WHY DOES ARKANSAS'S GOVERNMENT KILL JOBS AND DISCOURAGE HONEST WORK?

By Dan Greenberg and Marc Kilmer 11/3/16

Our government now intervenes in more and more areas of our economy; this is especially true in the regulation of occupations. Sixty years ago, only 5% of the U.S. labor force required a government license. Today, 25% of American workers do.[1] Advocates of government licensure claim this practice is necessary to protect the public. However, the evidence shows that occupational licensure often hurts the economy -- damaging both consumers (who must pay higher prices) and workers (who are prevented from obtaining a job in a licensed field). And the spread of providers' reputations over the internet is increasingly making occupational licensing obsolete as a means of consumer protection. That is why there is widespread agreement that policymakers should change course -- across the nation, and especially in Arkansas. Namely, **policymakers should create jobs by reducing the burdens of occupational regulation.**

THE NEED FOR REFORM

The rationale that licensure always benefits consumers is undercut by the differences in licensing regimes between the states. The manner in which some occupations are regulated (and others are not) is a patchwork of irrationality. Although numerous occupations are licensed throughout the states (according to one study of low-to-medium risk jobs), only 15 are licensed in 40 or more states.[2] For instance, only three states license dietetic technicians. It seems highly unlikely that dietetic technicians in the 47 other states are offering inferior service or harming consumers.

Mounting evidence from the left and the right shows that licensing hurts both consumers and workers. A recent Heritage Foundation study concluded that occupational licensure costs every American household $1,033 -- a total national impact of $1.27 billion.[3] Its author also found that every family in Arkansas pays an added cost of $754 annually.[4] An Obama Administration report demonstrates an even larger impact on workers:

> … licensing restricts mobility across States, increases the cost of goods and services to consumers, and reduces access to jobs in licensed occupations.

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> The employment barriers created by licensing may raise wages for those who are successful in gaining entry to a licensed occupation, but they also raise prices for consumers and limit opportunity for other workers in terms of both wages and employment. By one estimate, licensing restrictions cost millions of jobs nationwide and raise consumer expenses by over one hundred billion dollars.[5]

Occupational licensing's effect on labor mobility is especially troublesome. In many states, the personal qualifications for licensing differ for the same occupations. If you are a massage therapist in one state, you may not be able to perform that job in another state without obtaining a completely new license -- despite your previous work history of massage therapy. Similar requirements have had an especially negative impact on military families because they are often required to move around the nation. Licensing requirements regularly make it difficult or impossible for military spouses working in licensed fields to practice their occupation after moving to another state. Given that military families move routinely every few years, it makes little sense for a military spouse to invest time and money to obtain a license that is not transferable to another state. The General Assembly deserves credit for passage of Act 848 last year, which eases the occupational-regulatory burden on some soldiers and their spouses who move into the state -- but if the goal is to advance consumer welfare by allowing qualified people to practice their trade, it is difficult to see why the privileges Act 848 creates should be confined to a small fraction of the population.

This labor mobility problem is not confined to those who move to another state. A variety of professions are closed to the person who loses his or her job but does not possess the necessary license -- as well as to anyone who wants to move into the labor market, such as a young adult, homemaker, or retiree. Excessive licensure requirements therefore exacerbate unemployment and extend the time it takes for individuals to find new work. Indeed, preliminary research from Arizona State University suggests that lower rates of occupational licensing reduce crime rates because more people are allowed to work.[6]

The problems caused by occupational licensing are especially prominent in Arkansas. Our state was ranked the fifth "most extensively and onerously licensed state" in the Union in a recent survey by the Institute for Justice. That report charged that "Arkansas licenses a number of occupations that few other states do … Moreover, many occupations are subject to entry restrictions that exceed

national averages."[7] Similarly, Dr. David Mitchell, a professor of economics at the University of Central Arkansas, supplied related testimony to the General Assembly's Public Health, Welfare and Labor Committee last year. He explained that Arkansas policymakers have burdened our economy far more than surrounding states through occupational regulation, making Arkansas one of the worst environments for job creation in the country. Mitchell noted that Arkansas places the second-highest burdens of experience and education in the country on licensed occupations; for instance, to obtain a professional license in Arkansas, on average one needs more than twice as much education and experience as in Texas.[8]

Because of greater evidence of the harm that excessive occupational licensing causes both laborers and consumers, there is growing bipartisan consensus that we should reduce its scope. As noted above, the Obama Administration called for extensive licensure reform in a 2015 report detailing the problems that excessive licensing creates.[9] U.S. Senator Al Franken, arguably one of the most liberal lawmakers in America, recently said, "I think it's clear that we have some unnecessary occupation licensing that can harm workers and consumers in a number of ways."[10] Numerous think tanks and policy organizations also support reforms in occupational licensing. The Supreme Court's *Dental Examiners* decision of last year also heightened the case for reform -- it found that, if state governments continue to let anti-competitive licensure requirements stand and those requirements are enforced by boards or commissions without active supervision by democratically accountable public officials, board members could be subject to antitrust liability and higher costs for the state to indemnify them.[11]

Experts on this issue suggest that those who work in licensed occupations preventing others from competing with them receive a wage premium of approximately 18%.[12] It is troubling that roughly 5 out of every 6 Americans believe our economic system only benefits the better-off.[13] An honest examination of the reality of overextensive licensure must consider the possibility that the real justification of our licensure regimes has nothing to do with health, safety, or the quality of services, and everything to do with special-interest groups that want to preserve monopolies or cartelized markets. Regrettably, unless we address the government-created obstacles preventing our citizens from using their talents to do honest work, it looks as if that large majority of American citizens have reasons for this troubling view.

FIRST OPPORTUNITIES FOR REFORM

- **Repeal licenses for building contractors and tradesmen**
- **Repeal licenses (nearly unique to Arkansas) for psychiatric technicians, plant-nursery workers, funeral attendants, landscape workers, pharmacy technicians, massage therapists, and makeup artists**
- **Reduce, if not eliminate, requirements for opticians, teacher's assistants, barbers, cosmetologists, earth-drill operators, skin-care specialists, and manicurists.**
- **Repeal licenses where employers supervise competence, such as athletic trainers and veterinary technicians**

When considering which occupational regulations to relax or eliminate, policymakers should learn from regulatory practice in other states. For example, Arkansas imposes far more burdensome requirements on contractors in skilled trades than most other states. This is true for painting contractors, paving-equipment contractors, floor-sander contractors, mason contractors, door-repair contractors, glazier contractors, insulator contractors, iron/steel contractors, commercial-drywall/insulation contractors, cement/finishing contractors, pipelayer contractors, carpenter contractors, terrazzo contractors, and sheet metal contractors: typically, these contractors must work under someone else for *five years* before they are allowed to strike out on their own. Arkansas's restrictions in this area are some of the most oppressive in the nation.

With respect to these occupations, Arkansas is among the few states that require experience or training to obtain a license. If a commercial-painting contractor can perform the job as well in 40 states without the experience/training requirement, there is little justification for imposing a five-year experience requirement in Arkansas.

Other occupations require licensure in few states outside Arkansas. Psychiatric technicians, for instance, only need a license to work in four states; Arkansas is one of those four. Ending the licensing requirement for this occupation (perhaps in conjunction with requiring certification) would almost certainly do no public harm. Likewise, the state could presumably end occupational-licensing requirements without any real harm for plant-nursery workers, funeral attendants, landscape workers, pharmacy technicians, commercial-HVAC contractors, massage therapists, and makeup artists. Very few other states license these occupations at all.

In other respects, Arkansas is within the norm of other states, but there is still a good case to be made for ending occupational licensing or simply requiring certification as an alternative. Arkansas requires fire-alarm installers, for instance, to have 1,095 days of experience. That is excessive and serves no public interest. Likewise, although other states license residential-drywall contractors, Arkansas requires 730 days of experience, the heaviest burden in any state.

In several other occupations, Arkansas ranks near the top in the length of vocational experience imposed by state government. Our state has the second-highest experience/training mandate for opticians at 1,120 days. Texas, by contrast, has a one-day requirement. Are Texas opticians doing a worse job than those in Arkansas? No evidence indicates they are. Similarly, to become licensed as a teacher's assistant, Arkansas requires 730 days of experience/training (as do five other states). Most states allow someone to pursue this occupation with no experience/training requirement at all. Arkansas could easily end or sharply reduce the experience/training requirement for both these licenses.

Of course, Arkansas legislators could go beyond just reducing the state's licensing requirements that are out of line with other states' requirements. They could, instead, look to make Arkansas a leader in occupational freedom. For instance, is there really a need to require a governmental license for veterinary technologists or athletic trainers? Most other states require licenses for these occupations, but are veterinarians or gyms really incapable of hiring a skilled employee without the state of Arkansas's seal of approval?

Legislators should also consider scaling back the time requirements for licensing of barbers, cosmetologists, earth-drill operators, skin-care specialists, and manicurists. (Consider the requirements that Arkansas places on barbers: Given that millions of parents have cut their own children's hair for millennia, the requirements for that profession under state law -- 1500 hours of study and practice in "scientific fundamentals" of barbering, physiology, hygiene, the chemistry of sterilization and antiseptics, massaging, hair cutting, bobbing, waving, shaving, beard trimming, and chemical services -- are so overextensive as to be comical.) Even removing the licensure requirement and substituting a certification system -- a less restrictive form of regulation for these occupations -- would be a far superior policy choice. For these jobs, Arkansas has some of the most burdensome licensing rules in the nation -- and although such rules are successful at imposing huge barriers to employment, they fail to serve the public.

In addition to changing the experience/training requirements for licensure, legislators should also consider other licensure reforms. Consider licensing fees. The state charges a $2,750 fee for licensing a mobile-home installer. This seems difficult to justify: the average fee in other states is $337. Some occupational-licensing requirements stipulate age requirements; for instance, in Arkansas you must be 21 years of age to be a bill collector. It is entirely unclear how this age requirement furthers the public interest.

In many respects, Arkansas has onerous occupational-licensing rules that should be pared down or even eliminated. In a few areas, however, Arkansas's comparative absence of regulation suggests that regulators understand stricter requirements serve no public good. Arkansas midwives, for instance, have no experience requirement, even though 28 other states impose one. Our state government's commendable posture toward letting midwives work deserves wider emulation.

Arkansas is an outlier among state-licensing regimes -- our state imposes far heavier requirements on occupations than most other states do. In general, other states require exams -- not experience -- to obtain licensing or certification. This kind of testing is a superior policy alternative because it does not require those who want to work to spend months or years in classrooms; to put it bluntly, extensive classroom requirements run the risk of creating huge social waste in lost time and lost income. Schools that benefit from licensing may serve as special interests that lobby for increases in unnecessary licensing requirements. Arkansas lawmakers should move the state towards testing and away from its current, time-intensive licensing requirements.

The General Assembly deserves praise for the first step it took to carry out this strategy in 2015. Its passage of Act 409, the "Natural Hair Braiding Protection Act," allowed professional hair braiders to bypass the pointless and unnecessary 1,500 hours of training the law previously required, replacing that with an optional certification process. But removing one brick from a wall doesn't change much; the General Assembly can advance occupational freedom and economic growth in Arkansas much more aggressively. The bottom line is that Arkansas policymakers will have failed to do their job -- advancing job opportunities and increasing economic growth -- if all they do is target regulations that someone complains about. Instead, policymakers should adopt systemic solutions to the problems of occupational overregulation; to that end, we describe several different types of regulation, followed by several different kinds of implementation reforms, immediately below.

THE VARIETIES OF OCCUPATIONAL REGULATION

- **Adopt the policy of "least restrictive type of regulation"**
- **Choose the regulation that best addresses the actual need for consumer protection.**

To increase opportunities and rationalize regulations, Arkansas should use the least restrictive type of regulation (see graphic below). When considering a new regulation or evaluating an existing regulation, policymakers should start at the top of the inverted pyramid to select the first level of regulation sufficient to address the state's interest in protecting consumers.

HIERARCHY OF OCCUPATIONAL REGULATION OPTIONS

PRIVATE GOVERNANCE OPTIONS	Market competition
	Third-party or consumer-created ratings and reviews
	Private certification
	Specific private civil cause of action or alternative dispute resolution to remedy consumer harm
PUBLIC REGULATION	Deceptive trade practice act
	Regulation of the process of providing the specific goods or services to consumers
	Public inspection
	Mandatory bonding or insurance
COMMAND AND CONTROL	Registration
	Government certification
	Specialty occupational license for medical reimbursement
	Occupational license

Policymakers who rely on the logic of this graphic will find that the most powerful regulator is -- very frequently -- the consumer, who can bring lawsuits if dissatisfied or simply refuse to return to a practitioner whose service was not up to snuff. If market forces are sufficient, policymakers should stop at this level and not adopt any regulation.

Policymakers should move on to a lower level only in the case of an identifiable market failure. In such cases, they should look first not to individuals but to existing regulations on business processes -- such as deceptive trade practice acts that empower the attorney general to prosecute fraud.

If existing regulations on processes do not sufficiently protect consumers, policymakers should then consider inspections. Inspections ensure cleanliness. It is rational, for example, for municipalities to inspect restaurants' cleanliness. By contrast, it would be unwise for municipalities to license chefs, dishwashers, and busboys.

When inspections do not address policymakers' concerns, they should outsource the associated risks. For example, legitimate concerns exist about the risk that a tree trimmer might saw off a branch that falls on a neighbor's house. This externality is best addressed by requiring the tree trimmer to maintain a bond. Once again, licensing is not the appropriate policy choice here.

Registration is the next level of regulation -- that level does not require the state to determine and enforce personal qualifications; instead, it simply requires the individual to register.[14] This may be the appropriate kind of regulation if the state is concerned about fraudulent providers of roofing services, for example, after a natural disaster. Registration helps stop fly-by-night providers from selling inferior services.

Advocates of regulations often claim that consumers are at a disadvantage because they have less information than providers. Although the power that sellers have over buyers is often overstated, it can be addressed by policymakers adopting the next level of regulation. Certification is a titling act. Individuals who meet the state's required skills and training are granted the privilege to use the "certified" title. For example, anyone in many states can practice interior design or call themselves an interior designer, but only those individuals who have met the state's qualifications can market themselves as "certified interior designers." Certification is a better policy choice than occupational licensing, because it does not block entry or reduce competition the way licensing does; rather, it sends a signal to otherwise uniformed consumers about providers' qualifications.

Occupational licensing is the most restrictive type of occupational regulation. It should rarely be used because it blocks entry, decreases employment, and causes higher consumer prices. Policymakers should enact or maintain such a regulation only when there is permanent market failure that will cause significant harm to consumers.

In short, all these alternatives should be on the table in any adjustment to Arkansas's use of occupational licensing. More generally, it is hard to avoid the conclusion that Arkansas policymakers have assumed that the benefits of comprehensive occupational regulation are large and widespread, but that they have essentially ignored their costs. Policymakers should make sure that their work can be appropriately described as *public-interest* regulation; regrettably, much of our state's existing regulation is more accurately described as *special-interest* regulation. The harm that justifiable occupational regulation is supposed to cure must be actual and concrete, not speculative or hypothetical.

A PROPOSAL FOR EXECUTIVE AND LEGISLATIVE REVIEW

- **Implement sunrise and sunset reviews in the Legislature**
- **Empower the executive branch to provide "active supervision"**

To ensure that state government makes appropriate use of these varying levels of regulation, the General Assembly could enact regulatory-review legislation. The federal ALLOW Act provides more oversight of the rulemaking done by occupational-licensing boards; its model could easily be adapted to fit Arkansas's needs. That measure, recently introduced in Congress by Senators Mike Lee (Utah) and Ben Sasse (Nebraska), provides a mechanism for public officials' ongoing management and possible deregulation of occupational licenses in Washington, DC as well as a better role model for future state reformers. The ALLOW Act, which stands for Alternatives to Licensing that Lower Obstacles to Work, provides for active supervision of regulators, encourages alternatives to licensure such as certification, and provides for sunrise and sunset review of regulations.

Implementing such a proposal at the state level involves the creation of a supervisory office under the governor or attorney general that would oversee occupational boards. This office would oversee these boards to ensure they use the least restrictive regulations to protect public safety and health. Any new rule or policy proposed by one of the various occupational boards and all enforcement actions would need to be explicitly approved by this office before they are implemented. The office would also have the power to investigate citizen complaints about overly restrictive licensing; it could instruct a board to remedy a rule facing legitimate complaint. In addition, the governor or legislators could instruct the attorney general to investigate specific overly restrictive licensing rules.

This proposed legislation would also create a staff position in the Bureau of Legislative Research to analyze occupational regulations and proposed legislation dealing with these regulations as part of a sunrise process and a sunset process.

In a sunrise process, this analyst would review each bill that revises or enacts occupational regulations by:

- requesting that bill sponsors submit evidence about the harms they are trying to address;
- determining if the legislation uses the least restrictive means to protect the public from these substantiated harms;
- analyzing the bill to see how it will affect factors like work opportunities, consumer choice, employment in Arkansas, market competition, and government expenditures; and
- comparing the legislation to how other states regulate similar occupations.

The Bureau's findings would then be submitted to the relevant legislative committees, so that legislators would have that information before considering each bill.

As part of a sunset process, the legislative analyst would also review all the state's occupational rules over a five-year period to determine if they unnecessarily infringe upon occupational freedom. The analyst would then make recommendations to the General Assembly about how best to improve these rules.

By establishing reform processes that involve supervision by the executive branch and sunrise and sunset reviews by the legislative branch of state government, state government would institutionalize the idea of improving occupational licensure. These two branches could work together full-time on reform, placing a high priority on the right to do honest work in a state that has too often restricted such freedom.

THE MANY POSSIBLE AVENUES OF DEREGULATION

- **Use a four-pronged approach to grow jobs and Arkansas's economy**
- **Lower the Arkansas taxpayer's risk of large payout liabilities from antitrust litigation**

Arkansas legislators have several options to reduce the barriers state government has created to block its own citizens from doing honest work.[15] Policymakers can:

- Repeal existing licenses;
- Exempt new low-risk services at the margin of practice acts (legislation that regulates professions), as Arkansas did in 2015 when it exempted hair braiders from the cosmetology licensing regime;
- Convert existing licenses to less restrictive forms of regulations; and
- Reform Arkansas's licensing processes in response to the United States Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*[16] by giving new responsibilities to the legislature and the executive branch using less restrictive regulations.

Perhaps the best course would be to carry out multiple strategies -- nothing prevents legislators from adopting a general reformist strategy while simultaneously taking on particularly offensive instances of regulation that prevent people from working.

A. Repeal. With respect to some instances of licensure, Arkansas would do best just to abolish them. Allowing individuals to enter a profession without complying with onerous state mandates would open up opportunities to work for many individuals in the state. Consumers could judge these new businesses based on third-party evaluators, private-certification agencies, or word of mouth.

B. Exempt. Political scientists have long noted that administrative agencies tend to grow over time, responding to opportunities to expand their scope. This phenomenon has been called "mission creep" -- the process of slowly and methodically expanding an agency's jurisdiction and allowing it to gain employees, resources, and power. Licensing boards are subject to mission creep; they have a tendency to interpret the statutory authority given to them by practice acts in ways that extend their scope to new and innovated services. The legislature can halt this growth by enacting exemptions to occupational practice acts, as it did in 2015 when it exempted hair braiders from Arkansas's cosmetology statute and ended the licensing board's control of this low-risk procedure. Looking forward, the legislature might consider extending similar exemptions to eyebrow threaders or teeth whiteners.

C. Convert to less restrictive forms of regulations. In many other instances, moving from licensing to certification makes more sense. Certification means that someone who wishes to use an occupational title must pass certain state

requirements, but no one is prohibited from actually working in that profession. It is a less restrictive way to signal occupational competence, and it preserves an individual's freedom to work. This conversion can be carried out as part of the sunset review process.

D. Reform based on *North Carolina State Board of Dental Examiners v. FTC.* As mentioned above, the United States Supreme Court stripped licensing boards across the country of their immunity from antitrust litigation in 2015, when it decided *North Carolina State Board of Dental Examiners v. FTC*.

The key holding in that case is that if Arkansas, like North Carolina, wishes to re-establish immunity for its board members, they must be actively supervised by full-time state officials. That supervision must include approval, before implementation, of every rule, policy, and enforcement action.

Model legislation developed by the Institute for Justice builds on this paper's recommendations. It calls for both the legislature and the executive branch to play important roles in reforming Arkansas's use of occupational licensing. Specifically, the model calls for the state legislature to adopt both sunrise and sunset processes based on legislators choosing the least restrictive regulatory tool to address real consumer-protections concerns. Equally important, Arkansas's executive branch must better police its own boards and commissions, so as to ensure that they do not promulgate rules, adopt policies, or engage in any enforcement actions that violate this rule: namely, the action must be consistent with state statutes and intended to protect the public's health and safety, not to restrict competition.

THE RECOMMENDATIONS OF LEGISLATIVE AUDITORS

- **Studies have been done. It's time for the Legislature to act.**

Arkansas policymakers who seek to save taxpayer dollars and improve government services should also consider administrative consolidation of many of the state's regulatory boards and social-welfare commissions. This is not a new or original idea. In fact, back in December 2001, the Division of Legislative Audit released a report concluding that the state's structure of commissions and boards was inefficient and that taxpayer dollars could be saved through consolidation. In 2007, the same division released a follow-up report that showed, instead of consolidating, that the number of commissions had multiplied since the first report.

In 2001, Arkansas had 72 regulatory boards. These boards all have similar administrative, licensing, and accounting needs. However, they operate autonomously, so they each employ separate staff to perform such administrative functions. In addition, 17 of these boards employ staff that investigate and review complaints. Because these boards have similar functions, consolidating them could eliminate duplication and streamline processes.

A further problem caused by the separate staffing of these boards is that, in the words of the Division of Legislative Audit, they "have trouble establishing adequate segregation of financial duties."[17] Effective financial oversight requires the division of financial tasks among multiple parties, so allowing just one person or entity in government to handle these various responsibilities can create a fertile environment for fraud or financial mismanagement.

The Division of Legislative Audit compared Arkansas to neighboring states and states of similar size. Its conclusion was that "Arkansas maintains a greater number of regulatory boards than any of the comparative states and also expends more funds than each of these states."[18] Many of the states it examined consolidated regulatory functions decades ago.

One way to bring order to these state boards would be to merge similar ones, such as the Board of Dispensing Opticians and the Board of Optometry. Then the various boards could be placed under a state consumer or regulatory-affairs agency to handle the administrative and other duplicative functions currently being undertaken individually by the boards.

Similarly, Arkansas also has a multiplicity of social-welfare commissions with similar structural problems. Other states have these types of commissions but they have merged them with state agencies to remove duplication and streamline services.

In 2001, the Division of Legislative Audit concluded, "By consolidating the administrative and investigative functions into a single department or division and merging social welfare commissions into larger related agencies, the state and its citizens could realize a monetary savings in a time of budget concerns while enhancing taxpayer conveniences and diminishing the potential for misappropriation of funds."[19]

When the Division of Legislative Audit revisited this subject in 2007, it found that its common-sense recommendations had not been followed. Instead, the

number of regulatory boards and commissions had actually increased -- to 83. The situation has not improved since 2007.

In 2005, these various boards and commissions spent over $28 million.[20] It is difficult to say how much money consolidation or merging of duplicate boards could save, but it is reasonable to expect that millions of dollars could be returned to taxpayers through more efficient management. Furthermore, increasing financial control reduces the risk of theft or other malfeasance.

It is unfortunate that, since 2001, state auditors have produced sound recommendations to accomplish these laudatory goals -- but legislators have ignored them. Instead, Arkansas policymakers continue to create boards and commissions that do not operate with the efficiency or financial controls that taxpayers should expect from state government. While these reform recommendations are not aimed primarily at promoting economic growth or worker freedom, they do involve the larger issue of government efficiency. It is important, of course, that reformers accomplish more than simply consolidating boards with the goal of saving taxpayer money; instead, the focus should be on policy reform that improves consumer welfare and spurs economic growth by ensuring that any consolidation encompasses pro-consumer regulatory reform.

THE LESSONS OF 2015: HOW SPECIAL INTERESTS TORPEDOED REGULATORY REFORM

The time is right for Arkansas legislators to advance such reforms. Rep. Richard Womack attempted to reform occupational licensure in the 2015 legislative session with a measure that would have allowed workers to put overly burdensome regulations on trial -- his proposal, House Bill 1158, would have permitted those whom government has prevented from working to challenge overly burdensome regulations in court. Unfortunately, the noble intentions of this legislation were ultimately thwarted by special interest groups, the lobbyists they employ, and some legislators whose commitments to smaller government were primarily rhetorical. But even though some legislators worked against occupational freedom, the setbacks of 2015 do not have to be repeated.

The premise of HB 1158 was simple -- Arkansans deserve a defense when their legitimate right to pursue their occupation is challenged by overzealous regulators. The bill would have established every Arkansan's right to practice a legal occupation. If a laborer believed that a regulation makes it too difficult to exercise his right to an honest living, under HB 1158 he or she could go to court to

demonstrate that the regulation is unreasonable. Regulations resting on genuine health and safety grounds would be permitted; regulations that accomplish nothing besides stifling competition would be prohibited. If there were no less restrictive way to achieve the state's aim than the current rule, then it would stand. Only those regulations that are unjustifiable restrictions on occupational freedom would be invalidated. Under this system, if a litigant successfully challenged a regulation, no monetary damages would be awarded. Instead, the litigant would simply be permitted to work.

This legislation to protect worker freedom from unreasonable restrictions generated significant opposition. A number of lobbyists and special interest groups converged to oppose it. However, instead of dealing with the reality of HB 1158, many in the opposition simply misrepresented what HB 1158 would do.

Consider the state's Chamber of Commerce. Among other things, it charged that HB 1158 "eliminates licensing requirements for all professions – from a license to represent you in court, to a license to install electrical wiring in your home."[21] It also claimed the bill would establish a period of time when the judiciary would determine regulations that would be upheld, leading to "an unlicensed environment where anyone could hold themselves out as providing services."[22]

As Professor Robert Steinbuch of UALR's Bowen Law School explained, the Chamber's charges were simply false: "The bill expressly exempts professions from any deregulation at all if, under state law, those professions carry with them fiduciary duties. Those exempt professions are myriad: they include (among others) lawyers, accountants, engineers, and architects…. Notably, the bill would not have any immediate or general impact on our current licensing regime. If someone used an HB 1158 defense in court so as to demonstrate that some particular regulation overreached, this proposed law would expressly limit the result of that defense to the litigant, not to other similarly-situated third parties. The impact of the HB 1158 defense, over the long term, would be to force regulatory agencies to confine their regulatory scope to appropriate and bona-fide health and safety concerns."[23] Of course, it really shouldn't have taken a law professor to explain this: it was obvious to anyone who is reasonably competent at reading bills.

Other opponents of HB 1158 misrepresented the legislation in similarly overheated ways. Tom Curry, an Arkadelphia lawyer, repeated the claim that the legislation would end licensing for lawyers and CPAs in testimony before the

Public Health, Welfare, and Labor Committee. (It was especially notable that an attorney would make such a strange and unfounded claim; for more than a decade, the state Constitution has made it clear the power to regulate the practice of law in Arkansas is held by the state Supreme Court, not the General Assembly.) Curry groundlessly claimed that if lawmakers approved the bill, "this legislature gives up the right to regulate professions and occupations."[24] Notably, Curry was speaking on behalf of the Arkansas Bar Association, which continued to weigh in against the bill -- even though (to repeat) HB 1158 explicitly exempted professions with fiduciary duties, which unambiguously and uncontroversially includes lawyers. It is more than a little alarming that the leaders of the Arkansas Bar Association are apparently unaware that its own members are fiduciaries; the rule that attorneys are fiduciaries is a central principle of Arkansas law.[25]

Why did this legislation engender such vociferous opposition? Speculating about the motives of others is inherently tricky, but it is notable here that the bill would have upset the current regulatory status quo -- and the status quo can always be expected to have defenders. The opposition to HB 1158 exposed a reality in sharp contrast with a prevalent myth: that business interests generally oppose regulation. In fact, businesses often favor regulation -- as long as the regulations favor them. The formula is simple: occupational licensing restricts entry into the job market and that protects incumbent workers from competition. Business groups representing these established workers may sometimes see blocking competition as protecting their interests.

Whatever motivated opponents, their attacks on HB 1158 succeeded. Even though the bill passed out of House committee, it never made it onto the House calendar. The legislation was not considered by the full House of Representatives; it died when the House adjourned in mid-2015. In this instance, entrenched interests effectively misrepresented the session's most comprehensive efforts at regulatory reform, spreading scare tactics that had no basis in fact. Supposedly free-market entities like the Chamber of Commerce turned their backs on the right of the people to work and instead defended an occupational-licensing system that is among the worst in the nation.

Similar legislation was introduced in Tennessee. It, too, faced opposition from entrenched interests, although the state's chapter of the National Federation of Independent Business supported it. In the end, Volunteer State legislators weakened the bill greatly, ending up with legislation that establishes a process for occupational regulations to be reviewed by a legislative committee. If the committee determines such regulations are not necessary to protect public health

and safety, it could then make recommendations to alter the regulation. If the agency does not comply with the regulation, the committee could recommend the legislature take action to suspend the agency's authority to make rules in this area.

The Tennessee law is a weak start at enacting occupational-licensing reform, but it avoids real reform by making review optional, not mandatory. Further, it does not give individuals harmed by overly-restrictive rules the right to seek relief, as HB 1158 did. Although any legislation addressing occupational-licensing reform deserves plaudits, such bills should provide greater opportunity to overturn unnecessarily restrictive rules than did Tennessee's bill.

Ultimately, reformers in Arkansas need to be aware that special interests -- and their lobbyists -- are willing to misrepresent legislation that comes before the General Assembly when the stakes are high. Perhaps legislators will give more weight to the public interest -- and less weight to special interests -- in future sessions.

CONCLUSION: THE SPECIAL CASE OF AUTOMOBILE MECHANICS

While licensure may seem like a way to protect the public, it does not achieve that end. Many occupations are unlicensed; every day, the work of these professionals is central to the public's safety and welfare. For instance, no states require licensure of auto mechanics, even though we depend on them to provide us with reliable, safe transportation. Without this licensure, have we seen an epidemic of shoddy mechanics whose work has caused a slew of fatal accidents on the highway? Of course not. Instead, we see a profession with few governmental barriers to entry, allowing individuals of diverse backgrounds access to good-paying jobs. Arkansas should learn from the experience of mechanics: the best and most efficient regulation often is based on consumer choice, provider reputations, and less restrictive forms of regulations like private certification and government inspection rather than government licensing. That lesson should be expanded: all of us deserve the opportunity to pursue happiness through exercising the right to do honest work.

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[6] Slivinski, Steve, lecture at Heritage Foundation, July 12, 2016.
[7] "License to Work: Arkansas," Institute for Justice, April 24, 2012.
[8] Greenberg, Dan, "How the U.S. Supreme Court Empowered Political Accountability and Economic Growth in Arkansas," Advance Arkansas Institute, September 10, 2015, p. 7.
[9] "Occupational Licensing: A Framework for Policymakers."
[10] Taylor, Caleb, "Liberal Senator Al Franken is Questioning Occupational Licensing: Why Aren't More Arkansas Legislators?" *TheArkansasProject.com*, February 2, 2016.
[11] For an extensive discussion, see "How the U.S. Supreme Court Empowered Political Accountability and Economic Growth in Arkansas."
[12] Kleiner, Morris, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market," Institute for the Study of Labor," February 2011.
[13] Lee, Mike, lecture at Heritage Foundation, July 12, 2016.
[14] Terms used in occupational regulations are often used interchangeably and cause confusion. This can be seen in the terms "registered nurse." It would be more descriptive to call a person in the profession a "licensed nurse," because the person must achieve certain personal qualifications as a prerequisite to working.
[15] The information from this section was largely taken from the Institute for Justice's report "License to Work."
[16] *North Carolina State Board of Dental Examiners v. Federal Trade Commission,* 135 S. Ct. 1101 (2015).
[17] "Performance Audit: Analysis of Regulatory Boards and Social Welfare Commissions," Division of Legislative Audit, December 14, 2001.
[18] Ibid.
[19] Ibid.
[20] "Analysis of Regulatory Boards and Social Welfare Commissions," Legislative Joint Auditing Committee, June 8, 2007.
[21] Greenberg, Dan, "The Mystery of the Chamber of Commerce's 'Intense Opposition' to Regulatory Reform," *TheArkansasProject.com*, February 23, 2015.

[22] Ibid.
[23] Ibid.
[24] Greenberg, Dan, "HB 1158's Promise: More Arkansas Jobs, Lower Arkansas Prices," Advance Arkansas Institute, February 16, 2015.
[25] "No rule of law is more firmly established than that a fiduciary relationship exists between attorney and client, and the confidence which the relationship begets between the parties makes it necessary for the attorney to act in utmost good faith." *Sikes v. Segers*, 587 S.W.2d 554 (Ark. 1979) (referencing *Norfleet v. Stewart,* 180 Ark. 161, 20 S.W.2d 868 (1929)).