition to legislation outside the police power and the preservation of individual liberty were two sides of the same coin.¹⁵² Like other proponents of laissez-faire, medical licensing foes believed that invalid assertions of the police power always constituted unconstitutional invasions of economic freedom, including the “freedom to practice a trade” and “liberty of contract.” Bayly thus contended: “The State Board of Health has no more authority to regulate the practice of medicine than it has the common business of any other class of people in the State. The State, in the exercise of its police power, has no authority whatever to deprive a citizen of the United States of the right to freely engage in the business of his choice, provided, that the rights of others are not infringed.”¹⁵³ And Wilder asserted: “Of the right of an individual to make his own contracts there can be no rational question. He may engage whomsoever he pleases to cure him; and the

person, having rendered a meritorious service, has a moral right to a reasonable compensation.”¹⁵⁴

Although the economic freedom arguments of Gilded Age medical licensing foes resembled those of their antebellum counterparts, they lacked the same populist tone. Thomsonianism, rooted in Jacksonian thought, was primarily a rural and working-class phenomenon. Its followers portrayed Regular doctors as an elitist and intellectually pretentious cabal plundering the common folk. By contrast, as we have seen, many of the later alternative medical approaches attracted adherents from the educated middle and upper classes. Medical freedom activists associated with these schools were thus much less likely to vilify Regular doctors for their wealth or challenge the value of education and expertise. Nevertheless, like other Gilded Age reformers emerging from the subculture of well-bred urban professionals, campaigners against medical licensing utterly despised special legislation as a matter of principle. And to them, medical practice acts were a prime example of such legislation, the product of a corrupt alliance between a powerful interest group and unscrupulous party politicians.¹⁵⁵ Although the era’s stock villains were corporate plutocrats, not Regular physicians, medical freedom proponents saw little difference between the two.

Overall, economic freedom arguments were somewhat less prominent in Gilded Age medical freedom literature than they had been in Thomsonian writings. As we will see below, many anti-medical licensing activists began to embrace the need for widespread economic regulation, even as they continue to assail licensing in particular. But even those who began to feel less comfortable with the language of economic laissez-faire had no ambivalence at all about the two remaining strands of medical freedom: freedom of belief and freedom of inquiry.

Freedom of Belief

The antebellum Thomsonians likened orthodox doctors to despotic priests, compared medical licensing to the establishment of a state religion, and sometimes condemned government restrictions on medical practice as a violation of their freedom of “conscience.” Overall, however, freedom of belief in general—and freedom of religion in particular—played a much larger role in medical liberty arguments after the Civil War than before. This change in rhetoric was due largely to the increasing importance of spirituality in the alternative medical systems themselves. Thomsonianism did not have a strong link to religion, and its followers did not invoke the healing power of spiritual or divine forces.¹⁵⁶ By contrast, such forces were integral components of many later alternative movements.¹⁵⁷ Hahnemannian homeopaths ascribed “spiritual power” to their drastically diluted medicines.¹⁵⁸ And for followers of drugless approaches such as Mind Cure and Christian Science, cure of the body was virtually inseparable from cure of the soul.

The post-Civil War struggle against medical licensing was thus led by people who vigorously rejected the purely materialistic approach of Regular medicine. Judge Thomas E. Grover, testifying on behalf of the Boston Metaphysical Club at the 1898 Massachusetts hearing, declared that “there is a close, . . . unknown and unexplained connection between the unseen mind and the visible body.”¹⁵⁹ At the same hearing, Reverend T. E. Allen testified:

It is notorious that many physicians are confirmed materialists, convinced . . . that . . . man is wholly material and death ends all. Over against this, we find that the heretical healing schools believe that man is an immortal spirit.... Believing this, then, as a part of their religious systems, their theories of healing are dominated by the same idea, and they necessarily attach more importance to the operation of spiritual and mental forces than do many others in the community. It follows, therefore, that they either attach less importance to the use of drugs, or deny their efficacy or utility altogether.¹⁶⁰

To those for whom physical and spiritual health were inextricably linked, medical freedom was essentially indistinguishable from freedom of belief. And in their view, it was precisely medicine's basis in faith rather than science that made government regulation of it inappropriate. As Herbert Packard argued: "[I]n matters about which there is a right to exercise judgment and discretion, and about which men are not agreed, and have not come to definite and fixed conclusions, the majority of the people, through the legislature, cannot substitute their judgment and opinion for that of their fellowmen and make them conform thereto, without depriving men of natural and unalienable rights protected under the Constitution."¹⁶¹

Although Gilded Age medical licensing opponents frequently asserted violations of a generalized freedom of belief, they were more hesitant to claim infringements of religious liberty in particular. The worldviews with which many drugless healing systems overlapped, such as Transcendentalism, Swedenborgianism, and Theosophy, were not religious creeds so much as amalgams of philosophical, mystical, and religious ideas.¹⁶² Many advocates thus analogized medical and religious liberty rather than equated them. But religious themes were prominent in the literature nonetheless. Bayly proclaimed, "[T]he establishment of a State system of medicine ... is just as tyrannical in its methods, as subversive of the liberty and rights of the citizens, as any system of religion backed by the civil power, ever dared to be."¹⁶³ Flower declared: "The right of every man to employ whomsoever he desires in matters pertaining to his physical health is as sacred as his right to employ whosoever he desires to minister to his spiritual welfare."¹⁶⁴ Occasionally, in an effort to blur the distinction between medical and religious freedom, licensing foes mentioned the healing activities of Bible figures. Joseph Barbour, for instance, ended his testimony at the 1893 Connecticut legislative hearing by remarking that under the proposed law, St. Peter would have been prosecuted for healing the lame man at the Temple.¹⁶⁵

With Christian Science, medicine and religion seemed indivisibly intertwined. However, even the Scientists only gradually began to condemn government interference with its practitioners primarily as a violation of religious liberty.¹⁶⁶ The early Scientists—including, initially, Mary Baker Eddy herself—tended to view their movement as a healing system more than as a religion. As one historian observes, “Although there appeared to be a symbiotic relationship between sin and sickness in Christian Science . . . the practical reality was that most people initially came to Science for a cure from sickness.”¹⁶⁷

The Scientists remained conflicted about how to classify their rights into the twentieth century. Consider, for example, two nearly contiguous articles in the 1905 volume of the *Christian Science Journal* addressing the constitutionality of licensing Christian Science practitioners. In his contribution, Herbert Packard discussed the movement as a “system of healing” and contended that there is a “right to seek and preserve health” in our “fundamental principles of government.” A few pages later, by contrast, Clifford Smith depicted Christian Science first and foremost as a “system of religious teaching” and based his argument against licensing chiefly on “the constitutional guaranty of religious freedom.”¹⁶⁸

Invocations of religious liberty were clearly ascendant, however.¹⁶⁹ When Nebraska Governor John Mickey vetoed a licensing bill the same year, he asserted: “In the Christian Science religion the ideas of worship and of divine healing are so intermingled that it is impossible to draw the line of demarcation, and hence interference with the one is an interference with ‘the rights of conscience’ and thus becomes an infringement of the constitutional guaranty of religious freedom.”¹⁷⁰ After the New Hampshire Supreme Court definitively characterized Christian Science as a religion in a 1912 dispute concerning Eddy’s will, Scientists usually relied principally on religious freedom arguments.¹⁷¹

Freedom of Inquiry

The thronged State House in Boston must have buzzed with excitement as William James rose to address the Committee on Public Health on March 2, 1898. The Harvard professor was there to testify against the bill that would have extended medical licensing to drugless practitioners.¹⁷² He opened by reminding the committee of his Harvard medical degree and his long record of teaching scientific subjects at the university. He quipped: “The presumption is that I am . . . interested in Science. I am indeed; and it is, in fact, because I see in this bill . . . a movement in favor of ignorance, that I am here to oppose it. It will inevitably trammel the growth of medical experience and knowledge.”¹⁷³

In his testimony, James went on to articulate themes that, four years later, he would develop at length in his masterpiece *The Varieties of Religious Experience*—a book that included a lengthy discussion of Mind Cure.¹⁷⁴ One such theme was the contingency of truth. Although James did not, in his testimony, directly deny the possibility of objective medical truth, he flirted with this conclusion by suggesting that medical knowledge was in a state of permanent flux. “Both as to principle and as to practice our knowledge is deplorably imperfect. The whole face of medicine changes unexpectedly from one generation to another” James characterized medicine as a collection of “vital mysteries,” “personal relations of doctor and patient,” and “infinitely subtle operations of nature.” Whereas licensing might be appropriate if medicine were a “finished science,” it had not nearly achieved this status.¹⁷⁵

The other main theme of James’s testimony—one that he also elaborated on in *Varieties*—was the idea that practical experience is the only valid measure of medical truth.

“Whatever you do,” he urged the committee, “you are bound not to obstruct the growth of truth by the freest gathering of the most various experiences.” He mocked Regular and Homeopathic medicine for their mutual refusal to consider experiential evidence of the efficacy of the other, noting that their conflict was more akin to a disagreement between philosophers or “theologists” than one between scientists. He then rebuked the Regulars for taking the same dismissive stance toward Mind Cure:

One would suppose that any [set] of sane persons interested in the growth of medical truth would rejoice if other persons were found willing to push out their experiences in the mental-healing direction, and provide a mass of material out of which the conditions and limits of such therapeutic methods at last become clear. . . . [B]ut instead of rejoicing, [Regular doctors] adopt the fiercely partisan attitude of a powerful trades union, demanding legislation against the competition of the “scabs.”

James attacked the licensing bill on the grounds that “the Commonwealth of Massachusetts is not a medical body, has no right to a medical opinion, and should not dare to take sides in a medical controversy.” He urged the legislature to stay its hand in view of “the confusion, the deplorable imperfection of the most expert knowledge, . . . the conscientious divergences of opinion, the infinite complication of the phenomena, and the varying and mutually exclusive fields of experience.” The measure under consideration, he contended, would “convert the laws of this Commonwealth into obstacles to the acquisition of truth” by destroying “a whole department of medical investigation . . . together with the special conditions of freedom under which it flourishes.”

James did not scorn Regular medicine. Indeed, he conceded that if forced to choose only one type of practitioner, “I should unhesitatingly vote to license the Harvard Medical School type.” Such a choice was unnecessary, however. Massachusetts should continue allowing the

Mind Curers to do their work, because “[o]ur state needs the assistance of every type of mind, academic and nonacademic.” And if mental healers proved incapable of adequately interpreting their own results, “why then let the orthodox M. D.’s follow up their facts and study and interpret them. But to force the mind curers to a State examination is to kill the experiments outright.”

Unlike his 1894 letter to the *Transcript*, James’s 1898 testimony focused almost exclusively on freedom of inquiry, and he promoted this concept chiefly on utilitarian grounds rather than out of concern for individual rights. He stated that his duty was to “the larger society, the commonwealth” and to the “real interests of medicine.” James’s testimony was nonetheless a strong libertarian statement. “Above all things,” James concluded, “let us not be infected with the Gallic spirit of regulation and reglementation [sic] for their own abstract sakes.”

Following James’s address, freedom of inquiry became perhaps the most common theme in American anti-licensing literature. Just three months later, Benjamin Flower wrote an article opposing medical licensing in which he extensively quoted the testimony and concluded, “Medical freedom . . . fosters science and aids progress; and the safety of the people is conserved under freedom.”¹⁷⁶ A few years later, Alexander Wilder opined: “The concept that medical or other progress may be promoted by restrictive laws is absolutely contrary to the experience of mankind. It is not possible to devise any kind of government handcuff . . . that can help progress.”¹⁷⁷

Such reasoning appealed to the early twentieth century’s rising progressive impulse, which, at least in some of its manifestations, was concerned with societal improvement more than with individual rights. Medical freedom activists continued passionately to advance arguments based on personal liberty as well. But as we will see in the next chapter, the

contention that unrestricted medical inquiry generated community-wide health benefits would be an extremely important addition to their rhetorical arsenal in the Progressive Age.

Governor Thomas's Veto Message

In 1899, Colorado Governor Charles Spaulding Thomas vetoed a bill that would have subjected drugless practitioners to a state medical licensing system administered by a composite board comprising Regular physicians, Homeopaths, and Eclectics. Thomas' veto message is one of the best examples of a document weaving together all of the Gilded Age's main strands of medical freedom.

Thomas began by emphasizing the uncertainty of medical knowledge. He contended that in its current state, "[M]edicine is not a science. . . . It is a series of experiments more or less successful, and will become a science only when the laws of health and disease are fully ascertained and understood." Building on this theme, Thomas stressed the importance of freedom of inquiry. Parroting James's testimony of the previous year, the governor called for "unfettered" medical investigation. He asserted that medical knowledge would be advanced "not by arresting the progress of experiment, and binding men down to hard and fast rules of treatment, but by giving free rein to the man who departs from the beaten highway and discovers hidden methods and remedies in the wayside." Thomas remarked that without prior experimentation, "the leech, the lancet, and the pill-box would still be the regulators of the public health." He warned: "Innovation and experiment will always languish when held in thralldom by the censorship of a powerful commission founded upon a rigid and exacting statute."

Thomas next highlighted his concern for economic liberty. He denied the state's authority to "deprive practitioners . . . of the right to continue their business." Demonstrating the

continuing pull of economic freedom arguments in the Gilded Age, Thomas declared that “if [medical practitioners’] livelihood can be made to depend upon such oppressive conditions, the independences of the individual must disappear, and servitude in its worst form will inevitably follow.” The governor claimed that he would have vetoed the bill even if it actually advanced the public health, “for disease is . . . preferable to the unrestricted power of punishment and confiscation.” But the legislature’s references to health were in fact a “subterfuge.” After all, he observed, “all measures designed to promote a specific interest or protect an existing evil are ostensibly labeled ‘for the benefit of the people.’” The true goal of the licensing bill was to establish a “medical trust . . . which shall regulate demand and supply by absolute control of the product which forms its basis.”

Finally, Thomas turned to bodily freedom and freedom of belief, which—in a move typical of his era—he blended into a single line of argument. “The fundamental vice of the bill,” he maintained, “is that it denies absolutely to the individual the right to select his own physician. This is a right of conscience, and is that which enables the citizen to worship God as he may desire. It is indeed the same right manifesting itself in a parallel direction.” Thomas emphasized that the preservation of this right would benefit citizens’ bodily health, for “[c]onfidence of the patient in the healer does more to restore him than all the drugs that ever medicined [sic] man.” The governor pointed out that followers of drugless healing “recognize a subtle psychic force in mental healing, a power to overcome disease by the operation of mind and personal influence,” and he insisted that “the cures they narrate are not imaginary.” He asked, “Shall the government enact by statutes that these people shall not longer enjoy their beliefs or put them into daily practice?”

Gilded Age Medical Libertarianism

Notably, Governor Thomas did not confine his argument to these distinct strands of medical freedom. Near the end of his veto message, he broadly declared that the medical licensing bill, “like all kindred forms of paternalism, assumes that the citizen cannot take care of himself. The States must lead him as a little child, lest he fall into trouble unawares.... Such a system . . . crumbles into ashes in the crucible of experience.”¹⁷⁸ Thomas thus nodded toward a comprehensive libertarian philosophy of a type never quite voiced by the antebellum Thomsonians. Other medical licensing opponents routinely made similar statements. William James, for example, insisted that the “Massachusetts principle has always been to allow freedom of choice in personal matters and to let the citizen bear the consequences.”¹⁷⁹

Gilded Age medical licensing foes drew from various intellectual and cultural sources in forging this all-embracing libertarian worldview. One was the English political theorist Herbert Spencer. American medical freedom advocates enthusiastically adopted the “first principle” that Spencer articulated in his 1851 book *Social Statics*: “Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man.”¹⁸⁰ Spencer himself elaborated this principle into a condemnation of slavery, economic regulation, censorship, state religion, women’s inequality—and medical licensing.¹⁸¹ Americans frequently borrowed from Spencer in their own jeremiads against medical licensing.¹⁸² Reverend Allen, for example, stated: “The essence of liberty is to allow each person to follow his own choice wherever he may do so without infringing the equal liberty of others. The instance you say ‘I will give you liberty to do the thing that appears right or wise in my eyes,’ you enter upon a policy of coercion, and become at heart a tyrant.”¹⁸³ Clifford Smith suggested, anachronistically, that the Founding Fathers were Spencerians: “The purposes of government will not be carried out in accordance

with the principles of the Declaration of Independence, unless all men are guaranteed . . . the equal right to protection under the law in the enjoyment of individual liberty, so far as it can be secured without depriving others of substantially the same degree of freedom and opportunity.”¹⁸⁴

Spencer’s own attack on medical licensing had a ruthless, survival-of-the-fittest justification: “Unpitifying [sic] as it looks, it is best to let the foolish man suffer the appointed penalty of his foolishness.”¹⁸⁵ American licensing opponents assiduously avoided quoting this merciless language. Instead, they asserted, like Alexander Wilder, “Our American fellow-citizens are intelligent and able to take care of themselves, and need no such babying and swaddling by government.”¹⁸⁶ In addition, the Americans portrayed medical choice as just one aspect of a more general freedom of choice implicit in the United States’ democratic system. Henry Wood explained: “Democracy takes it for granted that citizens are not imbeciles but free, intelligent moral agents. Within proper limits, they are to exercise the power of choice . . . even where the choosing may not always be the best.”¹⁸⁷

As demonstrated by these passages, American medical freedom activists did not simply borrow arguments from Spencer. They also drew ideas and inspiration from a homegrown tradition of antistatism. This ideology of “radical libertarianism”¹⁸⁸ emphasized the protection of individual autonomy against invasion by state authorities. In the antebellum years, this worldview was evident not only among Thomsonians, but also among abolitionists, labor reformers, women’s rights advocates, and freethinkers.¹⁸⁹ In the decades following the Civil War, the somewhat diminished but still-strong cohort of radical libertarians embraced medical freedom as one of a cluster of causes that also included women’s rights, anti-imperialism,

freedom of speech, and sexual freedom (including access to contraceptives).¹⁹⁰ They carried these views into the twentieth century.

Consider, for example, the leading medical freedom activist Benjamin Flower, who lived from 1858 to 1918. As a young man, he “came under the spell of Herbert Spencer and abandoned himself to the perils of free thought.”¹⁹¹ He embraced the Mind Cure movement, explored spiritualism, and helped found the American Psychic Society.¹⁹² His libertarianism extended well beyond medical issues. He echoed abolitionist Wendell Phillips’ call for “[e]ntire unshackled freedom for every man’s life, no matter what his doctrine—the safety of free discussion, no matter how wide its range.”¹⁹³ Throughout his career as an editor and commentator, Flower was an exponent of freedom of speech, academic freedom, religious toleration, and women’s rights.¹⁹⁴ His dedication to the last of these extended not only to suffrage and property rights, but also to access to contraceptives, because women should be “given absolute control of their bodies.”¹⁹⁵

Or consider William Lloyd Garrison II, who lived from 1838 to 1909. He grew up immersed in his father’s abolitionist philosophy and community and fought for the African Americans’ rights until his death.¹⁹⁶ He also became an ardent proponent of women’s rights and a passionate anti-imperialist.¹⁹⁷ Underlying all these positions were Garrison’s commitment to the freedom of every individual and his fierce opposition to “the enthronement of privilege in fundamental law.”¹⁹⁸

Interestingly, at least some Gilded Age medical licensing foes eventually strayed from libertarian orthodoxy in one very important respect—namely, their attitude toward economic regulation. In the 1890s, as they confronted the social problems accompanying industrialization, urbanization, and growing wealth disparity, they began to support extensive government

intervention in the economic realm. Flower, for example, abandoned laissez-faire economics over the course of this decade and embraced a series of redistributionist measures, including large-scale public works programs, Henry George's single tax, and government ownership of some industries.¹⁹⁹ He became an admirer of populists like Tom Watson and William Jennings Bryan, progressives like Robert LaFollette, and even the socialist Edward Bellamy. Garrison's views seem to have undergone a similar evolution.²⁰⁰ And Charles Thomas twice enthusiastically supported Bryan for President of the United States; was elected Colorado governor in 1898 on a fusion Democratic-Populist ticket; publicly endorsed and signed a bill establishing a maximum eight-hour workday in the state's smelting and mining industries; and proposed the establishment of a state inheritance tax.²⁰¹²⁰²

Licensing is, at its essence, a form of economic regulation. So why did such men continue battling medical licensing even after they began to endorse other government interventions in the economy? The answer lies in part in the fact that they never lost their antipathy for *special* legislation. Their opposition to a state-supported medical monopoly directly paralleled their denunciations of government grants of special privileges in other industries and trades. Unlike Justice Field, Gilded Age enemies of medical licensing obdurately insisted that the public health justifications provided for licensing laws were fraudulent and that their true purpose was to enrich the Regular medical establishment.

But more important factors were also in play. Because of its connection to health and mortality, medicine is never simply another trade. The regulation of doctors raises profound issues of sovereignty over one's body that are not similarly raised by the regulation of railroads, for example. Moreover, in the Gilded Age, Regular physicians did not have a particularly strong claim that their therapies were practically superior to those of other schools, nor that their

materialist understanding of disease was scientifically more valid. Consequently, many Americans believed that the suppression of alternative approaches would interfere not only with their bodily autonomy, but also with their personal beliefs and with scientific progress. In other words, to the era's medical freedom proponents, state licensing represented not only a grant of *economic* privilege to the Regulars, but also a grant of *religious* and *intellectual* privilege. And American attitudes about the regulation of systems of belief (as opposed to economic affairs) have their own, consistently libertarian history.

As we will see, the twentieth century brought new challenges to the medical libertarians. One was the wide embrace of a Progressive political philosophy that prioritized societal welfare over individual rights in the health arena. The other was the emergence of increasingly effective orthodox treatments and the accumulation of empirical evidence demonstrating, to the satisfaction of more and more citizens, that modern scientific medicine was a uniquely valid approach to battling illness.

¹ William James, "The Medical Registration Act," *Boston Evening Transcript*, March 24, 1894.

² James introduced the name *pragmatism* to the world in an August 1898 talk, but in that address he attributed its coinage to Charles S. Peirce in the early 1870s. Louis Menand, *The Metaphysical Club: A Story of Ideas in America*, 1st ed. (Farrar, Straus and Giroux, 2002), 350.

³ On James's audience, see George Cotkin, *William James, Public Philosopher* (University of Illinois Press, 1994), 11–13. For a complete list of James's Harvard courses, see <http://www.uky.edu/~eushe2/Pajares/JamesTeachingSchedule.html>

⁴ 1894 Mass. Acts 530, 533. These exempted categories of practitioners were not, however, permitted to identify themselves as doctors of medicine or M.D.s. Ibid. For a discussion of James' role in the 1894 debate, see John T. Matteson, "'Their Facts Are Patent and Startling': WJ and Mental Healing (Part One)," *Streams of William James* 4, no. 1 (n.d.): 5–6.

⁵ On the Paris clinical school and its influence on Americans, see James H. Cassedy, *Medicine in America: A Short History* (Johns Hopkins University Press, 1991), 24; John Harley Warner, *The Therapeutic Perspective* (Princeton University Press, 1997), 24, 185–96; John S. Haller, *American Medicine in Transition, 1840-1910* (University of Illinois Press, 1981), 79–80.

⁶ On therapeutic skepticism and its effects on actual practice, see Warner, *The Therapeutic Perspective*, 83–161; Charles E. Rosenberg, "The Therapeutic Revolution: Medicine, Meaning, and Social Change in Nineteenth-Century America," in *Therapeutic Revolution: Essays in the Social History of American Medicine* (Philadelphia: University of Pennsylvania Press, 1979), 17–19; Edmund D. Pellegrino, "The Sociocultural Impact of Twentieth-Century

Therapeutics,” in *Therapeutic Revolution: Essays in the Social History of American Medicine* (Philadelphia: University of Pennsylvania Press, 1979), 247.

⁷ Russell C. Maulitz, “Physician Versus Bacteriologist: The Ideology of Science in Clinical Medicine,” in *Therapeutic Revolution: Essays in the Social History of American Medicine* (Philadelphia: University of Pennsylvania Press, 1979), 91–98; Cassedy, *Medicine in America*, 77–78, 84–84; Haller, *American Medicine in Transition, 1840-1910*, 216–17; William G. Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science* (JHU Press, 1992), 253–59.

⁸ Warner, *The Therapeutic Perspective*, 7.

⁹ Sherman M. Mellinkoff, “Chemical Intervention,” *Scientific American*, September 1973, 103.

¹⁰ A 1900 national medical directory listed 104,094 Regular physicians, 10,944 Homeopaths, and 4,752 Eclectics and others. William G. Rothstein, “The Botanical Movements and Orthodox Medicine,” in *Other Healers*, ed. Norman Gevitz (Baltimore: Johns Hopkins University Press, 1988), 50. These numbers certainly understate the influence of these alternative schools, however, because, as discussed below, orthodox physicians at the end of the nineteenth century became increasingly willing to borrow theories and remedies from the Homeopaths and Eclectics.

¹¹ On the social status of Homeopathy followers, see Martin Kaufman, *Homeopathy in America: The Rise and Fall of a Medical Heresy* (Johns Hopkins Press, 1971), 145; Paul Starr, *The Social Transformation of American Medicine: The Rise of a Sovereign Profession and the Making of a Vast Industry*, Reprint edition (New York: Basic Books, 1984), 99.

¹² Martin Kaufman, “Homeopathy in America: The Rise and Fall and Persistence of a Medical Heresy,” in *Other Healers*, ed. Norman Gevitz (Baltimore: The Johns Hopkins University Press, 1988), 99–107; James C. Whorton, *Nature Cures: The History of Alternative Medicine in America* (Oxford University Press US, 2004), 49–75.

¹³ Rothstein, “The Botanical Movements and Orthodox Medicine,” 47–51; John S. Haller Jr., *The People’s Doctors: Samuel Thomson and the American Botanical Movement 1790-1860*, 1st ed. (Southern Illinois University Press, 2001), 241–48.

¹⁴ Rothstein, “The Botanical Movements and Orthodox Medicine,” 50; Kaufman, *Homeopathy in America*, 141–55.

¹⁵ Whorton, *Nature Cures*, 103–15; Robert C. Fuller, *Alternative Medicine and American Religious Life* (Oxford University Press, 1989), 40–53.

¹⁶ On Quimby, see Fuller, *Alternative Medicine and American Religious Life*, 58–65; Whorton, *Nature Cures*, 115–19.

¹⁷ Rennie B. Schoepflin, *Christian Science on Trial: Religious Healing in America* (The Johns Hopkins University Press, 2002), 55–72.

¹⁸ Fuller, *Alternative Medicine and American Religious Life*, 61–63. Two other important new drugless schools—osteopathy and chiropractic—depended on manual manipulation of the body, rather than mental states or religious inspiration, to facilitate the flow of unseen health-giving forces. These sects emerged only in the final years of the nineteenth century, however, and did not become prominent participants in medical freedom debates until the twentieth.

¹⁹ Benjamin Orange Flower, “Restrictive Medical Legislation and the Public Weal,” *Arena*, June 1898, 789–90; Schoepflin, *Christian Science on Trial*, 42, 122.

²⁰ *Addresses Before the Committee on Public Health*, 13. On the social status of followers of Homeopathy, see Kaufman, *Homeopathy in America*, 145; Starr, *The Social Transformation of American Medicine*, 99. On Christian Science, see Schoepflin, *Christian Science on Trial*, 42. Eclectic medicine, by contrast, appears to have been most popular among poor and rural people. Rothstein, “The Botanical Movements and Orthodox Medicine,” 50–51.

²¹ Derived from data in Samuel Lee Baker, “Physician Licensure Laws in the United States, 1865-1915,” *Journal of the History of Medicine and Allied Sciences* 39, no. 2 (April 1984): 174–76; Samuel Lee Baker, “Medical Licensing

in America: An Early Liberal Reform" (Ph.D., Harvard University, Department of Economics, 1977), 54; Starr, *The Social Transformation of American Medicine*, 104.

²² Baker, "Physician Licensure Laws in the United States, 1865-1915," April 1984, 178; Starr, *The Social Transformation of American Medicine*, 104; Haller, *The People's Doctors*, 223; "Medical Practice Laws," *American Medical Association Bulletin* 3, no. 2 (November 15, 1907): 34-106.

²³ "A Conversation with Alexander Wilder, M.D., F.A.S. on Medical Freedom," *Arena*, December 1, 1901, 641.

²⁴ On AMA's influence, see James C. Mohr, *Licensed to Practice: The Supreme Court Defines the American Medical Profession* (Baltimore: Johns Hopkins University Press, 2013); Rothstein, *American Physicians in the Nineteenth Century*, 114-21, 200-01; Starr, *The Social Transformation of American Medicine*, 90-91, 109.

²⁵ See, e.g., Whorton, *Nature Cures*, 135; Shryock, *Medical Licensing in America, 1650-1965*, 44.

²⁶ Baker, "Medical Licensing in America: An Early Liberal Reform," 1977, S4-S5; Mohr, *Licensed to Practice*, 157-58.

²⁷ James C. Mohr attributes the adoption of medical licensing in West Virginia almost entirely to effective political organization by the Regular-dominated Medical Society of West Virginia. Mohr, *Licensed to Practice*, 25-79; Starr, *The Social Transformation of American Medicine*, 109; Samuel Lee Baker, "Medical Licensing in America: An Early Liberal Reform" (Ph.D., Harvard University, Department of Economics, 1977), 78.

²⁸ Dorothy Ross, *The Origins of American Social Science* (Cambridge University Press, 1992), 62; Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* (The Johns Hopkins University Press, 2000), S-6, 12; Baker, "Medical Licensing in America: An Early Liberal Reform," 1977, 78; *ibid.*, 118; Haskell, *The Emergence of Professional Social Science*, xx.

²⁹ Reginald H. Fitz, "The Legislative Control of Medical Practice," (Speech presented at the Massachusetts Medical Society, Annual Meeting, June 13, 1894), 278-79.

³⁰ Baker, "Medical Licensing in America: An Early Liberal Reform," 1977, 159-60.

³¹ "Editorial: Shall the Practice of Medicine Be Regulated?," *New England Medical Gazette* 15, no. 3 (March 1880): 65.

³² Baker, "Medical Licensing in America: An Early Liberal Reform," 1977, 101-03, 158-60, 203-04.

³³ Va. Code, c. 77, § 1747, in Burks, E. C. *The Code of Virginia: With the Declaration of Independence and the Constitution of the United States; and the Constitution of Virginia*, Richmond, 1887.

³⁴ R.I. Gen. Laws, c. 165, § 6, in *General Laws of the State of Rhode Island and Providence Plantations to Which are Prefixed the Constitutions of the United States and of the State*, Providence, 1896.

³⁵ Constitution of the State of Texas (1876), Art. XVI, § 31 (available at <http://tarlton.law.utexas.edu/constitutions/text/IART16.html>).

³⁶ "Medical Practice Laws," 44.

³⁷ *Ibid.*, 45-46. Some of these states required proportional representation, a couple prohibited majority representation by any one school, and the others reserved specific numbers of seats on the board for representatives of particular non-orthodox schools. Every state in this last category reserved one or more seats for homeopaths, most designated one or two seats for eclectics, and a few reserved seats for other sects including, after the turn of the century, osteopaths.

³⁸ Alternative practitioners were not necessarily eager to join forces with the Regulars, either. Homeopaths appear to have been more enthused about this cooperation than were the Eclectics. Baker, "Medical Licensing in America: An Early Liberal Reform," 1977, 110-12.

³⁹ "Conversation with Alexander Wilder," 640.

⁴⁰ Starr, *The Social Transformation of American Medicine*, 102.

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- ⁴¹ American Medical Association Code of Ethics, Art. 4, § 1 (1847); Starr, *The Social Transformation of American Medicine*, 107.
- ⁴² “Medical Practice Laws,” 74.
- ⁴³ 1874 Session Laws, Ch. 436, sect. 1 p. 556.
- ⁴⁴ Transactions, Medical Society of the State of New York (1889), 15-16, 23; (Editorial), “The State and Quackery,” *New York Times*, February 13, 1885, 4.
- ⁴⁵ See Transactions, Medical Society of the State of New York (1889), 15-16, 23-24.
- ⁴⁶ William Archer Purrington, *A Review of Recent Legal Decisions Affecting Physicians, Dentists, Druggists, and the Public Health* (New York: E. B. Treat & Co., 1899), 16.
- ⁴⁷ Transactions, Medical Society of the State of New York (1890), 27.
- ⁴⁸ *Ibid.* 27; Transactions, Medical Society of the State of New York (1891), 27.
- ⁴⁹ Transactions, Medical Society of the State of New York (1890), 28.
- ⁵⁰ [Editorial], “Medical Examinations,” *New York Times*, March 21, 1890.
- ⁵¹ Transactions, Medical Society of the State of New York (1891), 27.
- ⁵² Transactions, Medical Society of the State of New York (1891), 27; 1890 Session Laws, Ch. 507, p. 908-912.
- ⁵³ 1890 Session Laws, Ch. 507, § 5, p. 910.
- ⁵⁴ Starr, *The Social Transformation of American Medicine*, 107.
- ⁵⁵ Clifford P. Smith, *Christian Science: Its Legal Status: A Defense of Human Rights* (The Christian Science Publishing Society, 1914), 30.
- ⁵⁶ Other common exemptions were for the administration of domestic remedies without compensation, treatment in the event of an emergency, dentists, pharmacists, midwives, physicians in neighboring states acting in consultation, and—most common of all—medical officers of the Army, Navy, and Marine-Hospital Service. “Medical Practice Laws,” 101–03.
- ⁵⁷ Reproduced in Charles E. Gross, “Mr. Gross’s Closing Argument in Favor of the Bill,” in *Proceedings of the Connecticut Medical Society 1893 Annual Convention* (Bridgeport: Connecticut Medical Society, 1893), 289.
- ⁵⁸ “Doctors and ‘Doctors,’” *Hartford Courant*, March 9, 1893.
- ⁵⁹ “Mr. Gross’s Closing Argument,” 284–291.
- ⁶⁰ “Doctors and ‘Doctors.’”
- ⁶¹ *Ibid.*
- ⁶² *Ibid.*
- ⁶³ “Mr. Gross’s Closing Argument,” 288.
- ⁶⁴ “Doctors and ‘Doctors.’”
- ⁶⁵ “The Medical Practice Bill,” *New York Times*, March 1893.
- ⁶⁶ *Ibid.*
- ⁶⁷ *Ibid.*
- ⁶⁸ 1893 Conn. Spec. Acts ch. 158, § 1 p. 297.
- ⁶⁹ 1894 Mass. Acts Ch. 459, §§ 10-11 p. 533; Matteson, “‘Their Facts Are Patent and Startling’: WJ and Mental Healing (Part One),” 5–6.

⁷⁰ *The Medical Question. The Great Contest of 1898. Addresses Before the Committee on Public Health, at the State House, Boston, Mass., March 2d, 1898* (Boston: Banner of Light Publishing Co., 1898); “Christian Science Protests,” *New York Times*, March 5, 1898; Matteson, “‘Their Facts Are Patent and Startling’: WJ and Mental Healing (Part One),” 5–6.

⁷¹ 1897 N.H. Laws Ch. 63, § 11 p. 55; 1901 Me. Laws Ch. 170, § 11 p. 206. Unlike Massachusetts, these states clarified that the final part of the exemption, for practitioners of “other method[s] of healing” was restricted to those who did not use drugs or perform surgery. Whereas New Hampshire exempted practitioners of “any other method of healing, if no drugs are employed or surgical operations are performed,” Maine gave alternative practitioners slightly more freedom by exempting practitioners of “any other method of healing if no *poisonous or dangerous* drugs are employed nor surgical operations performed.” *Id.* (emphasis added).

⁷² “Medical Practice Laws,” 102; Schoepflin, *Christian Science on Trial*, 164.

⁷³ Schoepflin, *Christian Science on Trial*, 164; Smith, *Christian Science: Its Legal Status*, 61–64; Schoepflin, *Christian Science on Trial*, 72–75.

⁷⁴ Schoepflin, *Christian Science on Trial*, 212–15 (table).

⁷⁵ *Ibid.*, 164.

⁷⁶ Smith, *Christian Science: Its Legal Status*, 59–64; Clifford P. Smith, “Christian Science and Legislation,” *Christian Science Journal* 23, no. 7 (October 1905): 407–12.

⁷⁷ Samuel Lee Baker, “Physician Licensure Laws in the United States, 1865-1915,” *Journal of the History of Medicine and Allied Sciences* 39, no. 2 (April 1984): 183.

⁷⁸ Purrington, *Legal Decisions Affecting Physicians*, 86.

⁷⁹ Schoepflin, *Christian Science on Trial*, 146.

⁸⁰ *Ibid.*, Appendix.

⁸¹ 1876 Tex. Gen. Laws ch. 231, § 5 p. 232.

⁸² *Ibid.*, 184.

⁸³ Richard L. Abel, *American Lawyers* (Oxford University Press, USA, 1991), 40–43, 63; Lawrence M. Friedman, *A History of American Law, Revised Edition*, 2nd ed. (New York: Touchstone, 1986), 606–07, 649, 654.

⁸⁴ *Dent v. West Virginia*, 129 U.S. 114 (1889).

⁸⁵ The background of the case is related in detail in Mohr, *Licensed to Practice*.

⁸⁶ *Dent v. West Virginia*, Argument in Favor of Plaintiff in Error, 4.

⁸⁷ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

⁸⁸ See, for example, *Cummings v. Missouri*, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. 333 (1866). In these “Test Oath Cases,” Field wrote decisions for the Court holding that both federal and state laws that conditioned the practice of certain professions on a retrospective loyalty oath were unconstitutional *ex post facto* laws.

⁸⁹ *Slaughterhouse Cases*, 83 U.S. 36, 105, 110 (1873) (Field, J., dissenting). Field rooted this right in the “Privileges and Immunities Clause” of the Fourteenth Amendment, while Justice Bradley dissented separately and found the right in the Due Process Clause. The majority in *Slaughterhouse* so eviscerated the significance of the Privileges and Immunities Clause that in future cases, litigants and judges (including Field himself) asserting a right to practice a trade followed Bradley’s lead and relied on the Due Process Clause, sometimes in combination with the Fourteenth Amendment’s Equal Protection Clause.

⁹⁰ Charles W. McCurdy, “Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897,” in *American Law and the Constitutional Order: Historical Perspectives*, ed. Lawrence M. Friedman and Harry N. Scheiber (Cambridge, Massachusetts: Harvard University Press, 1978), 248–51.

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- ⁹¹ Ibid., 251 (quoting *Barbier v. Connolly*, 113 U.S. 27 (1885)).
- ⁹² *Dent v. West Virginia*, 129 U.S. 114, 121 (1889), 129:121.
- ⁹³ Ibid., 129:122.
- ⁹⁴ Ibid., 129:122–23.
- ⁹⁵ See cases cited in Purrington, *Legal Decisions Affecting Physicians*, 75–76; *People v. Phippin*, 37 N.W. 888, 898–903 (Supreme Court of Michigan 1888).
- ⁹⁶ Purrington, *Legal Decisions Affecting Physicians*, 76. Nine years later, the United States Supreme Court itself, citing *Dent*, held that a state could, pursuant to its police power, constitutionally deny a medical license based on the applicant’s lack of good character. *Hawker v. New York*, 170 U.S. 189, 195–196 (1898).
- ⁹⁷ *Mohr, Licensed to Practice*, 59.
- ⁹⁸ *Mohr, Licensed to Practice*, 67, 73, 87; *Dent*, 129 U.S. at 115.
- ⁹⁹ *Mohr* 102
- ¹⁰⁰ *Mohr, Licensed to Practice*, 101. See also “Former Cincinnati Medical Schools and Colleges” on the website of the University of Cincinnati Libraries, Archival and Rare Books Library. <http://libraries.uc.edu/libraries/arb/archives/collections/MedicalSchools.html>
- ¹⁰¹ Rothstein, *American Physicians in the Nineteenth Century*, 225–26.
- ¹⁰² Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Archon Books, 1963), 21.
- ¹⁰³ *Biographical Notice of Stephen J. Field* (Not published ,but printed only for the use of the family, 1892), 8.
- ¹⁰⁴ *Biographical Notice of Stephen J. Field* (Not published ,but printed only for the use of the family, 1892), 9.
- ¹⁰⁵ Ibid.
- ¹⁰⁶ *Parks v. State*, 64 N.E. 862 (Ind. 1902). Another magnetic healer apparently advanced a similar argument against Iowa’s examination requirement. *State v. Heath*, 101 N.W. 429 (Iowa 1904).
- ¹⁰⁷ *Ohio v. Marble*, 73 N.E. 1063, 1067 (Ohio 1905).
- ¹⁰⁸ *Heath*, 101 N.W. at 431; *Parks*, 64 N.E. at 867–868; *Marble*, 73 N.E. at 1068.
- ¹⁰⁹ *Dowdell v. McBride*, 45 S.W. 397 (Tex. App. 1898). (The law established a single board of examiners made up only of graduates from AMA-authorized medical colleges).
- ¹¹⁰ “Medical Practice Laws,” 109.
- ¹¹¹ *State v. Buswell*, 58 N.W. 728 (Nebraska 1894).
- ¹¹² Ibid., 58:732.
- ¹¹³ *State v. Mylod*, 40 A. 753, 755–56 (R.I. 1898).
- ¹¹⁴ Ibid.
- ¹¹⁵ Schoepflin, *Christian Science on Trial*, 154; *People v. Cole*, 113 N.E. 790 (N.Y. 1916); Rennie B. Schoepflin, “Christian Science Healing in America,” in *Other Healers: Unorthodox Medicine in America*, ed. Norman Gevitz (Baltimore: Johns Hopkins University Press, 1988), 207.
- ¹¹⁶ *Bennett v. Ware*, 61 S.E. 546, 549 (Ga. Ct. App. 1908).
- ¹¹⁷ *State v. Biggs*, 46 S.E. 401, 403 (N.C. 1903).
- ¹¹⁸ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, USA, 2005), 215.

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- ¹¹⁹ Speech of G. L. Porter before the Judiciary Committee, *Proceedings of the Connecticut Medical Society, 1893 One Hundred and First Convention* (Bridgeport: Connecticut Medical Society, 1893), 274.
- ¹²⁰ Flower, “Restrictive Medical Legislation and the Public Weal,” 808.
- ¹²¹ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, New Jersey: Princeton University Press, 1999), 9–14.
- ¹²² Henry Wood, “Medical Slavery Through Legislation,” *Arena*, November 1893, 680–81; Herbert W. Packard, “Christian Science and the Constitution,” *Christian Science Journal* 23, no. 6 (September 1905): 343.
- ¹²³ A. A. Chevaillier, “Constitutional Liberty,” *Arena*, March 1890, 432.
- ¹²⁴ Quoted in [Septimus J. Hannah], “Editor’s Table,” *Christian Science Journal* 16, no. 1 (April 1898): 70.
- ¹²⁵ Benjamin Orange Flower, *Progressive Men, Women, and Movements of the Past Twenty-Five Years* (New Arena, 1914), 302.
- ¹²⁶ J. W. Lockhart, “Socialistic Medical Legislation,” *Medical Brief: A Monthly Journal of Scientific Medicine and Surgery*, July 1900, 1012.
- ¹²⁷ R. C. Bayly, *The Legal Status of Doctors Everywhere Under the Flag and State Recognition of the Supremacy of National Law and Legal Courtesy to Physicians of Other States.--Fraudulent Practice Acts* (Lesson Leaf Publishing Company, 1900), 52, 54, 97, 112, 120–22, 125, 129–30, 132. This book is largely a compilation of articles that Bayly published in Volume 28 (1900) of *Medical Brief: A Monthly Journal of Scientific Medicine and Surgery*.
- ¹²⁸ Bayly, *Legal Status of Doctors*. Numerous citations to these provisions are scattered throughout the book.
- ¹²⁹ *Ibid.*, 62.
- ¹³⁰ *Ibid.*, xiii, 50–51.
- ¹³¹ F. E. R., “The Medical Bill. A Woman Who Objects--She Suggests a Sensible Addition (Letter to the Editor),” *Hartford Courant*, April 5, 1893.
- ¹³² “Conversation with Alexander Wilder,” 634.
- ¹³³ *Ibid.*, 632.
- ¹³⁴ Packard, “Christian Science and the Constitution,” 348.
- ¹³⁵ James, “The Medical Registration Act.”
- ¹³⁶ Packard, “Christian Science and the Constitution,” 348.
- ¹³⁷ *Addresses Before the Committee on Public Health*, 9.
- ¹³⁸ James B. Stewart, “How Broccoli Landed on Supreme Court Menu,” *New York Times*, June 13, 2012.
- ¹³⁹ William James, “Legislation in Massachusetts--the Medical Registration Act,” *Boston Transcript*, March 24, 1894, 233 (emphasis added).
- ¹⁴⁰ *Roe v. Wade*, Amicus Brief by New Women Lawyers et al., 16. While finding a right to obtain an abortion, the Court explicitly rejected the assertion that “one has an *unlimited* right to do with one’s body as one pleases.” 410 U.S. at 152–53 (emphasis added).
- ¹⁴¹ Michael Les Benedict, “Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism,” *Law and History Review* 3, no. 2 (October 1, 1985): 293–331; Lewis A. Grossman, “James Coolidge Carter and Mugwump Jurisprudence,” *Law and History Review* 20, no. 3 (October 1, 2002): 577–629.
- ¹⁴² “Conversation with Alexander Wilder,” 632, 636.
- ¹⁴³ Bayly, *Legal Status of Doctors*, v, 65.
- ¹⁴⁴ McCurdy, “Justice Field and the Jurisprudence of Government-Business Relations,” 259–61.

¹⁴⁵ *Addresses Before the Committee on Public Health*, 16.

¹⁴⁶ J. W. Lockhart, "Socialistic Medical Legislation," *Medical Brief: A Monthly Journal of Scientific Medicine and Surgery*, July 1900, 1012–13.

¹⁴⁷ *Lochner vs. New York*, 198 U.S. 45, 64 (1905). The opinion did not specify what "other motives" were at play in this case. Scholars disagree on what the justices thought these motives were. Compare David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (University Of Chicago Press, 2011), 23–39 to Paul Kens, Review of *Rehabilitating Lochner*, H-Law (June 2013), <https://networks.h-net.org/node/16794/reviews/17301/kens-bernstein-rehabilitating-lochner-defending-individual-rights>.

¹⁴⁸ Packard, "Christian Science and the Constitution," 350.

¹⁴⁹ "Conversation with Alexander Wilder," 636.

¹⁵⁰ Bayly, *Legal Status of Doctors*, 72.

¹⁵¹ Smith, *Christian Science: Its Legal Status*, 42; Packard, "Christian Science and the Constitution," 350.

¹⁵² Benedict, "Laissez-Faire and Liberty."

¹⁵³ Bayly, *Legal Status of Doctors*, 77.

¹⁵⁴ Alexander Wilder, "Medical Liberty," *Mind*, July 1898, 197.

¹⁵⁵ Grossman, "James Coolidge Carter and Mugwump Jurisprudence."

¹⁵⁶ Fuller, *Alternative Medicine and American Religious Life*, 53.

¹⁵⁷ Alternative medicine in the late-nineteenth century was part and parcel of what religious historian Sydney Ahlstrom describes as a surge in "harmonial religion"—"those forms of piety and belief in which spiritual composure, physical health, and even economic well-being are understood to flow from a person's rapport with the cosmos." Sydney E. Ahlstrom, *A Religious History of the American People*, 2nd ed. (Yale University Press, 2004), 1019.

¹⁵⁸ Kaufman, *Homeopathy in America*, 25–26; Fuller, *Alternative Medicine and American Religious Life*, 55; Whorton, *Nature Cures*.

¹⁵⁹ *Addresses Before the Committee on Public Health*, 25.

¹⁶⁰ *Ibid.*, 41–42.

¹⁶¹ Packard, "Christian Science and the Constitution," 347.

¹⁶² Ahlstrom, *A Religious History of the American People*, 483–90, 1019–22, 1038–42; Fuller, *Alternative Medicine and American Religious Life*, 38–65.

¹⁶³ Bayly, *Legal Status of Doctors*, 64–65.

¹⁶⁴ Flower, "Restrictive Medical Legislation and the Public Weal," 808. See also Lockhart, "Socialistic Medical Legislation."

¹⁶⁵ "Doctors and 'Doctors.'" Reverend T. E. Allen similarly remarked that if Jesus were to appear in Boston and heal someone, and the recipient of his care were to invite him home in gratitude, "an officer sent by the Board of Registration in Medicine would call at the host's house before breakfast the next morning to take Jesus away to prison for receiving, in the language of Sect. 5, 'a gift, bonus or compensation' for his services as a healer." *Addresses Before the Committee on Public Health*.

¹⁶⁶ In court, at least, this delay was due partly to the fact that the Supreme Court did not definitively apply the U.S. Constitution's religion clauses to the states until 1940, in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). But this is only a partial explanation, for many state constitutions guaranteed religious liberty as well.

¹⁶⁷ Schoepflin, *Christian Science on Trial*, 148–49.

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- ¹⁶⁸ Packard, "Christian Science and the Constitution," 342, 348–49; Smith, "Christian Science and Legislation," 406, 410. See also Schoepflin, *Christian Science on Trial*, 156.
- ¹⁶⁹ Schoepflin, *Christian Science on Trial*, 156.
- ¹⁷⁰ Quoted in Smith, *Christian Science: Its Legal Status*, 59.
- ¹⁷¹ Margery Fox, "Conflict to Coexistence: Christian Science and Medicine," *Medical Anthropology* 8 (1984): 296.
- ¹⁷² James's rarely reprinted testimony appears in *Addresses Before the Committee on Public Health*. It is also reproduced in the Congressional Record at 48 Cong. Rec. S5532-33 (Apr. 29, 1912) and in William James, *Essays, Comments, and Reviews*, ed. Ignas K. Skrupskelis (Cambridge: Harvard University Press, 1987), 55-62.
- ¹⁷³ *Addresses Before the Committee on Public Health*, 17.
- ¹⁷⁴ William James, *The Varieties of Religious Experience* (New York: Touchstone, 2004), 57–91.
- ¹⁷⁵ In *Varieties*, James would push the notion of the contingency of medical truth even further, remarking: "[W]hy in the name of common sense need we assume that only one such system of ideas can be true? . . . And why, after all, may not the world be so complex as to consist of many interpenetrating spheres of reality . . .?" *Ibid.*, 87.
- ¹⁷⁶ Flower, "Restrictive Medical Legislation and the Public Weal," 808.
- ¹⁷⁷ "Conversation with Alexander Wilder," 637.
- ¹⁷⁸ Smith, "Christian Science and Legislation," 411.
- ¹⁷⁹ James, "The Medical Registration Act."
- ¹⁸⁰ Herbert Spencer, *Social Statics: Or, The Conditions Essential to Human Happiness Specified, and the First of Them Developed* (London: John Chapman, 1851), 103.
- ¹⁸¹ *Ibid.*, Ch. 28.
- ¹⁸² In 1894, Fitz stated: "Herbert Spencer is usually quoted as the leading exponent of [the anti-licensing] view." Fitz, "The Legislative Control of Medical Practice," 280.
- ¹⁸³ *Addresses Before the Committee on Public Health*, 37. Horton and Garrison also paraphrased Spencer's first principle in this hearing. *Ibid.*, 5, 15.
- ¹⁸⁴ Smith, "Christian Science and Legislation," 405 (quoting McClain, Constitutional Law).
- ¹⁸⁵ Spencer, *Social Statics*, 378.
- ¹⁸⁶ "Conversation with Alexander Wilder," 636.
- ¹⁸⁷ Wood, "Medical Slavery Through Legislation," 681. For other examples of statements linking medical freedom to the general freedom of choice necessary in a democratic system, see Bayly, *Legal Status of Doctors*, 65–66, 68; Packard, "Christian Science and the Constitution," 343.
- ¹⁸⁸ Michael Willrich, *Pox: An American History* (New York: Penguin, 2011), 252. David Rabban labels this tradition "libertarian radicalism." David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (New York: Cambridge University Press, 1999), 23–76. Mark Elliott calls a similar cluster of ideas "radical individualism." Mark Elliott, *Color Blind Justice: Albion Tourgée and the Quest for Racial Equality from the Civil War to Plessy v. Ferguson* (New York: Oxford University Press, 2008), 7–9, 314–16.
- ¹⁸⁹ Rabban, *Free Speech*, 23.
- ¹⁹⁰ *Ibid.*, 24; Willrich, *Pox*, 252–53.
- ¹⁹¹ Allen J. Matusow, "The Mind of B. O. Flower," *The New England Quarterly* 34, no. 4 (December 1961): 492.
- ¹⁹² *Ibid.*, 493–94.
- ¹⁹³ Flower, *Progressive Men, Women, and Movements of the Past Twenty-Five Years*, 290.

¹⁹⁴ Roy P. Fairfield, "Benjamin Orange Flower: Father of the Muckrakers," *American Literature* 22, no. 3 (November 1950): 276–77.

¹⁹⁵ Matusow, "The Mind of B. O. Flower," 495.

¹⁹⁶ Harriet Hyman Alonso, *Growing Up Abolitionist: The Story of the Garrison Children* (Univ of Massachusetts Press, 2002); Marion Hohenstein, "William Lloyd Garrison II, the Universal Reformer in the Gilded Age" (M.A., Smith College, 1954), 37–51.

¹⁹⁷ Alonso, *Growing Up Abolitionist*, 283, 286–92; Hohenstein, "Universal Reformer," 71–72, 92–94. Garrison's wife, Ellen Wright, came from a family similarly committed to social reform. Ellen was the niece of Lucretia Mott, the celebrated advocate for abolition and women's rights.

¹⁹⁸ Hohenstein, "Universal Reformer," 88 (quoting 1895 speech by Garrison to the New England Free Trade League).

¹⁹⁹ Matusow, "The Mind of B. O. Flower," 500–07; Fairfield, "Benjamin Orange Flower," 275, 278.

²⁰⁰ Alonso, *Growing Up Abolitionist*, 286–87; Hohenstein, "Universal Reformer," 86–90, 95.

²⁰¹ *Swimming Against the Current*, 31.

²⁰² Stephen J. Leonard, "Swimming Against the Current: A Biography of Charles S. Thomas, Senator and Governor," *Colorado Heritage*, Autumn 1994; Darcy Richardson, *Others: Fighting Bob La Follette and the Progressive Movement: Third-Party Politics in the 1920s* (Lincoln, NE: iUniverse, 2008), 133–38.