ACTION PLAN FOR ARKANSAS 2017

Dan Greenberg and Marc Kilmer, editors

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"For many years now, you and I have been shushed like children and told there are no simple answers to the complex problems which are beyond our comprehension. ***Well, the truth is, there are simple answers; they just are not easy ones.****"*

– Ronald Reagan

Introduction

The citizens of Arkansas face large challenges – challenges that arise not only from our sputtering recovery from one of the longest recessions in our nation's history, but also from a legacy of bad decisions by Arkansas policymakers. The difficulties that we face are temporary, but the ideas and values that will enable us to triumph over our difficulties are eternal. If our leaders' choices are inspired by the American traditions of individual liberty, free markets, lower taxes, and limited, transparent, and accountable government, those choices will pave the way for the kind of economic growth and job creation that will ensure our continued advancement. Such traditional values are at the center of American civilization; they remain as timely as the ideas that animated the American Revolution.

In much of the world today, political change is only achieved through violence. But in Arkansas and in America, we can trust the counsel of the Book of Isaiah: "Come, let us reason together." Our Action Plan for Arkansas is a sourcebook of solutions for those who believe that bedrock American values should inform policymaking in Arkansas. Each chapter of the Action Plan for Arkansas reviews a specific problem that our state faces today and explains how traditional American values can provide a solution. Many chapters provide examples of draft legislation that have already been proposed in previous legislative sessions; those chapters without draft legislation could easily be submitted as bill draft requests for the upcoming legislative session.

Dr. Larry Reed, who now serves as president of the Foundation for Economic Education, once gave a famous speech to the Detroit Economic Club entitled "Seven Principles of Sound Public Policy." Any policymaker who hopes to improve governance in Arkansas should become familiar with Reed's seven principles. Here they are:

- *Free people are not equal, and equal people are not free.*
- *What belongs to you, you tend to take care of; what belongs to no one or everyone tends to fall into disrepair.*
- *Sound policy requires that we consider long-run effects and all people, not simply short-run effects and a few people.*
- *If you encourage something, you get more of it; if you discourage something, you get less of it.*
- *Nobody spends somebody else's money as carefully as he spends his own.*
- *Government has nothing to give anybody except what it first takes from somebody, and a government that's big enough to give you everything you want is big enough to take away everything you've got.*
- *Liberty makes all the difference in the world.*

It is difficult to distill principles into a few brief words; in fact, Reed's entire speech deserves careful study. (That speech is available on the Advance Arkansas Institute's website.) Reed closed his speech by quoting Benjamin Franklin, who noted that "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." That maxim teaches two valuable lessons: that legislative decisions often imply trade-offs – exchanges of one value for another – and that some trade-offs simply are not worth making.

We hope this book will serve as a resource for any freedom-oriented legislator, candidate, or activist who is serious about solving the problems of the Natural State and

transforming Arkansas into a Land of Opportunity. Though the path to progress is often steep, it is far from insurmountable. The Advance Arkansas Institute is pleased to present you with these ideas for a better Arkansas: we now pass the torch to you.

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Tax Policy Should Create Jobs, Investment, and Economic Growth

Every session, Arkansas legislators file bills to reduce Arkansas's tax burden, but enacting all of those tax-relief bills would likely be impossible. Any tax reduction deserves some praise, but legislators should note that some tax cuts are better than others. Writing second-rate tax relief into law will threaten the passage of first-rate tax policy. Legislators should keep the following principles of tax policy in mind, and not only because every one of these principles – if established in law – will both reduce taxes and increase revenue. Among the principles that an ideal tax system encourages and embodies are:

- **Simplicity**. Taxes should be easy to administer and comply with, in order to encourage voluntary compliance and discourage tax shelters and disguised income.
- **Transparency**. Taxes should be obvious and apparent: they shouldn't be hidden from consumers by being lumped in with the price of the purchased good.
- **Neutrality**. The tax code should not micromanage the economy, encourage people to make decisions for tax reasons, or otherwise distort price signals that affect individual choice.
- **Stability**. Frequent changes in the tax code make planning and investment difficult.
- **Economic growth and prosperity**. A broad-based, low-rate tax best encourages job creation, capital investment,

and economic growth.

These values may seem abstract. However, their importance becomes more apparent when they are used to rank the tax policies that the General Assembly created in 2013.

If the goal of tax policy is to create a thriving economy that attracts investment and jobs to the state, *the most preferable tax relief is broad-based reductions in income taxes, capital gains taxes, and/or industry taxes on utility consumption.* Such tax relief will lead to capital investment, job creation, and a prosperous state economy. If the Arkansas tax code treats capital investment more favorably by lowering the cost of doing business here, Arkansas will succeed in attracting investments and businesses that create jobs when it lowers income taxes. The double taxation that Arkansas manufacturers face – because of our state's extra layer of energy taxes – makes utility tax relief another priority for advocates of economic growth and job creation. (With respect to economic development, any of these three tax measures is far superior to Arkansas's current policy of trying to attract new businesses into the state with an array of special tax breaks and subsidies. Such favoritism is demoralizing and insulting to other businesses in Arkansas; it could encourage them to leave the state to see if they can get a better deal elsewhere.) The slight reduction of income tax rates created by Act 1459, therefore, is arguably the best and most important tax reform that the General Assembly passed in 2013. The income tax rate reduction prompted by Gov. Hutchinson and passed by the General Assembly in 2015 also deserves praise. However, because our state's income tax rates still tower over those of our neighbor states, with whom we compete for jobs and investments, there is still a long way to go.

Tax cuts limited by area or time are inferior. They score poorly on neutrality, simplicity, and stability. For instance, our sales tax holiday on selected consumer goods appears to have very little impact on consumer behavior, except that people buy more untaxed goods during the holiday and correspondingly

less when the holiday is over. There is little or no evidence that a sales tax holiday improves the economy or increases purchasing power in the long term.[1] Similarly, measures that are designed to improve the fortunes of a particular business or economic sector are often ineffective. For instance, the film tax credits that Arkansas wrote into law several years ago, which were intended to spur film production and job creation, will likely have the same result as Louisiana's and South Carolina's: recent studies of those two states' film tax-credit programs showed that every dollar the state shelled out for film tax credits was replaced with about 16 to 19 cents of tax revenue – in other words, each state lost more than 80 cents of every dollar that it expended on its film tax credits.[2]

Proposals that benefit small groups are inferior. In 2013, the General Assembly passed several tax measures designed to provide deductions or exemptions to particularly admired people or groups, such as military personnel (Act 1408), nonprofit blood banks (Act 1419), and volunteer firefighters (Act 1452). Although our appreciation for public service and societal improvement separates these particular tax-relief beneficiaries from others, it is harder to make the case that the General Assembly's choice to limit the tax on cigars (Act 510) was similarly justified. Although lawmakers' intent is doubtless praiseworthy, proposals that benefit small groups score poorly on neutrality, simplicity, transparency, and fostering economic growth. For example, there is no economic difference between giving a volunteer firefighter a $100 state grant and a $100 tax credit. But there are huge political and fiscal differences: estimates of the effect of tax cuts on revenues are notoriously inaccurate, and state legislators don't have to account for revenue loss in the way that they bear responsibility for increased spending. Provisions in the tax code that act as subsidies are easily hidden or overlooked. Fiscally responsible lawmakers will accept the responsibility of budgeting for their preferred special-interest expenditures by openly and honestly paying for them from the state budget. Policymakers who want to use the tax code to

help small groups or redistribute wealth should consider the more efficient and transparent alternative of direct payments or grants.

Proposals that create or expand consumer exemptions are inferior. For instance, if advocates of shrinking the sales tax on food want to help the poorest of the poor, cutting the food tax is a misguided way to accomplish it. The poorest of the poor receive a direct food subsidy: food stamps. Treating food differently from other purchases can create costly and complex administrative problems; it does very little to encourage investment and job growth in Arkansas. Rather than narrowing the tax base by shielding some purchases from taxation, a better policy option is a broad-based sales tax with a lower rate. Legislators who want their values of equity or redistribution written into state law should consider the possibility that there are more effective ways to accomplish these goals than increasing the complexity of the state tax code. Expanding the food stamp program would be an economically superior, less distortive way of helping the poor than cutting sales taxes on roughly one-fifth of all consumer purchases. Because it scores poorly on simplicity and economic growth, food tax relief is therefore not at the top tier of preferable tax relief.

In short, lawmakers who support economic development in Arkansas should focus on creating a pro-growth tax code. A state's tax policy is the most direct, immediate way to foster economic development and attract the capital investment that creates more jobs. Directly subsidizing new businesses runs the risk of picking losers instead of winners, which leads only to wasted taxpayer money and disused facilities. Improving education, while worthwhile, might take a decade or two to produce appreciable results. In general, higher-quality public services can fall victim to citizen mobility: it is not much of an exaggeration to say that many of Michigan's current economic problems can be traced to former Michigan residents who have attended its top-tier universities and then used its top-tier roads to escape its top-tier taxes, and to move to states with top-

tier jobs. Except for certain poverty exemptions, all economic activity should ideally be taxed at the same rate. Arkansas tries to do this for agricultural goods, fails to do this for industrial goods when it loads on the double taxation discussed above, and introduces further distortions in its wide array of deductions, credits, and varying sales tax rates for consumers. Simplicity in the tax code will shrink administrative costs and economic distortions, increase revenue, and lead to economic growth. Above all, policymakers should resist temptations to narrow our tax base or raise our tax rates.

The foundation of tax reform that will advance Arkansas is a simple, transparent, stable, and neutral tax code that establishes a broad tax base and a low tax rate. Lawmakers who want to bring job creation and economic growth to Arkansas should look to the tax policy of successful regional competitors like Texas, Tennessee, and Florida. Notably, those job-creating economies are entirely unsaddled by a state income tax.

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1. See, e.g., Joseph Henchman, "Sales Tax Holidays: Politically Expedient but Poor Tax Policy," Tax Foundation Special Report #209, July 2013.

2. Frank Hefner, "Impact Analysis for Film Production in South Carolina," South Carolina Coordinating Council for Economic Development, April 29, 2008; Greg Albrecht, "Film and Video Tax Incentives: Estimated Economic and Fiscal Analysis," Legislative Fiscal Office of Louisiana, March 2005. More generally, see Marc Kilmer, "The Folly of Film Subsidies in Arkansas," Advance Arkansas Institute, September 3, 2015.

Tax Relief Without Revenue Loss

Currently, our state income tax code is loaded with credits, exemptions, and other reductions for various groups. These special rules, which often benefit special interests, are sometimes labeled 'tax expenditures' by tax experts. Tax expenditures shrink the Arkansas tax base, reduce state revenue, and ultimately require tax increases on those without the political resources to create exemptions for themselves. Not only do these tax expenditures push higher tax burdens onto the general public, they also encourage interest groups to invest in lobbyists as a means of reducing their own cost of doing business. By encouraging these special tax expenditures, we perpetuate the general public's obligation to pay higher taxes. The large number of special tax rules and the crowded legislative agenda often limit the state legislature's incentive to tackle the issue of special tax privileges.

A central strategy of large-scale tax reform should be to minimize special tax expenditures while lowering income taxes for the general public. This can be accomplished without lowering the revenue that comes into the state treasury. To accomplish these ends, tax reformers should carry out a threefold strategy:

1. **Require the Department of Finance and Administration to calculate and disclose the annual amount of income tax that would have been received by the state if all current special tax expenditures did not exist.** Right now, the tax revenue that Arkansas forgoes because of its extensive set of tax exemptions, credits, and deductions is

not easily accessible. This information should be revealed to the public. (House Bill 1916 of 2015 represented a commendable effort to disclose such information.)

2. **Repeal, on a delayed basis, all exemptions, credits, and deductions in the income tax code that do not apply to the general public – effective 4 years after the bill is passed.** The repeal of all special tax expenditures in a 4-year time frame will give legislators a reasonable amount of time and sufficient incentive to review all special exemptions in the tax code – thus forcing decisions on which tax privileges have a legitimate public policy purpose and should be maintained, and which ones should not.

3. **When the repeal takes effect, the state should reduce each income tax rate by the same percentage, so that the increased revenue gained by eliminating tax expenditures will be balanced by the decreased revenue from lowered rates.** This goal ensures that tax reform will be revenue-neutral (that is, the revenue gained by the elimination of special tax expenditures will be balanced by the revenue lost by rate reductions). Once the revenue loss caused by the exemptions is calculated, the state can then lower income tax rates proportionally so as to balance against the increased revenue brought in by the elimination of special tax expenditures. The repeal of these tax expenditures, when balanced against a reduction in the income tax rate, will allow this policy to be completely revenue-neutral.

This reform plan should also have the beneficial consequence of requiring that any new tax privilege would be directly compensated for by a direct increase in the income tax rate. Tax reform that requires transparency of the revenue forgone from tax expenditures, and furthermore requires the corresponding calculation of an increase in the income tax rate for everyone else, would make legislators directly face the true costs and benefits of enacting new tax privileges. Requiring transparency would discourage future tax privileges from

being passed, because it would require their true costs to be calculated and disclosed. Legislators would have to review the true costs of tax privileges that are borne by the general public, instead of just the benefits that special groups receive from tax expenditures.

Of course, some tax expenditures may be justifiable as a matter of policy and therefore might deserve continued support. By repealing all tax expenditures unless individual action is taken within a fixed period to preserve particular ones, a policy that forces continuing and wide-ranging transparency of tax expenditures would encourage legislators to scrutinize each tax privilege while bringing to light each privilege's true costs. Thus, this measure does not mechanically eliminate all tax expenditures; rather, it aims to create a legislative environment in which only the most justifiable tax expenditures will be preserved – while providing legislators with the information they need to make that decision.

Tax reform policy that incorporates the elements laid out above would encourage the legislature to conduct exhaustive and effective scrutiny of the state tax code, while making it more difficult for future tax exemptions to become law unless their true costs and benefits are publicized. **This reform will create lower and fairer tax rates that apply to a broader base of taxpayers; increase government transparency; encourage legislators to review tax expenditures while providing them with the information they need; and create an environment that would make the creation of objectionable tax expenditures more difficult in the future.** Tax reformers who are sympathetic to this approach should study Senate Bill 758 of 2011, which reflects similar ideas in legislative form.

How Budget Hawks Can Save Taxpayer Money

The best way for proponents of big government, and big government spending, to keep the size and scope of government at its current swollen state is to keep budget matters as opaque and under-discussed as possible. Big-government enthusiasts would like fiscal votes (and the even-year fiscal session) to allow no time for analysis, no discussion, and no publicity of alternative options available to policymakers. Legislators will continue to expand government if the agenda is to approve every spending authorization on the legislative calendar without examination, congratulate themselves on a job well done, and go home.

However, legislators who wish to exercise their constitutional responsibilities and their own independent judgment should follow a different path. Legislators who are committed to reducing the size and scope of government, and to relieving government's burden on Arkansas taxpayers, should consider the following five strategic recommendations:

1. **The Zero-Growth Strategy.** *At a minimum, fiscally conservative legislators should first set a goal of limiting state government size and spending capacity to non-political factors like inflation and population.* In real terms, this means that the cost of government per citizen should remain steady over time. Historically, many commentators have abused the word "cuts" when talking about budgeting. In fact, many budget proposals that are labeled "cuts" appear to be an attempt to hold total spending constant from this year to next year; the only sense in which

these proposals are "cuts" is if the norm (the "baseline") is government spending that expands faster than the state's economy and population. Adopting a zero-growth strategy will help distinguish a budget that does not change in real terms from real cuts or real increases in spending: such a strategy provides some non-politically influenced metrics (population and inflation) to use in determining the appropriate amount of government spending.

2. **The Consolidation Strategy.** *Lawmakers concerned about the size and scope of government should focus on consolidating outdated and redundant agencies, boards, and commissions.* Because of the supermajority requirements of fiscal votes, budget-minded legislators should exercise their holdout power and refuse to authorize the full budgets of organizations that they believe should be merged or closed. If legislators are genuinely interested in reducing the size and scope of state government, they should target organizations to be consolidated by funding (for instance) 75 percent of their total budget. This 75 percent strategy must be coupled with a commitment to produce a non-budget consolidation bill that would shutter the doors of the agency by (for example) the end of 2015.

   For instance, there are scores of separate boards and commissions that focus on various aspects of medicine or health care. A legislator genuinely interested in reducing waste and rationalizing policy might try to combine many of these boards and commissions under professionalized and centralized policy leadership. Lawmakers should pick a target and execute a 75 percent strategy, which would force an examination of the pros and cons of administrative consolidation. This approach would be useful in the consolidation of almost any state government program; for instance, the Advance Arkansas Institute has already published an extensive analysis that provides a roadmap for the consolidation of the UALR-Bowen law school with the state's Fayetteville campus.[1]

3. **The Settlement Fund Strategy.** Every quarter, the attorney general's office produces a report of cash funds disbursed from its office that have arisen from court orders or its receipt of settlement funds. Historically, that office's quarterly announcements have regularly revealed over $5 million of disbursements to state government agencies (the number has been as high as $13 million); each dollar of attorney general disbursements equals a dollar of potential breathing room in the state budget.[2] *Legislators should take advantage of the breathing room offered by the attorney general's disbursements and make one-time budget reductions as appropriate, so as to compensate for the giveaways of public money engineered by the attorney general which sidestep the normal legislative authorization of spending.*

4. **The Quick Action Closing Fund Strategy.** The Quick Action Closing Fund consists of roughly $45 million that is nominally under the Governor's control. Historically, the executive branch has resisted legislative attempts to require QACF payments to be governed by binding performance commitments from corporate welfare recipients; as a consequence, the promises of job creation that QACF recipients have made in exchange for taxpayer-funded subsidies have been broken.[3] *Legislators should use uncommitted portions of the fund to close budget gaps and save taxpayers money, rather than permitting that money to be spent unaccountably on corporate welfare programs.*

5. **The Revenue Stabilization Act Strategy.** Perhaps most importantly, lawmakers should scrutinize the yearly Revenue Stabilization Act to ensure that it does not permit state government to grow faster than the state's economy, population growth, and inflation. The historical trend of every year's Revenue Stabilization Act has been to make government grow faster than the rest of the state. *The Revenue Stabilization Act is like a spigot: if the growth of spending increases faster than the growth of the economy, legislators should turn the spigot off.*

If state government spending had been held constant over the last decade, Arkansans would be nearly $20 billion richer. Instead, government growth has starved the Arkansas economy of jobs and capital investment. That is why the size, scope, and growth of Arkansas government should be limited; however, almost the only players in state government who can actually control the size and scope of government, and government spending, are legislators. Fiscal conservatives in the legislature should avoid the temptation to serve only as rubber stamps, voting "yes" to all requests and avoiding confrontation. The above strategies serve as an invitation to fiscally conservative legislators to develop a state budget framework that serves the public, rather than the government.

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1. That paper, Richard J. Peltz's "Time for a Top-Tier Law School in Arkansas," February 17, 2011, is available on the website of the Advance Arkansas Institute, advancearkansas.org, as is all of our other research.

2. The appropriateness of the attorney general's expenditure of public money without legislative approval is discussed in more detail in this volume's "The Right to Have Attorney General Settlements Benefit the Public," below.

3. The failure of Quick Action Closing Funds to achieve their objectives, and some suggested reforms that might address this problem, are discussed in more detail in this volume's "Arkansas's Best Economic Development Plan: Cutting Corporate Welfare," below.

Job Creation Through Occupational Freedom

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 have to pay higher prices) and workers (who are prevented from obtaining a job in a licensed field). That is why so many experts have come to agree that policymakers should reverse course – across the nation, and especially in Arkansas. Namely, policymakers must take action to reduce the burdens of occupational licensing.

The rationale that licensure 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] Only three states license dietetic technicians. Can it really be true that dietetic technicians in the 47 other states are offering inferior service or harming consumers? It seems unlikely.

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] The same author finds that every family in Arkansas pays an added cost of $754 annually.[4]

Occupational licensing's effect on labor mobility is especially troublesome. In many states, the personal qualifications for licensing differ for the same occupations. These requirements have had an especially negative impact on military families because they are often required to move around the nation. Licensing requirements make it difficult for military spouses working in licensed fields to find work in the same occupation after moving to another state. Given that such 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.

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."[5] Similarly, Dr. David Mitchell, a professor of economics at the University of Central Arkansas, testified before the General Assembly 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.[6]

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.

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 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.

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. 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.

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. 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; legislators can advance occupational freedom and economic growth in Arkansas much more aggressively.

To advance worker freedom, the General Assembly should enact regulatory-review legislation. They could copy federal legislation known as the ALLOW Act, which 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 proposed by one of the various occupational boards would need to be explicitly approved by this office. The office would also have the power to investigate citizen complaints about overly restrictive licensing; it could instruct a board to remedy a rule under legitimate complaint. In addition, the governor or legislators could instruct the attorney general to investigate specific overly restrictive licensing rules. This proposal 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.

Besides a state-level ALLOW Act, Arkansas legislators have several options (summarized immediately below) to reduce the barriers state government has created to block its own citizens from doing honest work.[7] Nothing prevents legislators from adopting a general reformist strategy while simultaneously taking on particularly offensive instances of regulation that prevents people from working.

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.

Exempt – Administrative agencies tend to grow over time in a phenomenon 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' 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.

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. A less restrictive way to signal occupational competence, this type of regulation preserves an individual's freedom to work. This can be done as part of the sunset review process.

Reform – 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.

The Institute for Justice has developed model legislation that would establish in the state legislature both sunrise and sunset processes based on legislators choosing the least restrictive regulatory tool to address real consumer-protections concerns. Equally important, the executive branch must better police its own boards and ensure that boards do not promulgate rules, adopt policies, or engage in any enforcement actions without legal review that the action is consistent with state statutes and intended not to restrict competition but to protect the public's health and safety.

The time is right for Arkansas legislators to advance

such reforms. Rep. Richard Womack attempted to reform occupational licensure in the 2015 legislative session. His proposal, House Bill 1158, would have permitted those who 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 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.

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.

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. 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. All of us deserve the opportunity to pursue happiness through exercising the right to do honest work.

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1. "Occupational Licensing: A Framework for Policymakers," The Department of the Treasury Office of Economic Policy, the Council of Economic Advisers, and the Department of Labor; July 2015; p. 6.

2. Carpenter II, Dick, Lisa Knepper, Angela C. Erickson, and John K. Ross; "License to Work," The Institute for Justice, May 2012.

3. Furth, Salim, "Costly Mistakes: How Bad Policies Raise the Cost of Living," The Heritage Foundation, November 23, 2015.

4. Furth, Salim, "The Hidden Tax That Costs Households Up to $1,600 a Year," The Daily Signal, April 15, 2016.

5. "License to Work: Arkansas," Institute for Justice, April 24, 2012.

6. Greenberg, Dan, "How the U.S. Supreme Court Empowered Political Accountability and Economic Growth in Arkansas," The Advance Arkansas Institute, September 10, 2015, p. 7.

7. The information from this section was largely taken from the Institute for Justice's report "License to Work."

Getting Lawsuits Under Control

One problem for any discussion of tort reform is that a significant number of people do not know what a tort is. A tort is something like a crime, in that American law creates penalties both for torts and crimes; like a crime, a tort is a bad act, but the penalties for the two are very different. When you commit a crime, a court might send you to prison; when you commit a tort, a court might order you to pay someone else money. For instance, if you throw a punch at someone or drive carelessly and thereby injure someone, our legal system can view those bad acts as involving both criminal liability (which can lead to jail time) and civil liability (which can lead to court-ordered cash compensation).

Reforming our system of civil liability – also known as "tort reform" – is a complex subject. Some people take the mistaken view that tort reform is really only of interest to those who practice law. However, it's the everyday citizen who ultimately benefits from tort reform.

When a doctor gets sued, this has ripple effects. It can make other doctors change the way they treat patients, so that they can avoid being sued. Other medical professionals could face higher insurance premiums because of the increased risk of lawsuits. Some medical professionals may even close their practice, or emigrate to another area with a different tort system. These ripple effects could push down the number of patients that are served and the quality of care they receive.

The same is true for business owners. When a business

gets sued – whether or not that business must pay anything in recompense – that business must then spend time and money that it may not be able to afford. Lawsuits mean higher prices for consumers, less choice in products or services being offered, and a smaller number of jobs.

In fact, three-quarters of all small business owners in America are concerned that they might be the target of an unjustifiable lawsuit. Of those who are most concerned, six in ten say the fear of lawsuits makes them feel more constrained in making business decisions generally, and 54 percent say lawsuits or the threat of lawsuits forces them to make decisions they otherwise would not have made. Of course, measuring the cost of all the forgone business due to these conditions is impossible, but polling data demonstrates that the public believes that our civil justice system is out of control: 83% of voters say the number of frivolous lawsuits is a serious problem, and 73% of voters say lawyers benefit the most from lawsuits. A few years ago, reasonable estimates suggested that every U.S. citizen pays a "lawsuit tax" of $838, meaning that a family of four paid a "lawsuit tax" of $3,352 for the U.S. civil justice system; in fact, the cost of U.S. tort liability as a percentage of GDP is more than double the average cost of any other industrialized nation.[1] Rising legal costs force businesses to raise the price of products and services, and this "litigation tax" also leaves consumers with less money to spend on products and services. A costly legal system makes everyone poorer – it raises businesses' costs and leaves consumers with less to spend.

This is not an argument that lawsuits are, as such, bad. The point is that every lawsuit has a social cost – and that an ideal tort system only permits lawsuits that impose appropriate costs on genuine wrongdoers. The civil justice system is supposed to provide a way for those hurt by the actions (or inactions) of someone else to recover damages. Too often, however, the tort system provides incentives that create payouts and profits for unscrupulous litigants and their attorneys.

Arkansas lawmakers have recognized that the state's tort system needs reform. There have been a variety of efforts in recent years to accomplish this, including a large-scale reform by the Arkansas General Assembly in 2003. However, in succeeding years the state Supreme Court struck down large parts of this law in a series of decisions, on the theory that some of the 2003 reforms intruded on the rule-making powers of the state's judiciary.[2]

What would tort reform do for Arkansas? Texas provides a good illustration. In 2003, Texas legislators dramatically overhauled that state's civil justice system. When House Bill 4 was signed into law by Governor Rick Perry, this transformed a civil justice system that was nationally recognized as being deeply dysfunctional, in that it dampened the state's business climate and its provision of medical care. Ten years after this legislation was enacted, the results from Texas show that tort reform benefits the public.

Health care consumers have benefited the most. Post-reform, there are almost twice as many doctors in Texas.[3] The number of doctors in Texas increased at twice the rate of the state's population growth.[4] Doctors put down roots in areas that were medically underserved before the enactment of tort reform.

Besides the increased number of doctors, there are other indications that tort reform is benefiting Texans who need health care. For instance, one hospital system, CHRISTUS Health, saw its liability costs drop so much that it was able to expand charity care by $100 million yearly; charity care from CHRISTUS was $594 million greater in 2006 than it was in 2003.[5] The Texas Medical Association estimates that $10 billion has been invested in the expansion of health care facilities because of Texas's tort reform law.[6]

However, these statistics do not tell the full story of the way tort reform brought new medical professionals to Texas: Consider the case of George Rodriguez, a man who

lives in Corpus Christi, a city that did not have a neurosurgeon before House Bill 4. One day, suffering from back pain, Mr. Rodriguez went to the emergency room and was seen by Dr. Matthew Alexander, a neurosurgeon who had moved to Corpus Christi from out of state and had opened his practice one week beforehand specifically because of House Bill 4. It turns out that Mr. Rodriguez had a spinal abscess, a life-threatening condition if not treated within the hour. Before Dr. Alexander opened his practice in Corpus Christi, a patient needing a neurosurgeon would be stabilized as best as possible and flown to Houston. The flight itself is about 45 minutes. In George Rodriguez's case, there was no stabilizing option: He would have died or been permanently crippled unless he received immediate treatment. Fortunately, Dr. Alexander was there to operate on Mr. Rodriguez, thereby saving his life. Though Mr. Rodriguez still has a limp, he is, like many other patients in Texas, a big supporter of House Bill 4.[7]

Of course, it's difficult to know exactly what changes tort reform created over the last decade, but there are certainly strong indications that tort reform played a significant role to advance patient welfare. One indication is that medical malpractice premiums in Texas have declined significantly, and it appears that this decline is likely due to tort reform. In 2003, Texas doctors were paying insurance premiums similar to those of doctors practicing in New York. After reform, premiums for Texas doctors fell by an average of 60%.[8] In New York, which did not enact any sort of tort reform, premiums have climbed by 60%, and nearly 2,000 physicians moved their practices from New York to Texas; New York reacted to this exodus by subsidizing the malpractice insurance of doctors.[9] This solution is an expensive patch for the deficiencies in New York's legal system, which generates huge premium increases; its consequence is that New York taxpayers subsidize New York trial lawyers through the conduit of high medical malpractice premiums, leading to medical malpractice verdicts of low social value. In short, New York's medical malpractice system is not

so much a litigation solution as a generator of more litigation problems.

The benefits of tort reform are not limited to medical patients. In Texas, the entire economy benefited from tort reform. An analysis by the Perryman Group found that $112.5 billion in additional spending enters Texas's economy each year because of tort reform. That analysis also estimated that tort reform created an additional 499,000 jobs in the state. Public officials saw an additional benefit, beyond job creation and economic growth: Texas state government has an additional $2.6 billion in yearly revenue in its coffers, thanks to tort reform.[10]

In short, tort reform in Texas led to more patients with access to doctors (especially in rural areas), more jobs, and greater economic opportunity. Tort reform could bring the same effects to Arkansas.

Because our neighboring states continue to adopt tort reform measures, such reforms are especially crucial for Arkansas. Along with Texas, lawmakers in Tennessee, Oklahoma, and Mississippi have all enacted tort reform measures. Missouri and Louisiana legislators regularly consider similar measures. If Arkansas is to remain economically competitive, then passage of tort reform is essential.

Loser Pays

Perhaps the most popular tort reform is what is typically referred to as "loser pays" – which requires the party that loses a lawsuit to pay the prevailing party's costs and fees. But the classic loser-pays rule has some rough edges: there is some force to the idea that the increased legal costs of meritorious legal actions might deter appropriate litigation at the margins and (more generally) make it harder for poor people to bring legitimate legal actions. *However, a "modified loser pays" settlement system would greatly improve the litigation process for all parties: under this system, a losing party would be liable only for a portion of litigation*

costs and attorney fees – and only if the party that refused a settlement offer ended up losing the trial. This system would incentivize both parties in a lawsuit to settle for its appropriate value: it is a reform that would both shorten the litigation period and discourage parties from filing frivolous or low-merit lawsuits. A well-designed loser-pays system will encourage opposing parties to resolve disputes and diminish litigation ploys that have the goal of burdening other parties with lawsuit costs.

In practice, this reform would encourage opposing parties to produce settlement offers which could be filed with the presiding court. In the event that no settlement was reached and the action was tried, the winning party could be awarded the lesser of either attorney fees or the extent to which the judgment exceeds the settlement offer.

An example may clarify how this "modified loser-pays" system would work. Suppose, for instance, that P sues D, requesting $100,000 in damages. D offers to settle by paying $40,000 in damages, but P rejects the offer. At trial, after each side has spent $10,000 on lawsuit-related expenses, the verdict is $43,000 in damages. Because the judgment exceeded the settlement offer by $3,000, the loser would pay a portion of the winner's legal costs – namely, $3,000 – but that figure of $3,000 is the maximum amount of P's legal costs that D could be required to hand over. (Alternatively, if the settlement offer had exceeded the judgment – if, for instance, D had offered $45,000 to settle rather than $40,000 – D would face no requirement to pay any of P's costs at all, because D's offer of $45,000 exceeded the verdict of $43,000.) The incentives of this system encourage litigants to narrow the scope of disagreement by inducing them to make settlement offers that approach the true value of the action. Notably, those incentives both push litigants toward making reasonable offers and reward the litigants who do by reducing or eliminating the loser-pays liability they face in the event of a loss at trial.

By shifting the additional costs of litigation to the losing

party in the event that the losing party rejects a settlement offer, this reform would encourage defendants to settle high-merit actions before a suit is filed and to pursue settlement from parties it has injured in an effort to deter a higher judgment. Likewise, the reform encourages plaintiffs to settle low-merit actions, since they will be responsible for the litigation costs of the defendant if they lose the trial; it follows that filing low-merit lawsuits with the intention of placing a financial burden on the defendant (by means of litigation costs) and not with the intention of resolving legitimate claims would no longer be a viable option, since responsibility for these costs would then be shifted to the losing party. Additionally, by encouraging only meritorious cases to go to trial, courts would have more time to expeditiously hear appropriate cases.

This reform would help ensure that parties seeking relief through the courts are actually seeking justice and bringing only meritorious cases to trial. Likewise, this system would increase the likelihood that financial limitations would not deter a meritorious case from being brought to trial – a relatively poor client could hire a lawyer on contingency, and the lawyer would be more likely to accept, because the opposing side would be responsible for the financial burden of excessive litigation rather than his client.

Arkansas courts have the power to exercise "permissive" fee shifting. Currently, when a plaintiff sues but then changes his or her mind and then drops the suit, there is permissive, not mandatory, fee-shifting at the discretion of the judge. However, establishing a mandatory fee-shifting reform strengthens the power of the fee-shifting mechanism by putting the fee-shifting discretion in the hands of the suing parties, instead of the judge. Moreover, this reform makes fee-shifting relevant to all liability issues, not just when a plaintiff changes his or her mind.

Furthermore, because the "modified loser-pays" system can be structured so that the loser is only required to pay either the attorney fees of the opposing party or the difference

between the proposed settlement and the judgment (whichever is less), the loser's liability is in effect capped by the true value of the dispute – the judgment – and not subject to any effort by the opposing side to generate unnecessary attorney fees and expenses. Thus, neither side can subject the other to punishment by litigation costs.

Tort reformers who are sympathetic to this approach should study House Bill 2057 of 2011. One word of caution, however: because recent decisions by the Supreme Court of Arkansas suggest that the Arkansas judiciary understands the state Constitution as giving our courts the leeway to reject the procedural rules that the state legislature produces,[11] this approach will likely be unworkable without amending the state Constitution. This would likely require changing or rewriting some portions of Amendment 80, particularly section 3, which the state courts have relied on so as to (in some sense) make their own rules in the policy domain, an area arguably best left to the state legislature.

One additional argument for reform of Amendment 80 is that it has almost certainly made a variety of good-government reforms unconstitutional, even though such reforms are already written into the Arkansas code. For instance, in 2005 the Arkansas General Assembly passed a measure that was designed to protect its citizens from meritless lawsuits while safeguarding the right of the people to petition their government or to make statements about public matters. For instance, under Arkansas law, if someone sued you because you made a public statement that the plaintiff didn't like, this measure permitted you to countersue and acquire compensatory damages, fees, and expenses – as long as you could show that the suit against you was for purposes of harassment or intimidation.[12] The majority of American states have passed similar measures, known as "anti-SLAPP" laws (the acronym stands for a "strategic lawsuit against public participation"); anti-SLAPP laws are designed to foil those who wish to abuse the legal system to intimidate or silence critics.[13] Arkansas's anti-SLAPP

law contains a detailed schedule of procedural requirements which any lawsuit that appears to be designed to squelch First Amendment rights must meet; regrettably, because of the state Supreme Court's aggressive interpretation of Amendment 80 (and the General Assembly's creation of procedures in its anti-SLAPP law to protect innocent defendants and thwart those willing to abuse our legal system), Arkansas's anti-SLAPP law appears unconstitutional – because Amendment 80 prohibits the General Assembly from creating rules of court procedure. This is one of many reasons that Amendment 80 needs reform.

Because of recent state Supreme Court decisions, it is hard to avoid the conclusion that our state's highest court will block tort reform whenever it is possible to do so. This suggests that the likeliest possibility for reform is a constitutional amendment that is initiated by our legislature; the Court's willingness to strike down a citizen-initiated tort-reform amendment based on an abstruse and technical point was disappointing, if not surprising.[14]

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1. See "Get the Facts: Lawsuit Abuse Is Having a Devastating Impact on Our Society," Institute for Legal Reform, U.S. Chamber of Commerce.

2. See, e.g., *Broussard v. St. Edward Mercy Health System, Inc.,* 386 S.W.3d 385 (2012).

3. Texas Medical Board, *Statistics, Fiscal Years 2003-2012* (December 2012).

4. Joseph Nixon, "Ten Years of Tort Reform in Texas: A Review," Heritage Foundation Backgrounder #2830, July 26, 2013.

5. *Hearing Before the Senate Committee on State Affairs, Interim Charge No. 6: Study the Economic Impact of Recent Civil Justice Reform Legislation* (April 18, 2008) (statement of Sr. Michele O'Brien, CHRISTUS Health).

6. Texas Medical Association, *Proposition 12 Produces Healthy Benefits.*

7. See Jason Roberson, "The Grateful Patient," *Dallas Morning News,* June 17, 2007; quoted in Nixon, "Ten Years of Tort Reform."

8. Texas Medical Liability Trust, "Four Percent Rate Reduction to Save

Policyholders Approximately $5.5 Million," August 15, 2012.

9. Benjamin Lawsky, *Report on the Hospital Excess Liability Pool to the Governor and Legislature of New York,* December 2012.

10. Perryman Group, *A Texas Turnaround: The Impact of Lawsuit Reform in Business Activity in the Lone Star State,* April 2008.

11. See, e.g., *Broussard,* op cit.

12. See Ark. Code Ann. §§ 16-63-501 to §§ 16-63-505.

13. See generally anti-slapp.org, which provides a detailed explanation of how these laws work in different states.

14. See *Wilson v. Martin*, 2016 Ark. 334 (2016) (striking down ballot title because it contained the undefined technical term "non-economic damages," which voters allegedly would not readily understand); cf. another decision issued the same day, *Rose v. Martin*, 2016 Ark. 340 (2016) (approving a ballot title which contained such undefined technical terms as "discrimination," "certification," and "affirmative defense").

Shrinking Arkansas's Lawsuit Exposure

Two well-intentioned bills passed in the 2013 session will likely have the effect of subjecting Arkansas citizens and businesses to lawsuits of little or no social value. Furthermore, a United States Supreme Court decision in 2015 will likely provide grounds for a wave of lawsuits against state government agencies (for which taxpayers will ultimately pick up the tab) unless lawmakers cure this problem. The General Assembly should take action to avoid these three dangers.

Arkansas's first new litigation exposure. In the 2013 legislative session, the Arkansas General Assembly passed a series of laws to protect employees' rights. Many of these legislative reforms seem well-intentioned – for example, Act 1480 of 2013 prohibited employers from requiring their employees to share passwords to their social media (e.g., Facebook) accounts. However, parts of this same law have served to limit employers' and employees' freedom of speech and association while simultaneously raising the costs of doing business in Arkansas. That is because the statute apparently prohibits employers from suggesting or requesting that an employee add him or her to his contact list on a social media account.

By prohibiting any employer (including a colleague that happens to be one's superior in a workplace) from adding an employee to a contact list on a social media account, the legislature has made doing business in Arkansas more complex by inviting litigation.

When an employee adds his or her supervisor to a contact list on Facebook, that would seem innocent enough. In fact, however, that supervisor is putting his or her employer at risk for having violated this new employment law, since the law could view a mere 'friend request' as a 'request' for the supervisor to be part of the employee's contact list. Having violated this law, the supervisor not only puts his company at risk but also might create additional litigation risks; namely, litigation could be bolstered because the two are 'friends' on a social media network.

Furthermore, even if an employee rejects a supervisor's friend request, the same legal complication could arise. That is because the new law prohibits 'requests' between employees and employers on social media networks.

In short, we appreciate the intent of the legislature, but this new law is simply too broad: when the law says that no employer may "request, suggest, or cause a current or prospective employee to ... add an employee, supervisor, or administrator to the list or contacts associated with his or her social media account,"[1] the prohibition is overextensive. Furthermore, this new law creates unintended consequences. By increasing the regulation of the employer-employee relationship, Arkansas companies will have to divert more resources away from productive activities and into human resources departments that must ensure their workers are regulatorily compliant. Because employers now face a heavy cost for allowing employees to be friends on social media networks, employers have an added incentive to monitor their employees' social media presence, a practice which this very same law seeks to prohibit by prohibiting employers from requesting employee passwords. Ultimately, because this law provides yet another avenue to litigation for wrongful termination, Arkansas businesses will be further burdened by compliance costs and litigation risks.

It is certainly true that this law would eliminate situations in which supervisors coercively require employees to add them

to a contact list on a social media network (which would give supervisors access to personal information against employees' will), but this law is not the appropriate method to stop that type of wrongdoing. A 'one-size-fits-all' blanket solution to this hypothetical problem which does not permit any supervisor to be on the contact list of any employee only succeeds in placing an undue burden on employers and employees in Arkansas. It raises the cost of employing Arkansas citizens.

In 2014, the state Department of Labor reacted to the difficulties this law creates by proposing administrative regulations.[2] The problem that Act 1480 creates could be significantly reduced by writing the Department's regulations, or something like them, into state law. As a general matter, Act 1480 understands an offer to communicate via social media as inherently coercive; state law should be clarified, so that any such suspicion of coercion (with respect to communication via social media) would have to be demonstrated, not simply assumed, in order to be punished.

Arkansas's second new litigation exposure. The difficulty that is created by Act 227 of 2013 is easier to explain. Act 227 permitted private colleges and universities to create their own police forces, which will have government powers. This is an unhealthy mixture of government authority and private business. This mixture is particularly dangerous with respect to taxpayer liability for civil rights actions: more particularly, establishing police officers under the command of private universities runs the risk of violating a citizen's civil rights, which could lead to significant liability on the part of taxpayers.

This danger becomes especially apparent in light of the fact that university police officers may be called to enforce university rules, such as the confiscation of alcohol or other property, from students in a manner that might violate their civil rights. Act 227 apparently tries to get around this difficulty by stating that the colleges and universities which it affects

are not agents of the state of Arkansas. But these legislative declarations are, at best, unsuccessful word magic: Act 227 creates government agents, and those government agents have to be accountable to and under the command of someone. This creates a problem for taxpayers, in that those government agents will, over time, likely injure citizens and create legal judgments which will ultimately be paid with taxpayer money. In short, legislators who want to avoid the potentially disastrous effects of Act 227 should end the program's confused mixture of public and private police powers during the 2015 session. The best way to do this is likely to eliminate the program (that is, its creation of a new species of police officers) entirely.

Arkansas's third new litigation exposure. In February of 2015, the Supreme Court of the United States issued a decision in the matter of *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[3] which will have profound effects on the operations of state boards and commissions in the years ahead. The end result of this decision is that, if boards and commissions exercise rulemaking or quasi-legislative authority, in some circumstances they are no longer immune from liability under federal antitrust law. This means that if such boards and commissions continue to issue or enforce anti-competitive regulations, those actions could generate notable liability exposure both for individuals and government bodies. These damages could possibly include treble damages or even criminal penalties. If the state of Arkansas wishes to avoid such liability, its lawmakers should make substantial structural changes in our state boards and commissions: these changes could also trigger substantial job creation and economic growth.

This case, which for the sake of brevity we'll refer to as *Dental Examiners*, involved a dental regulatory board – composed largely of practicing dentists – that successfully locked providers out of the market who were offering teeth-whitening services. The dental board contended that the teeth-whitening providers

were illegally practicing dentistry. Some might believe that non-dentist teeth whiteners were endangering the public, and some might believe that the dental board was protecting a lucrative dental service cartel. It seems fair to say that the Supreme Court was more sympathetic to the latter view.

Dental Examiners has a much larger scope than just the North Carolina Board of Dental Examiners, however: the decision applies to state regulatory bodies generally. The case suggests that many boards and commissions will need to be restructured or firewalled in order to escape antitrust liability.

It is reasonable to read *Dental Examiners* as creating new antitrust liability for boards and commissions, but only if those boards and commissions are structured in such a way that special interests might come to control them. This is a phenomenon known to economists and political scientists as "regulatory capture."[4] The *Dental Examiners* case identifies the structure of a regulatory board in North Carolina as fitting into this category. In this case, North Carolina law required that six of the eight state dental board members had to be licensed dentists engaged in the active practice of dentistry.

The core of the Supreme Court's concern is based on "the risk that active market participants [e.g., professionals placed on boards that regulate their own business] will pursue private interests in restraining trade" – or, to put it another way, "the structural risk of market participants' confusing their own interests with the State's policy goals."[5]

It is likely that Arkansas could avoid *Dental Examiners* liability in two ways. It could either *restructure* boards and commissions so that their members are not self-interested. For instance, states could remove some or all practicing professionals from service on their own profession's boards. Or the state could *firewall* those boards and commissions in a way that adds an element of sovereign accountability. This could happen by requiring legislative or gubernatorial review of regulations. Because of the opinion's emphasis on the structural aspect of

preventing special interests from capturing regulatory bodies, the second alternative ("firewalling") is probably superior.

Dental Examiners also suggests that state legislatures have powers to create anti-competitive policies in ways that boards and commissions do not. The anti-competitive conduct of a state which is acting in its sovereign capacity is immune from interference by antitrust law. But if a state delegates its sovereign regulatory power to a board or commission, that sovereign immunity could vanish unless two conditions are met:

- *First*, the measure passed by the board/commission must be "clearly articulated and affirmatively expressed as state policy,"[6] or at least must be consistent with it.
- *Second*, the policy must be "actively supervised by the State."[7] To put it another way, from now on the state must take responsibility for a system of anticompetitive regulations by endorsement through its court or legislature.

Policymakers who want state government to encourage competition should therefore view *Dental Examiners* not simply as a nuisance that will create more difficulties, but as an opportunity. For instance, the state legislature could expressly lay down the policy by statute (or by means of state Supreme Court interpretation), and by requiring state officials to "exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[8]

Dental Examiners specifies an impermissible structure, but it is less forthcoming about what constitutes permissible structures of regulatory boards and commissions. This means policymakers have some degree of freedom to respond to the opinion with a reform plan; nonetheless, that reform needs to be substantive, not simply cosmetic. The best way to respond to *Dental Examiners* is only partially determined by the law. Any legislative response will be, in part, a policy decision. However, superficial reforms that do not significantly affect anti-competitive/quasi-monopolistic regulatory action by boards

and commissions will leave Arkansas open to significant legal uncertainty. The way to avoid such legal uncertainty is to enact measures that will restrict the kind of anti-competitive conduct that originally created the grounds for *Dental Examiners*. It is likely that if Arkansas only does the bare minimum to comply with *Dental Examiners*' "active supervision" requirement, it will run a significant risk of continued liability.

If, for instance, the Federal Trade Commission targets Arkansas for anti-competitive action under this decision, the state is unlikely to prevail if it argues that the state merely employs someone who monitors regulations. Instead, Arkansas would be better served by enacting some kind of structural safeguard against anti-competitive regulations.

Recommendations for action. If policymakers want a more competitive and productive economic system, then *Dental Examiners* provides an excellent opportunity for change. Arkansas lawmakers could respond to *Dental Examiners* in the following way:

Create an Office of Regulatory Affairs ("ORA"), with the mission of reviewing board and commission regulations so as to protect Arkansas taxpayers from antitrust liability. This office could presumably be composed entirely of one person. This office, or officer, could report directly to the Governor. In fact, establishing this office could be as simple as adding one person to the Governor's staff. While the office could be situated in many possible places in state government, the requirement of active supervision suggests that the ORA should be inside the executive branch of state government. An alternative possibility would be to house the ORA in the Attorney General's office.

Require the ORA to encourage competition inside each industry through its supervision. Unless this step is taken, the ORA will be reviewing regulation without a clear idea of what it is looking for. Articulating a pro-competition ORA policy in state law would assure the exercise of public supervisory authority to prevent anti-competitive behavior. Furthermore, such legislation

should list specific factors for the ORA to consider, such as the impact of regulations on consumer choice, product and service innovation, and job creation in the state. More generally, the ORA should be guided by the standards of active supervision that our nation's highest court has laid down.[9] Ideally, such legislation would provide a scale of most to least restrictive regulation, so as to encourage lawmakers and regulators to establish only the least burdensome regulation necessary to protect consumers from actual (not hypothetical) harm.

Require the ORA to review rules created by boards and commissions on a regular basis, and to recommend changes to the legislature which would repeal or reduce inappropriate regulatory burdens. Lawmakers should consider allowing the ORA to take into account the extent to which other states regulate the industry in question, the extent to which alternatives to licensure (such as certification) would serve the same safety or consumer protection interest, and the extent to which the predicted harms that justify regulation are real. This approach falls in line with a recent White House Council of Economic Advisors report which examines licensure. It recommends certain best practices for states. One such recommendation is that "in such cases where public health and safety concerns are mild, consider using alternative systems that are less restrictive than licensing, such as voluntary State certification … or registration…" It also recommends that states "make sure that the substantive requirements of licensing (e.g., education and experience requirements) are closely tied to public health and safety concerns."[10]

In line with these recommendations, legislators may wish to require the ORA to determine whether certain conduct is outside the scope of regulatory bodies, or to produce a plan for the legislature to the effect that some boards and commissions be consolidated or eliminated.

Give the ORA power to disapprove regulations from boards and commissions that might reduce competition and/or create antitrust liability. When boards and commissions issue regulations, they

should go through some kind of review process that requires affirmative approval by the ORA. Similarly, ORA should in some circumstances have similar disapproval power over already-existing regulations from boards and commissions.[11]

Although this disapproval power may be controversial to some observers, something like it appears mandated by a paragraph near the end of the *Dental Examiners* decision, which lays out some "requirements of active supervision":

> *The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see* Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see ibid.; and the "mere potential for state supervision is not an adequate substitute for a decision by the State,"* Ticor*, supra, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.*[12]

While *Dental Examiners*'s scope is limited to boards and commissions, policymakers are not. Legislators who want to encourage regulatory reform more generally should consider whether regulations that are issued by executive departments in state government (for instance, the Department of Health) should come under ORA review.

Arkansas already has an existing gubernatorial review process of board/commission rulemaking, but its scope and force is unclear. Legislators should consider the above recommendations for replacing or modifying that existing process. It is worth emphasizing that just having a regulatory review process does not do much to shield against *Dental Examiners* liability. Instead, Arkansas needs a regulatory review process that expressly highlights and scrutinizes anti-competitive

practices and provides a practical avenue to eliminate them.

Other states have set up praiseworthy structures to encourage solid regulatory policy. Colorado established a one-person office in 2003 called the Office of Regulatory Reform and Economic Competitiveness. It has many elements Arkansas policymakers could learn from. For instance, in Colorado all regulatory agencies must submit proposed new rules or amendments to an online database that is open to the public. This online system allows citizens to receive "Regulatory Alert" emails whenever new rules or amendments are considered. Interested parties are able to send comments to the office on those proposals by email. The office can also require that a state agency submit a cost-benefit analysis that describes the impact of a proposed new rule or amendment. Importantly, Colorado allows this regulatory review office to disapprove regulations.

Policymakers across the political spectrum have endorsed licensure reform. Perhaps the most prominent example came from the Obama Administration. As mentioned above, the White House Council of Economic Advisors (CEA) recently issued a report that noted the sharp increase in occupational licensing over the past few decades.

This report pointed out the problems with this uptick in licensing:

> *...the current licensing regime in the United States also creates substantial costs, and often the requirements for obtaining a license are not in sync with the skills needed for the job. There is evidence that licensing requirements raise the price of goods and services, restrict employment opportunities, and make it more difficult for workers to take their skills across State lines.*[13]

It goes on to discuss how lawmakers who enact these licensing rules do not take into consideration the full range of effects, or look at alternatives such as certification that may impose a far lighter burden on those seeking to work. The

CEA then calls on lawmakers to create a regulatory system that "protects public health and welfare while promoting economic growth, innovation, competition, and job creation."[14] Establishing an ORA in Arkansas would advance this goal.

In testimony to the House State Agencies Committee in 2015, Dr. David Mitchell, a professor of economics at the University of Central Arkansas, explained the burden that excessive regulation places on Arkansas's economy. According to Mitchell, Arkansas policymakers have burdened our economy far more than surrounding states through occupational regulation, making our state one of the five worst (out of 50) when we compare the burdens of occupational licensure across the country. We place the second-highest burdens of experience and education in the country on licensed occupations; for instance, on average to obtain a professional license one needs more than twice as much education and experience in Arkansas as in Texas. Mitchell estimated that if Arkansas had reduced the number of low-wage jobs requiring a license to equal that of Missouri, it would cut Arkansas's black poverty rate by 15.6% (from 34.1% of the population to 28.8%), bringing over 22,000 black Arkansans out of poverty; if Arkansas had reduced education and experience licensure requirements for low-wage jobs to those of Mississippi's, (from 689 days to 155 days), prices would have fallen in Arkansas by 5%, which of course would significantly raise the purchasing power of the poor; if Arkansas had reduced the number of low-wage jobs that require a license to correspond with the requirements of Missouri (from 52 occupations to 31 occupations), then Arkansas could have created more than 8,000 new jobs. These figures suggest that, compared to surrounding states, the Arkansas economy is relatively overregulated in a manner that blocks job creation and economic growth – and that creating a government institution that reduces the barriers that government has previously created should lead to a future of growth and prosperity for Arkansas.

Although *Dental Examiners* arguably creates a new set of burdens for state government regulators, it also presents

an opportunity for state lawmakers. A reasonable structural response to this decision might provide an avenue for a significant increase in free-market competition in the state. That, in turn, would lead to increased consumer welfare and economic growth. Arkansas should take advantage of this opportunity to pursue regulatory reform, rather than becoming a laggard state that is targeted by the Federal Trade Commission in a future lawsuit. Legislators who want to avoid an infestation of lawsuits with little or no social value in Arkansas should reform the two pieces of legislation describes above that caused the lawsuit magnets, as well as modifying the rules for state agencies that leave state government (and, derivatively, state taxpayers) vulnerable under *Dental Examiners*.

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1. Act 1480 of 2013, § 1(b)(1) to 1(b)(1)(B).
2. Specifically, Administrative Regulations of the Labor Standards Division of the Arkansas Department of Labor #010.14-500.
3. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015).
4. See generally, e.g., Daniel Carpenter and David Moss (eds.), Preventing Regulatory Capture: Special Interest Influence and How to Limit It (2013).
5. *Dental Examiners.*
6. Ibid.
7. Ibid.
8. Ibid.
9. See, e.g., *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634–635 (1992) (stating the purpose of active supervision is to determine "whether the State has played a substantial role in determining the specifics of the . . . policy" and that the policy was "established as a product of deliberate state intervention, not simply by agreement among private parties"). See also *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985) ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state.") and *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791–792 (1975) (denying immunity to a state agency that "joined in what is essentially a

private anticompetitive activity" for "the benefit of its members"). See also *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."). See also *Dental Examiners* (holding active supervision "require[s] the State to review and approve interstitial policies made by the entity claiming immunity" to provide "realistic assurance that a private party's anticompetitive conduct promotes state policy . . . .") (quoting *Patrick,* 486 U.S. at 101).

10. "Occupational Licensing: A Framework for Policymakers," White House Council of Economic Advisors, July 28, 2015.

11. To state the obvious: there are many instances of regulation that are important and necessary, and under this paper's proposed recommendations, it is quite simple for state government to protect regulation from anything like an ORA disapproval if that is the desired result. All that would be necessary in such a situation would be to write the regulation into state law.

12. *Dental Examiners.*

13. "Occupational Licensing," p. 3.

14. Id., p. 5.

Holding Regulators Accountable

The chapter immediately above, "Shrinking Arkansas's Lawsuit Exposure," discusses (among other things) the threat that a recent U.S. Supreme Court case poses to state government regulatory bureaucracies, as well as to state government taxpayers. One of the most important things Arkansas policymakers can do is to protect Arkansas taxpayers from antitrust liability that is created by rules and regulations that are established by boards and commissions.

To put that in plain English, the legislature now has an additional incentive to encourage boards and commissions to no longer pass rules which help special-interest groups and harm competition and consumer welfare. That additional incentive is the threat of litigation. Regulations that harm competition now make the state of Arkansas, or its subsidiaries, vulnerable to lawsuit – in a manner that they were not vulnerable prior to 2015. This vulnerability can be addressed by requiring the General Assembly to approve all rules and regulations from boards and commissions, so that those rules and regulations do not have legal force until the General Assembly approves them.

Those who wish to avoid this vulnerability should acquaint themselves with a recent decision by the U.S. Supreme Court (*North Carolina Board of Dental Examiners vs. Federal Trade Commission*[1]). According to that decision, states may be vulnerable to antitrust lawsuits if those states' boards and commissions pass rules and regulations that harm competition. Importantly, however, if a state legislature passes laws that harm competition, those states do not bear antitrust liability. To

put it another way – courts will permit the state legislature to pass anticompetitive measures, but they will punish boards and commissions for doing so.

It is arguably in the public interest that, once the General Assembly looks at proposed legislation, it will also decline to pass anticompetitive measures. But with respect to protecting Arkansas from a wave of antitrust litigation, the key point is that if the legislature is the decider, then taxpayers are protected.

What the Supreme Court held in *North Carolina Board of Dental Examiners* was that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."

Here is a plain-English translation of that holding: *A board/commission with a "controlling number" of practicing, regulated professionals must be actively supervised by state government to avoid antitrust liability for the board/commission.*

In 2014, Arkansas amended its state Constitution to give greater authority to legislators to monitor state government regulatory bodies. Shortly thereafter, the General Assembly passed Act 1258 of 2015 to implement its new powers of regulatory supervision. Before Act 1258 was passed, the state Legislative Council was authorized by statute to make non-binding recommendations about rules; after Act 1258, the Legislative Council was authorized by statute to review and approve all rules. However, a closer examination of the new procedure demonstrates that it is difficult or impossible for any proposed regulation to be blocked by the Act 1258 procedure. Here is the current procedure under Act 1258:

Any proposed rule will be approved *unless*

1. A majority of the quorum present of the Rules/Regulations subcommittee asks for a vote on whether to vote.
2. In that subcommittee, there is both a procedural vote on

whether to vote, and then a substantive vote to disapprove the regulation.

3. A majority of the quorum present of the full Legislative Council asks for a vote on whether to vote.
4. In the full committee, there is both a procedural vote on whether to vote, and then a substantive vote to disapprove the regulation.
5. With respect to these decisions, a rule may only be disapproved if it is inconsistent with (1) state or federal law or (2) "legislative intent."
6. The committee which disapproves the rule must explain its grounds for disapproval of the rule.[2]

In short, the default is that all regulations are going to be approved by the Legislative Council. It is unlikely that this procedure satisfies the constitutional requirements of "active supervision": there are two other Supreme Court decisions (summarized in the last two paragraphs of the Federal Trade Commission's report on the *Dental Examiners* case, and quoted immediately below) that suggest that that, with respect to the 1258 procedure, Arkansas is in what might be called the "danger zone." These two summaries of holdings from other Supreme Court cases, reproduced below, summarize two situations which *clearly do not* satisfy the requirements of "active supervision." Regrettably, the Act 1258 procedure appears similar to these other cases.

> *An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. See* Ticor, *504 U.S. at 638.*
>
> *An independent state agency reviews the actions of the*

> *regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. See* Patrick*, 486 U.S. at 104-05.*

The bottom line is that state government has to play a "substantial role" (in *Ticor's* language) in policymaking. It has to be more than a rubber stamp. There is little reason to believe that a procedure in which the regulators get a very large benefit of the doubt – as in Act 1258 – qualifies as "active supervision."

To sum up, what changes to Act 1258 might eliminate antitrust uncertainty?

- Have a review process with the same kind of scrutiny that we have for legislation generally. Get rid of any presumption that rules will be approved. Require affirmative votes for rule approval, just as the legislature requires affirmative votes to pass legislation.
- Both legislators and legislative staff should scrutinize rules for any anti-competitive aspects generally. A formal requirement that legislative staff should identify any anti-competitive aspects to the relevant committee, as part of their review, is worth considering.
- Modify or eliminate the requirement that legislators may only disapprove of a rule if they find it inconsistent with the law or with legislative intent – and modify/eliminate the requirement that legislators have to explain themselves if they disapprove a rule.
- Ultimately, the long-term solution to this problem probably lies in creating one or more offices of regulatory review in state government, so as to ensure that rules and regulations advance consumer welfare. These offices could be located in the Bureau of Legislative Research, or in the governor's or attorney general's office. This would probably not require much more than the assignment of additional duties to one or two lawyers. This suggestion is discussed in greater detail

in the immediately previous chapter.

The first three recommendations are the low-level changes that should be considered; these changes would likely remove Arkansas from what could be called the "danger zone" of uncertainty about active supervision.

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1. *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015).

2. This summary does not include the emergency procedures which allow for relatively rapid approval of rules by the Executive Subcommittee.

How To Bring Down Health Insurance Costs

Arkansas has seen astoundingly large rate hikes in health insurance in recent years; when we compare Arkansas with other states, Arkansas has seen some of the biggest rate increases in the nation. (For instance, after the Affordable Care Act's health insurance exchanges were implemented in 2013, the premiums of young adults in Arkansas nearly tripled; they had the highest rate increases in the nation as compared to their peers.[1]) Those who wish to lower health insurance costs should try to eliminate unnecessary insurance-plan burdens, such as the many mandated benefits that state law forces health insurance contracts to provide. Policymakers should therefore scrutinize the requirements in state law that require all Arkansas health insurance plans to offer roughly 25 additional mandated benefits or offerings – which are not mandated by the Affordable Care Act or any other federal law – whether consumers want to pay for them or not.[2]

A health insurance mandate is a legal requirement for all insurance policies to cover a specific type of medical service or benefit. Often, different policies offer different services depending on how much the consumer is willing to pay, but special interest groups have lobbied our state government in order to create a regulatory environment that requires these mandatory benefits and services.

Every health insurance mandate makes health insurance plans more expensive. Mandates restrict consumer choice, in just the same way that consumer choice would be restricted if

– every time you bought a hamburger – you were required to buy french fries and a Coke as well. In order to lower health insurance costs for Arkansas consumers, reduce the Arkansas uninsured rate, and reduce regulatory capture in the health services industry, Arkansas state legislators should establish a health insurance mandate review commission that will review a certain percentage of current health insurance mandates annually and have the power to eliminate those that prove inefficient for consumers.

Establishing a Health Insurance Mandate Review Commission will help lower health insurance costs for Arkansas consumers and expand health coverage. The commission would be able to ensure that the health insurance mandates – required by the legislature – are in fact in the best interest of the consumers. Each biennium, the commission should compile a list, and be required to review, a set percentage of those health insurance mandates – in a manner that ensures that all mandates will be reviewed eventually (over, say, a term of 6 years); after the term of 6 years elapses, the commission should then begin its review of all mandates again. In reviewing these mandates, the commission should require that an independent study, one that meets professional research standards, be conducted that brings all relevant research regarding a particular mandate to light. If a review of some particular mandate demonstrated that its benefits would likely not be worth the costs it would create, the commission should have the authority to recommend elimination of the mandate. Furthermore, the enabling legislation that created the commission could require that the legislature could only reject the commission's recommendations en bloc (rather than having individual votes on each mandate), so that the state legislature would be less likely to weaken or otherwise amend commission policies; this might entail changing the procedural rules of the Arkansas General Assembly so as to send commission regulations directly to the floor, rather than subjecting them to committee roadblocks. Finally, the policymakers who write the

enabling legislation might also consider a stronger alternative: namely, giving the commission the power to recommend to legislators that all insurance mandates that are not required by federal law should be eliminated by means of one vote.

In addition to being able to review existing health insurance mandates, the health insurance mandate review commission should be required to review proposed mandates before they are implemented. In reviewing proposed mandates, the commission should consider the financial hardship a new mandate would impose, the extent to which such service can be purchased without mandating it, and the expected demand for the new health insurance mandate. Only after these conditions are satisfied, and the commission continues to find the new mandate in the public interest, should a new mandate be implemented. This requirement might also imply changes to the procedural rules of the General Assembly.

The Council for Affordable Health Insurance once estimated that mandated benefits increase the cost of basic health coverage by about 20 percent,[3] but the figure may be much higher – depending on the number of mandates, the benefit design, and the cost of the initial premium. Simply put, the more requirements are placed on insurers, the higher the price they must charge for services, all while consumers are left without the ability to choose whether or not they need such services.

Increasing the number of health insurance mandates will likely prove to be particularly harmful to consumers not only because of the price of the mandate, but also because mandates encourage people who do not need insurance to leave the insurance pool. Once a mandate is passed and prices rise, the first consumers who will be unwilling to pay the higher price will be those who can most easily forgo insurance: the young and healthy. Because mandates adversely affect the young and healthy, the risk pool of consumers becomes more risky for insurance providers. When the profile of the risk pool changes

because it is made up of those who are relatively older and sicker, this increase in risk for providers will lead to an additional price increase.

Those who favor additional health insurance mandates could correctly point out that each mandate adds very little to health insurance costs. In fact, the average mandate adds less than 1% to health insurance costs, but the fact that each mandate only creates a tiny additional burden also creates dangerous incentives for legislators to keep piling on mandates. A mandate review board would address the weight of all mandates; it is a superior alternative to individual reform of any particular mandate.

Arkansas health insurance mandates raise prices on consumers, push the young and healthy out of the insured market, and keep Arkansas's uninsured rate above the national average. **A health insurance mandate review commission would ensure that Arkansas's mandates on health insurance are, in fact, beneficial to consumers and not just to health service providers.** Legislators serious about improving the cost and quality of health insurance for the Arkansas consumer should establish such a commission.

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1. A 27-year-old's monthly premium increased by 171.4% that year. Drew Gonshorowski, "How Will You Fare in the Obamacare Exchanges?", heritage.org, October 16, 2013.

2. State law mandates the following benefits and services for all health insurance plans: autism spectrum disorders, breast reconstruction/mastectomy, children's preventative care, colorectal cancer screening, dental anesthesia, diabetic supplies/education, equity in prescription insurance and contraceptive coverage, medical and modified foods, gastric pacemakers, in vitro fertilization, speech or hearing impairment, maternity and newborn coverage, mental health parity, off-label drug use, prostate cancer screening, orthotic and prosthetic devices or services, craniofacial anomaly corrective surgery, alcohol and drug dependency treatment, hospice, mental health disorders, mammogram, outpatient services, psychological examiners, temporomandibular and

craniomandibular joint disorder, and hearing aids.

3. See Victoria Craig Bunce, *Health Insurance Mandates in the States,* Council for Affordable Health Insurance.

Avoiding the Fiscal Catastrophe of the "Private Option"

The election results of 2016, which granted Republicans control of both Houses of Congress and the Presidency, can be understood as a kind of repudiation of significant portions of the Affordable Care Act. Republicans have hardly kept their interest in modifying Obamacare a secret: for instance, a year ago, House and Senate Republicans passed legislation that would have repealed Obamacare mandates, eliminated Obamacare exchange subsidies, and rolled back Obamacare's Medicaid expansion completely. In some sense, the legislation's passage was a symbolic gesture, in that everyone knew what would happen next: namely, President Obama vetoed it. However, the new Trump Administration opens up substantial opportunities for Obamacare reform – and, in particular, Medicaid reform. Conservative lawmakers in our state should follow the lead of their federal counterparts by rolling back Medicaid expansion.

Legislators learned the wrong lesson from the U.S. Supreme Court's ruling that states did not have to accept Obamacare's massive expansion of the Medicaid program. Chief Justice John Roberts argued that mandatory Medicaid expansion was not foreseeable by states when they originally agreed to participate in Medicaid. As a result, the expansion was tantamount to a breach of contract. The court held that the federal government could not require states to accept it; Medicaid expansion became optional.[1]

This ruling gave states a significant weapon to use against Obamacare: by rejecting the law's Medicaid expansion, states could essentially cut the massive new entitlement program

off at the knees. Over the long term, most of the individuals that the U.S. Department of Health and Human Services expects to gain coverage under Obamacare will do so through the Medicaid expansion.[2] By rejecting Medicaid expansion, state policymakers who opposed Obamacare could deal a serious blow to the law.

But many Arkansas lawmakers thought they could outsmart the federal government: instead of rejecting Obamacare's Medicaid expansion outright, they used it as a negotiating chip. What did they get in exchange? The federal government gave Arkansas "special permission" to put the new Medicaid population into insurance plans that delivered Medicaid benefits – instead of distributing Medicaid through traditional public channels. That's about it. Perhaps it's obvious to see why this was a good deal for the Obama Administration and a bad deal for Arkansas: the Obama Administration got a Republican-leaning state to expand Medicaid through Obamacare – the only state in the South to do so. Arkansas, on the other hand, got stuck with a new entitlement program that will cost the state billions of dollars, will not improve physical health outcomes, and prioritizes healthy people over the most vulnerable. It's a bad deal for Arkansas, and one that the legislature should move quickly to end.

The Bill Is Coming Soon

By 2017 – at the latest – the federal government's share of the burden for new Medicaid expansion expenses will begin to drop, shifting more of that program's cost onto the state. By 2021, the state will be required to pay for 10% of the costs of the new population – a figure that does not include the exploding costs created by Arkansas's traditional Medicaid clients.

To date, no Arkansas policymaker has released even the vaguest of plans that explain how the state will pay for its

new, impending liabilities. Based on the original projections released by the state, it seems that lawmakers assumed that expanding Medicaid would create an "economic boon" to the state and generate "savings" in reduced uncompensated care costs. Both of these assumptions are faulty. In reality, states that have expanded Medicaid eligibility in the past have seen uncompensated care costs increase. There are many reasons to believe that this same phenomenon will occur here in Arkansas, given that the state was facing a doctor shortage and access-to-care problems before expansion; now Arkansas has added 324,000 people to our already-long waiting lines.[3]

There are also plenty of reasons to believe that the Medicaid expansion won't create an economic stimulus. The best evidence of this is the fact that the state – knowing expansion funding was on its way into the state economy – revised its economic outlook downward at the end of 2013, tacitly admitting that the expansion's promised "economic boon" would not come to fruition.[4]

The Private Option Sends the Truly Needy to the Back of the Line

In April of 2014, Arkansas's Deputy Insurance Commissioner Cynthia Crone told state lawmakers that some doctors in the state who had declined to accept traditional Medicaid patients are now accepting private option patients: "Many of the physicians that might not have accepted Medicaid – because, under private option, it's a private insurance plan at a higher reimbursement – are accepting this. So, many of the physicians are accepting consumers they would not have before."[5]

Crone's comments represent the first confirmation of a phenomenon that many opponents of the plan predicted –

namely, that an influx of new, able-bodied Medicaid expansion enrollees would push the truly needy to the back of the line. According to federal data available before Medicaid expansion was passed, Arkansas has a physician shortage in 54 of 75 counties.[6] Combine this physician shortage with a traditional Medicaid program that remains broken – and carries nearly a million enrollees – and it's clear that the private option has severely worsened the outlook for those who need care the most.

Medicaid Benefits Don't Improve Physical Health Outcomes

The private option is a colossally expensive program. Based on the most conservative estimates available, it will cost taxpayers $20 billion over the next 10 years – and costs are already exceeding those targets. $20 billion might be a good investment if (1) government had the money and (2) the program would make a meaningful difference in the health of the 324,000+ Arkansans who will be enrolled. In fact, many politicians have made the claim that the new program will save "thousands" of lives.

During the heat of the initial private option-debate, Minority Leader Greg Leding (D-Fayetteville) said that the program would result in "about 2,800 lives saved each year."[7] Democratic candidate Steve Rockwell, during his failed bid for state Senate, lowered the bar a bit: he claimed that the private option would "save 1,000 lives per year."[8] Arkansas lawmakers and taxpayers would be ill-advised to rely on such scare tactics for information about the program: a study conducted over a period of two years by Harvard researchers revealed that enrollment in Medicaid – for sicker individuals – "generated no significant improvement in measured physical health outcomes."[9]

In fact, a more recent study conducted by the University of Michigan revealed that Medicaid patients actually fare worse: according to the study, Medicaid patients "come into their operations with worse health, do worse afterward, stay in the hospital longer, and find themselves back in the hospital more often" than those with private insurance.[10] In fact, the study found that Medicaid patients were twice as likely to die in the first month after their surgeries as those with private insurance. Although private-option advocates might respond that private-option benefits cannot be compared to Medicaid benefits, the fact remains that the private option delivers Medicaid benefits and is funded by Medicaid dollars. The notion that private-option benefits are analytically unrelated to traditional Medicaid benefits is therefore difficult or impossible to defend.

How horrifying to think that taxpayers will be forced to pony up (at least) $20 billion over the next 10 years for a program that does not improve physical health outcomes for its enrollees and will not generate any meaningful economic stimulus. But it's worse than that: more than a year after the program passed into law, it was revealed that private-option advocates broke yet another one of their promises – this one having to do with their commitment to establish health savings accounts for private-option clients. (This broken promise was especially painful, in that the promise appeared to secure state Senator Missy Irvin's vote and thus provide the margin of victory for passage.) Because health savings accounts create incentives for economical health-care choices, the prospect of health savings accounts in Arkansas was initially intriguing. However, the "health independence accounts" that were announced in 2014 are a disappointment and a policy failure. These health independence accounts do not provide any incentive to economize on health-care choices; they simply provide matching funds to private-option clients who make deposits into their accounts. The only incentive that such accounts provide is an incentive to remain inside the coverage of the private option.[11]

Medicaid Expansion Dampens Job Creation and Economic Growth

A comprehensive study from the National Bureau of Economic Research found that Medicaid expansion to able-bodied, childless adults reduced employment, earnings, labor force participation, and economic growth.[12] The Congressional Budget Office has issued similar predictions about Medicaid expansion's deleterious effects on employment, earnings, and economic activity generally.[13] States that have expanded Medicaid have seen relatively slow job growth, as compared to non-expansion states.[14]

The experience of our neighbor state of Tennessee demonstrates that rolling back Medicaid expansion can encourage work, self-sufficiency, private-sector coverage, and economic growth.[15] In 2005, Tennessee disenrolled approximately 200,000 residents from Medicaid. This failed to result in the kind of economic turmoil that had been predicted by doomsayers: rather, it created economic growth and higher employment. Tennessee's economy benefited from a sudden employment increase not seen anywhere else in the South, largely because able-bodied adults re-entered the labor force. An astounding 63% of disenrolled adults increased their employment (for instance, part-time employees became full-time), leading to other significant changes – for instance, applications for Social Security disability benefits declined by 10%, and job-search behavior increased by 100%. The increase in private insurance coverage triggered by Medicaid disenrollment was perhaps even more notable: 90% of those who increased their employment gained employer-sponsored health insurance. As explained in a *Quarterly Journal of Economics* paper, the disenrollment that led to Tennessee's employment spike was also accompanied by a jump in private health insurance coverage:

> *The increased employment is concentrated among individuals working at least 20 hours per week and receiving private, employer-provided health insurance. We explore the dynamic effects of the disenrollment and*

> *find an immediate increase in job search behavior and a steady rise in both employment and health insurance coverage following the disenrollment.*[16]

The Tennessee experience suggests that ending expansion will be unlikely to have a major catastrophic effect on the able-bodied, childless adults who are now enrolled in the private option. In Tennessee, many of those who previously had coverage adjusted to the change and found work, which created beneficial effects for them as well as all other Tennessee citizens – who benefit from a growing, productive economy.

Furthermore, new research from the Mercatus Institute suggests that the effects of rolling back expansion are vastly overstated. More precisely, in 2014, roughly two-thirds of new Medicaid enrollees were eligible for the program under previous state eligibility criteria — meaning that they were not made eligible by Obamacare. In other words, rolling back Medicaid expansion would leave huge numbers of enrollees untouched, except that states would have to cover those enrollees under a traditional Medicaid funding match (which is, of course, more costly for state budgets). The lawfulness of making these enrollees expansion clients, rather than traditional Medicaid clients, is an interesting and largely unexplored question.[17]

Conclusion

Overall, it seems the only thing that the private option will create is more debt for future generations, more government, and a higher burden on taxpayers – thus moving our state even further away from a culture of economic growth and self-reliance. Arkansans need jobs, not new entitlement programs that taxpayers can't afford. **Lawmakers who have made a commitment to their constituents to resist Obamacare should realize that Arkansas's version of Medicaid expansion is flatly incompatible with such a commitment;**

indeed, the only way to honor such a commitment is to proceed to shrink and/or eliminate the private option. The new realities of a Trump Administration are difficult to forecast, but state policymakers should resist the snare of yet another round of bargaining with a distant federal partner about how to spend taxpayer money.

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1. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

2. Ibid.

3. Caleb Taylor, "DHS Director: Number of Medicaid Expansion Enrollees To Keep Growing," thearkansasproject.com, October 17, 2016. Earlier this year, the Arkansas Hospital Association had released a brief, preliminary report that drew tentative conclusions about changes in the *number* of patients visiting emergency rooms during the first quarter of 2014. However, they did not provide data on the *costs* to hospital emergency rooms because of the private option. See John Lyon, "Survey: ER Visits, Uninsured Patients Down at Most Arkansas Hospitals," arkansasnews.com, May 15, 2014. Furthermore, the AHA's subsequent research (in sharp contrast to its previous report) appeared to show that Arkansas's private option created greater ER use in our state, just as Medicaid expansion created greater ER use around the nation. Andy Davis, "Uninsureds' Costs Plunge, Hospitals Say," *Arkansas Democrat-Gazette,* November 1, 2014; Kevin Downey, "National Report: States Expanding Medicaid Continue to Outpace Their Non-expansion Neighbors in Medicaid Patient Volume and ED Visits," Colorado Hospital Association, September 8, 2014.

4. Nic Horton, "Beebe's Offensive Medicaid Offensive," thearkansasproject.com, December 12, 2013.

5. Crone's statement is recorded on youtube.com, "Crone Says PO Clients Are Moving to the Front of the Line," starting at 14:00.

6. See Jonathan Ingram, "The Empty Promises of Arkansas's Medicaid Private Option."

7. John Lyon, "Arkansas Legislature: Medicaid Expansion Tops Agenda for House Democrats," *Southwest Times-Record,* February 27, 2013.

8. Nic Horton, "Steve Rockwell's Five False Claims About Medicaid

Expansion," thearkansasproject.com, January 6, 2014.

9. Dr. Katherine Baicker, "The Oregon Experiment: Effects of Medicaid on Clinical Outcomes," *New England Journal of Medicine,* vol. 368, pp. 1713-22 (2013).

10. Kara Gavin, "Study Shows Worse Health, Higher Costs for Medicaid Patients," *University Record,* May 12, 2014.

11. See Josh Archambault, "Arkansas Private Option's Latest Boondoggle: 'Health Independence Accounts' Increase Dependence and Increase Costs," forbes.com, August 12, 2014.

12. Laura Dague et al., "The Effect of Public Insurance Coverage for Childless Adults on Labor Supply," National Bureau of Economic Research (2014).

13. Edward Harris and Shannon Mok, "How CBO Estimates the Effects of the Affordable Care Act on the Labor Market," Congressional Budget Office (2015).

14. See Jonathan Ingram and Nicholas Horton, "Arkansas's Failed Medicaid Experiment: Not A Model for Nebraska," Platte Institute for Economic Research, January 2016.

15. The sources for the Tennessee statistics are provided in Marc Kilmer, "Politically Toxic: Why the Stephen Report Provides No Antidote for the Private Option," Advance Arkansas Institute, March 15, 2016.

16. Craig Garthwaite, et al., "Public Health Insurance, Labor Supply, and Employment Lock," *Quarterly Journal of Economics*, vol. 129:2 (2014), pp. 653- 96.

17. See, e.g., Brian Blase, "New Gruber Study Raises Major Questions About Obamacare's Medicaid Expansion," forbes.com, November 27, 2016.

Making Medicaid Better, Not Just Bigger
by Jonathan Ingram

Any state's Medicaid program should meet three fundamental goals. First, that program must improve patient health. The most vulnerable citizens deserve a health care safety net that meets their needs and moves them from sickness to health. Second, the program should be run efficiently. Taxpayers deserve the peace of mind that comes from knowing that their sacrifices to fund a safety net aren't being squandered on a failing program. Third, the program should create budget certainty. Policymakers deserve budget certainty so that they can adequately fund the program and all other state priorities. Unfortunately, Arkansas's Medicaid program is failing on all three fronts.

Worse yet, Arkansas's plan for expanding Medicaid eligibility through its "private option" waiver will not solve these problems. Under Arkansas's plan, most traditional Old Medicaid benefits are being delivered to the expansion population by health plans offered through the state's health insurance exchange. Some benefits, however, are being carved out; the state is providing supplemental coverage for those services.

This "private option" does not reform the underlying Medicaid system; rather, it only applies to the individuals who become eligible for Medicaid under the Affordable Care Act's optional Medicaid expansion. The state has indicated that it intends to include parents and children who are currently eligible for Medicaid in its "private option" waiver at some point

in the future, but these populations are staying in Old Medicaid for the time being. Likewise, Arkansas's most costly patients, especially individuals who are elderly, blind, or disabled, remain trapped in Old Medicaid.

The quality of Arkansas's Medicaid program is on the decline. Arkansas measures performance of its Medicaid program with the Healthcare Effectiveness Data and Information Set, or HEDIS, a set of metrics used by more than 90 percent of health plans nationwide. In 2011, Arkansas's Medicaid program performed worse than the national average on 83 percent of its regularly tracked metrics. Worse yet, many of these metrics are on the decline in Arkansas, while the national average for Medicaid is improving.

The program is also not running efficiently. Arkansas spends more per-person than any other state in the region. Despite this high spending, quality is deteriorating, and all patients are trapped in the same one-size-fits-none plan. Arkansas offers no customized or enhanced benefit packages; instead, it dumps all patients into the same Old Medicaid plan, regardless of their unique needs or circumstances. Even under the "private option," patients receive the standard Old Medicaid benefit package, as the waiver indicates that the benefits provided through the "private option" do not differ from those provided under the Medicaid state plan. Regrettably, the choice of plans Arkansas offers under the "private option" is unpleasantly similar to Henry Ford's famous offer to the buyers of his Model T: namely, "Any customer can have a car painted any color he wants so long as it is black."[1]

Worse yet, there is no meaningful accountability for improving patient health or satisfaction. Because the state does not contract with private plans directly through a competitive bidding process, there are few financial rewards or penalties to incentivize high performance. Likewise, without meaningful differences in benefit packages, patients will have little reason to "vote with their feet" to select a plan that better meets their

needs. Absent these two major pillars, the "private option" plan will not significantly improve accountability within the Medicaid system.

Finally, there is no budget certainty. Total Medicaid spending in Arkansas has grown by nearly 90 percent since 2003. Because Medicaid costs are outpacing state revenues, Medicaid continues to consume an ever-larger share of the state budget, crowding out resources for other state priorities, like education and public safety. Because the "private option" does not utilize multi-year contracts or the competitive bidding process, and the targeted childless adult population has proven much more expensive than expected in other states, this plan is unlikely to produce budget certainty for the foreseeable future.

Given these failures, Arkansas should look to innovative pro-patient, pro-taxpayer solutions from states such as Florida, Kansas, and Louisiana.

Choice and Competition

Arkansas's first step should be to introduce meaningful choices and competition into its Medicaid program. Rather than forcing all Medicaid patients into the same plan design, Arkansas should contract with multiple private plans to offer customized and enhanced benefit packages. In Florida's Reform Pilot, for example, patients can choose from up to 35 customized benefit packages, offered by up to 14 different health plans. Unlike the zero-choice world of the "private option" waiver, where the benefit package offered is the same as Old Medicaid, these benefit packages may vary cost-sharing requirements, covered services, and additional benefits, so long as they are actuarially equivalent to the state plan. This level of customization genuinely allows patients to select a plan that best meets their needs, rather than just picking one of a few plans that all offer just the same benefits. Likewise, in Louisiana, patients can

choose from five different statewide options selected through the state's competitive bidding process.

The benefits of plan customization are most evident for patients with very complicated health challenges. Florida's Reform Pilot, for example, includes plans developed specifically for medically fragile children and plans customized to best manage HIV/AIDS. Likewise, Kansas offers programs that are specifically designed to help manage complicated conditions such as HIV/AIDS and schizophrenia.[2]

These benefit packages have also included benefits and services not typically covered by Old Medicaid. In Florida, for example, plans have included coverage for over-the-counter drugs, preventive dental coverage, vision benefits, respite care, wellness therapy and nutritional counseling. In Kansas, individuals can choose plans that offer – for example – additional dental benefits, smoking cessation programs, GED programs, Weight Watchers membership, and Boys and Girls Clubs membership.

When given meaningful choices and adequate, objective information, Medicaid patients are able to take more control over their health. In Florida's Reform Pilot and in Louisiana's Bayou Health, independent choice counselors assist Medicaid patients with plan selection, providing neutral comparisons based on patients' specific needs and concerns.[3]

As a result, between 70 percent and 80 percent of patients in Florida's Reform Pilot actively choose their health plan, compared to the 20 percent to 30 percent who let the state automatically assign them to a plan. In Louisiana, approximately 70 percent of new Medicaid patients actively choose their health plan. These choice counseling programs ensure that patients are empowered not only with the ability to choose, but with the knowledge necessary to choose wisely.

Smarter Funding

By contracting with multiple private plans, Arkansas can also move away from its flawed fee-for-service system. Under this arrangement, the state would pay a fixed amount of funding per patient, rather than the open-ended funding of today. This fixed amount of money, or capitated rate, should be risk-adjusted based upon health status, ensuring that plans receive more funding for sicker patients and less funding for healthy ones.

A capitated-rate system would be far superior to Arkansas's movement toward episode-based funding, which still reimburses providers based upon the bundled services provided for each episode of care. Capitated funding, on the other hand, provides a fixed payment to cover all services and benefits, shifting the risk of loss onto private plans and away from taxpayers.

A capitated-rate system is also superior to Arkansas's proposed move to medical homes built upon these fee-for-service and episode-based funding systems, which have already proven ineffective in other states at significantly improving quality, reducing costs, and creating budget stability. Indeed, it is telling that North Carolina, which had pioneered the medical home model in its Medicaid program for many years, is now moving away from the model and toward risk-based contracts with private plans.[4]

A capitated-rate system would also give policymakers real budget certainty, as rates are set through multi-year contracts. Taxpayers will no longer be on the hook for budget overruns under this arrangement. Better yet, Arkansas can build savings directly into the capitated rates set in its contracts.

These reforms are producing bankable savings in Florida, Kansas and Louisiana. In Florida, for example, costs for patients in the Reform Pilot are 15 percent to 20 percent lower than costs for comparable patients not in the Reform

Pilot. The capitated rates have also been flat for five years, producing measurable, long-term savings. When the reforms are implemented statewide, the state expects to save $1 billion annually.[5]

Kansas built savings of approximately 5 percent into their waiver, producing $1 billion in savings over the course of the next five years.[6] Although the reforms only launched in 2013, the state has already saved roughly $67 million more than expected, meaning the $1 billion in anticipated savings is likely to grow larger in future years.[7]

Louisiana also built 3.5 percent savings into their capitated rates,[8] producing $160 million in savings in the first year alone. Capitated rates are expected to remain flat for the next few years, which should provide even greater savings as time goes on.[9]

Real Accountability

Contracts with private plans also improve accountability, as they link significant financial incentives and penalties to quality and performance. In Kansas, for example, the state withholds three to five percent of health plans' total payments as a performance incentive. In order to receive the withheld funds, plans must meet numerous standards to improve health outcomes, improve care coordination, pay claims promptly, support members in their communities, promote wellness and healthy lifestyles and lower the overall cost of care. Kansas also has additional penalties for failing to meet quality benchmarks and failure to report progress adequately.

It's no wonder, then, that patients in reformed Medicaid programs experience better outcomes and higher satisfaction. In Florida, for example, the Reform Pilot plans outperform Old Medicaid on 22 of the 33 health measures regularly tracked

by the state.[10] Better still, roughly 94 percent of health metrics have improved since 2008.[11]

Patients in this new patient-centered approach aren't just healthier, they're happier as well. Approximately 83 percent of satisfaction measures for Reform Pilot plans are at or above national benchmarks not just for Medicaid, but for private health insurance as well. When surveyed, patients reported high satisfaction and generally had no problems finding personal doctors whom they liked within their plans' networks.[12] In 2012, the Florida agency overseeing the reforms received just six complaints for every 10,000 patients. The plans were able to resolve these complaints successfully, as no unresolved grievances were filed in that year at all.[13]

Healthy Incentives

By contracting with multiple private plans, Arkansas can also encourage healthy behaviors through innovative incentive structures. Patients in Florida's Reform Pilot plans, for example, can earn up to $125 per year for receiving certain preventive services, complying with maintenance and disease management programs, keeping appointments, and engaging in other healthy behaviors. Individuals can then use those rewards to purchase over-the-counter items at participating pharmacies.[14]

In Kansas, patients can choose plans that offer cash incentives for healthy behaviors, such as getting vaccinations, regular checkups, and the like.

These wellness programs encourage Medicaid patients to take more control of their own health by offering financial incentives for engaging in healthy behaviors. These types of incentives can be built directly into the capitated rates paid to health plans.

Conclusion

Arkansas's Medicaid program is spiraling out of control. Lawmakers should take a close look at what's happening in the nearby states of Florida, Kansas and Louisiana for inspiration. These states have adopted pro-patient, pro-taxpayer solutions – approved by the Obama Administration, no less – to alleviate the same problems that plague Arkansas's own troubled Medicaid program.

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1. Henry Ford, *My Life and Works* (1922), p. 72.

2. Bruce D. Greenstein, "Making Medicaid Better: Lessons from Louisiana's Journey to Managed Care," Louisiana Department of Health and Hospitals (2012).

3. "Florida Medicaid Reform: Year 6 Annual Report," Florida Agency for Health Care Administration, 2012.

4. See Jonathan Ingram and Katherine Restrepo, "The Partnership for a Healthy North Carolina: Medicaid Reform that Works for Patients, Providers, and Taxpayers Alike," Foundation for Government Accountability Policy Brief #3, May 28, 2013.

5. Tarren Bragdon, "Florida's Medicaid Reform Shows the Way to Improve Health, Increase Satisfaction, and Control Costs," Heritage Foundation Backgrounder #2620, November 9, 2011.

6. Kansas Department of Health and Environment, "KanCare: Section 1115 Demonstration Application" (2012).

7. Andy Marso, "KanCare Savings Shift Proposed," *Topeka Capital-Journal,* April 29, 2013.

8. Bruce D. Greenstein, "The Louisiana Story: How to Achieve a Medicaid Cure without a Federal Waiver," Foundation for Government Accountability Medicaid Cure Conference Call #3, December 4, 2012.

9. Ibid. See also Greenstein, "Making Medicaid Better," op. cit. Bayou Health is estimated to have saved $136 million in its first year through the 3.5 percent built-in savings, as well as an additional $24 million in its first year by carving in pharmacy benefits.

10. "Florida Medicaid Reform: Year 7, 2nd Quarter Progress Report,"

Florida Agency for Health Care Administration (2012).

11. Ibid. Of the 18 HEDIS measures tracked every year since 2008, 17 improved between 2008 and 2012. Of the 33 HEDIS measures ever tracked, 28 improved between the year tracking began and 2012.

12. R. Paul Duncan, et al., "Medicaid Reform Enrollee Satisfaction: Year Two Follow-Up Survey," Florida Agency for Health Care Administration, 2010.

13. "Florida Medicaid Reform: Year 6 Annual Report," op. cit.

14. Ibid.

Arkansas's Best Economic Development Plan: Cutting Corporate Welfare

Across the nation, state governments grant tax breaks and corporate welfare to benefit particular businesses. Well-funded and well-organized corporations gladly accept these favors and regularly pressure the government for additional benefits, while politicians hand out these favors in exchange for political support. These benefits are often so hidden, and of so little direct cost to each taxpayer, that the public is largely unaware they exist. However, in recent years, corporate welfare has substantially grown, and the unfortunate effect it has on our economy has become more difficult to ignore. **By granting special privileges to favored businesses or industries, government discourages competition, increases spending, harms consumers, and ultimately leaves everyone worse off; this is a problem that the Arkansas state legislature could easily solve.**

Free-market capitalism creates competition that benefits the public. Companies' attempts to compete with each other require that they serve their consumers with better products and better services. Ordinarily, businesses earn money by serving the consumer. However, when companies receive political grants or subsidies, they have an incentive to direct their resources to politics rather than to customer service. Because lobbying government is frequently easier than improving products or services, businesses are at risk of concentrating on pursuing special favors from government instead of pursuing gains from entrepreneurship.

Corporate welfare also creates a more basic problem: increased government spending increases government power. By spending more money on programs that favor businesses, government distorts economic signals and increases its footprint on the economy. Furthermore, in the long run these programs are likely to make all parties worse off. Subsidizing an industry will discourage innovation; the business will lack the incentive to grow or change its product focus; consumers will not have increasingly better products; and everyone will pay higher taxes. In short, it isn't just that corporate welfare wastes money; rather, it takes capital investment away from genuinely productive business that could create real jobs.

Corporate welfare is especially dangerous at the state level, where interstate competition for business encourages and accelerates this kind of economic intervention. States are often tempted to attract business to their states in order to bring in other new industries and create jobs; they typically use grants, special tax privileges, or other measures unavailable to the general public to do so. However, this weakens the economy as a whole, because one state will not want to lose a potential industry to another state, and so state governments have a powerful incentive to engage in mutually destructive bidding wars.

In a 2012 state legislative hearing, Grant Tennille (the head of the Arkansas Economic Development Commission) explained that Arkansas's reliance on corporate welfare was like a nuclear weapon.[1] Tennille said: "I say this all the time. I hate incentives. I don't think we ever should pay a dime to anybody to do anything. But I feel about incentives the same way I feel about nuclear weapons. I will happily be the second guy to put mine down" – that is, to disarm. "As long as Bobby Jindal pays $56 million for a chicken plant," Tennille added, "I can't sit here and say that we're going to be too good to do that."

This remarkable metaphor is perhaps more revealing than Tennille intended. A central justification of nuclear weapons

is that they are a better threat than they are a tactic; when we get to the point that nuclear weapons are used by multiple parties, most people will conclude that something, somewhere, has gone wrong. One name for what has gone wrong, of course, is mutually assured destruction. If analogizing corporate welfare to nuclear weapons is apt, it's worth keeping in mind that the damage that corporate welfare is doing – taxpayer-funded subsidies to businesses that might not be able to make it on their own – is already taking place.

Regrettably, it is not even clear that the money that taxpayers are spending on economic development is having its promised effects: an *Arkansas Democrat-Gazette* analysis in June of 2012 demonstrated that there is no way for the public to verify that economic-development expenditures actually result in jobs.[2] When asked about this at the hearing, Tennille responded that he is confident that most companies have delivered on their promise, but "a lot of it is an article of faith because it's really tough for us to say with absolute certainty ... that yeah, they've done what they said they were going to do and hired this many people."

Less than a month later, Tennille's "article of faith" was shown to have shaky foundations. In August of 2012, the Arkansas business LM Wind Power, which had received, at a minimum, $15 million in taxpayer largesse in exchange for a promise to create "over 1,000 high-quality jobs," announced layoffs that brought its payroll down to 206 workers. (The $15 million figure does not include a quarter-century tax exemption; sales-tax refunds on building materials, machinery, and other equipment; and a 5% rebate on payroll additions. That is, $15 million doesn't come close to the money that taxpayers are laying out to prop up this business.) LM Wind Power's recent statement that demand for "wind power installation" was expected to decrease by 70% from 2012 to 2013 provides little ground for optimism that the company will make good on its thousand-employee payroll promise.[3]

Ironically, Tennille cited Hewlett-Packard of Conway in his remarks to lawmakers as an example of the success of AEDC's "investments." But in June of 2013, HP announced massive layoffs, leaving 500 Arkansans out of work.[4] This news came after the company promised to provide 1,200 jobs and received $10 million from state taxpayers, $2.2 million from Conway taxpayers, a $5 million upgrade to the industrial park in advance of their arrival, and additional tax incentives that total (at minimum) hundreds of thousands of dollars (the total amount was not disclosed). When the HP experiment was announced, Governor Beebe explained that "We would not have been in the market without incentives." This fact was used as a justification for continued gambling with taxpayer dollars; a more sophisticated inference would be that the project was not viable in the free market.

Just a week before the HP cuts were announced, Nordex, another wind energy company that received millions from state taxpayers, announced they were laying off 40 of their 50 remaining employees. To say the least, this is a deceleration of Nordex's earlier promises, in which the company had promised to employ 750 Arkansans. At the groundbreaking for Nordex's new facility, Vice President Ralf Sigrist said "The investment will pay for itself within 12 years and will save considerable amounts over the long run. Just as renewable energy will do for all of America. The investment pays off." Unfortunately for taxpayers, he was wrong. Nordex received $14 million in up-front cash from the state, along with various tax incentives and rebates, the totals of which are undisclosed. Nordex's presence in the state is now virtually non-existent. Once again, taxpayers were left holding the bag. The final development in the Nordex fiasco is that a new manufacturer, TrinityRail Maintenance Service, set up shop in Nordex's empty plant; regrettably, the Arkansas Economic Development Commission decided that Arkansas taxpayers will also be entrusting it with $2 million of their dollars.[5]

Arkansas's embarrassing record of cronyism in this area

should engender skepticism about the viability of taxpayer-funded enterprises generally. In the long run, the best solution for Arkansas is probably to eliminate corporate welfare altogether. However, as long as tax breaks and subsidies for favored businesses are a part of Arkansas's economic development strategy, government officials should aim to be as transparent as possible. Lawmakers should establish the following reforms to increase transparency in Arkansas's economic development policy:

- All contracts entered into between government bodies and private organizations for the purpose of economic development should be made publicly available. Arkansas citizens should have a legally-protected right to know how their tax dollars are being "invested" – and that right should extend to all agreements involving public assistance (value of tax breaks, value of in-kind assistance such as buildings and infrastructure work, lease terms, etc.), company expectations, and timelines for deliverables. Government officials use public money, rendering the argument of "proprietary information" as an excuse for secrecy invalid; to the extent necessary, the state's Freedom of Information Act should be amended so as to protect and extend transparency in this area.

- The "clawback" formula used to determine how much money companies who fail to live up to their promises must return to the public treasury should be made publicly available. Furthermore, the clawback formula should be concrete and non-negotiable. In the event of bankruptcy of a subsidized business, bonds or other securities should be required to ensure that taxpayers won't end up holding the bag. Clawbacks are a tool put in place to provide accountability to taxpayers; they should not be shrouded in mystery or uncertainty.

- In addition to reporting proposed average wages, lawmakers should require that companies receiving public assistance

must report proposed median wages. A handful of high earners (such as executives or upper management) can drive up average wage statistics, misrepresenting the proposed benefit to the workforce. Median wages, along with average wages, provide a more transparent picture of the benefit employees may experience.

- To truly be accountable to the public, lawmakers must require regular reporting on the status of economic development projects. For instance, lawmakers should require an annual statistical report from all companies who have received or are currently receiving public assistance that would report the average number of full time jobs during the year, the average wage of those employed during the year, and the median wage of those employed during the year. These statistics should be in a legislatively-specified format, such that they could be placed next to company promises at the time of entering into an assistance contract or other years' reports; ultimately, Arkansas citizens are entitled to see how companies are performing compared to their original promises, and whether or not they are keeping their promises.

Arkansas's economic history is filled with businesses which received taxpayer largesse but created no jobs, as well as other corporate-welfare recipients who admit that they would have expanded and created new jobs even without taxpayer funding.[6] The boom-and-bust cycles that are created by our public investment in failed businesses are especially dangerous, because they trigger more infusion of capital into distorted and unhealthy markets that ultimately create nothing but waste and poverty.[7] Jacob Bundrick of the Arkansas Center for Research in Economics has compiled an excellent primer that explains why, in principle, corporate welfare is highly unlikely to deliver on its promises;[8] at a minimum, Arkansas policymakers should attempt to write policies into law that pushes those promises into the sunlight.

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1. Presentation to Joint Committee on Revenue and Taxation, July 19, 2012.

2. Sarah Wire, "State Seeks Way to Track Incentives," *Arkansas Democrat-Gazette*, June 20, 2012.

3. As this book went to press, LM Wind Power's spokesman, Lene Kristiansen, told us that it had "around 500 people employed in Little Rock currently."

4. See Luke Jones, "Hewlett-Packard Bringing New Jobs to Conway," *Arkansas Business,* January 13, 2014.

5. Jeannie Oliver, "TrinityRail delivers up to 350 jobs to Jonesboro," justgoodnews.biz, June 17, 2014.

6. See Brian Fanney, "State's Incentive Program Built on Promise," *Arkansas Democrat-Gazette*, January 17, 2016.

7. See Scott Sines, "Osceola Waits for Better Times," November 29, 2015, greenrocketnews.com, which describes the Beckman Volmer bankruptcy in Osceola as a function of the failure of Nordex and LM Windpower, the artificially-supported energy businesses described above.

8. Jacob Bundrick, *Tax Breaks and Subsidies: Challenging the Arkansas Status Quo*, Arkansas Center for Research in Economics.

Arkansas Should Reverse Course on Obamacare Exchange by Marc Kilmer

Under the Affordable Care Act, Arkansas was required to establish a state health insurance exchange or to permit the federal government to do so: each exchange accepts and processes citizen enrollment in health insurance plans. Two-thirds of the states have declined to establish state exchanges, thus leaving exchange creation to the federal government. Given that only 13 states have decided to operate their own health care exchanges, it is a bit of a mystery why the General Assembly ever decided to approve a state exchange for Arkansas. Act 15 of 2013 set the state on a path of setting up its exchange. The state currently operates the small business marketplace while the federal government operates the individual insurance marketplace. The state will eventually take over operation of the individual marketplace.

There is no compelling reason for the state to operate an exchange, and there are many downsides. Arkansans would be in a much better position if the state simply abandoned work in its exchange and continued to let the federal government enroll individuals in health insurance policies through its federal website.

The federal government will control either a state or a federal exchange. The ACA empowers the federal Secretary of Health and Human Services to impose "such ... requirements as the secretary determines appropriate" upon state exchanges;[1] the Act specifies that states "may not establish rules that conflict with or prevent the application of regulations

promulgated by the Secretary";[2] the Act grants the Secretary ultimate authority to reject or approve a state exchange. In other words, there is no real state control over a state exchange.[3] Furthermore, the notion that our state cannot control the performance of Arkansas insurance providers under a federal exchange is entirely groundless: Arkansas policymakers can always resort to the lever of determining whether insurance providers are in good standing and should retain their license to do business inside our borders.

Prior to the June 2015 Supreme Court decision in King v. Burwell, there was a question of whether insurance subsidies authorized by the Affordable Care Act could be used in a federal exchange or if they were only legally permitted in a state exchange. The Supreme Court ruled that, regardless of the text of the Affordable Care Act, subsidies could indeed be offered in the federal exchange. With that question being settled, it is difficult to see what the state gains by establishing an exchange.

While the gains may be scant, there are many downsides to Arkansas operating its own exchange:

- It will impose new taxes on health insurance purchases;
- State taxpayers will likely be burdened with new spending to support it;
- Operating a state exchange will likely be as problematic in Arkansas as it has been in other states.

If the state moves to a state exchange, many more Arkansans will find their insurance policies subject to a new fee or tax. This change is described in the grant proposal submitted by AHIM in October 2014:

> *AHIM has decided to recommend an initial assessment or user fee of 3 percent to be applied against all Qualified Health Plans (QHPs) sold in the Marketplace in Plan Year 2016. Subject to [Centers for Medicare and Medicaid Services] approval, this fee would replace the*

> *current 3.5 percent assessment being charged by the federal government on all Arkansas QHP premiums, except Private Option premiums.*[4]

In plain English, the state would charge a fee on every plan sold through the insurance exchange, including private-option plans. That would be a massive expansion of the fee's reach. The grant proposal estimates that 280,000 plans would be subject to this state fee by 2019. Currently, the only plans subject to the federal fee are those of 63,357 Arkansans who purchased health insurance through the federal exchange.[5]

AHIM estimates that in 2019 the new fee would raise $41.3 million from state policyholders. According to AHIM, in 2015 the average premium was $4,680. If 63,357 Arkansans paid the 3.5 percent federal fee on these premiums, that would produce revenue of $10.8 million. Even though current enrollees would face a lower fee, the higher number of enrollees subject to the fee through a state exchange would increase the revenue extracted from Arkansans by 282 percent. Because Obamacare makes the purchase of health insurance compulsory, it is reasonable to view this revenue hike as a tax increase.

A state-run exchange would blow a hole in Arkansas's state budget; a federal exchange, in contrast requires the federal government to pick up the tab. As analyst Elizabeth Stelle has noted, "Creating a state exchange – or even a hybrid exchange – would be costly. Annual operating budgets for state exchanges, according to The Washington Post, are $28 to $32 million, not including start-up costs which the federal government may not provide."[6] Some states spent well over $100 million to set up their exchanges. Maryland, for instance, spent $170 million, but had to scrap its exchange because it failed to work.[7] While AHIM is being designed not to require an infusion of money from state taxpayers, ultimately it is these taxpayers who are responsible if AHIM's fiscal plans do not work out as intended.

To avoid a transfusion of general fund tax dollars, many states are trying to address their financial difficulties by imposing fees on the insurance plans sold through them. Of course, these fees are passed on to consumers, raising the cost of the supposedly "affordable" policies (and thus raising subsidy amounts). These states include Kentucky, Colorado, and Maryland, along with the District of Columbia. In fact, a majority of the state exchanges charge a percentage fee based on the plan's cost. Other states are looking at imposing such a fee to help recoup costs.[8]

Proponents of a state exchange in Arkansas have argued that a federal exchange is undesirable because of the fees that exchange could impose. Given the prevalence of this practice in the financing of state exchanges, this argument is difficult to take seriously. Some states, such as Kentucky, even apply the fee to policies sold outside the exchange. As noted above, AHIM proposes a massive tax increase on Arkansans purchasing insurance through the state exchange.

Budget problems are already becoming apparent with AHIM. In June 2015, AHIM told the federal government that it would receive $18 million in return for assisting in the management of Arkansas's Medicaid expansion. A year later, however, lawmakers have expressed concern that state government is now paying several million dollars to keep what was supposed to be a self-supporting program afloat.[9] The exchange's shifting budget numbers do not bode well for the taxpayers who will ultimately be on the hook for the operation of the exchange.

There is no guarantee that a state exchange will work well. Across the nation, there are widespread problems with state-run exchanges. In fact, Hawaii, Nevada, Oregon, and New Mexico have switched from a state exchange to a federal exchange.[10] Minnesota and Vermont are considering doing the same. Massachusetts has had to completely redo its state exchange. Other states are having serious difficulty achieving

the necessary funding to pay for exchanges that are more expensive and that enroll fewer individuals than anticipated. Maryland, which had to scrap its state exchange and start over after a catastrophic launch, may request a taxpayer bailout.

In 2015, the General Accounting Office released a draft report looking at state exchanges. According to one account, it found problems in many states:

> *Of the 14 state-based marketplaces, for example, only eight were "fully operational" and operating without service interruptions" as of February 2015. The other six were categorized as partially operational, meaning that although there was some functionality they "did not work as intended and may have required manual processes to supplement automated functionality" – workarounds such as using paper copies or human data entry.*[11]

A state exchange will load political accountability onto state officials for federal Obamacare problems. A state exchange will divert blame onto state officials for rules they did not write and cannot change. The implementation of the Affordable Care Act is certainly the biggest domestic policy failure of the federal government in the last half-century. As the Act continues to deliver sub-par performance, it is reasonable to predict attacks launched through town meetings and television commercials that blame state officials for problems they didn't cause, but exchanges did. The train wrecks caused by Obamacare aren't over – and as a political matter, it is quite mysterious to see lawmakers continue to build new train tracks.

In light of these problems, Congress is increasingly likely to change the rules in the future in response to the concerns of the states and their exchanges. Because of the widespread failure of state exchanges and the trend towards federal exchanges, the problems that states will face in the future will almost certainly be easier to address through a federal exchange. The argument that state exchanges have advantages in innovation is

a snare: the reform designs that Congress adopts in the future appear increasingly likely to focus on federal exchanges, and thus the possibility of a unique state-exchange design could create more bugs than features. For instance, Congress is likely to move away from Obamacare's one-size-fits-all rules and make changes permitting consumers to buy insurance through existing private channels, such as eHealthInsurance.com. As long as the federal government makes Obamacare rules, the flexibility that state-exchange boosters brag about might create unintended consequences that could place state-exchange states at a significant disadvantage relative to federal-exchange states.

One additional reason to oppose the establishment of a state exchange should be of some interest to legislators who consider themselves conservative. The two chief goals of Obamacare implementation at the state level are Medicaid expansion and the establishment of a state exchange. Given the passage of the "private option," any conservative legislator who wants to oppose Obamacare should view the state exchange with some skepticism. The new state exchange – which is, quite literally, the establishment of a new Obamacare bureaucracy – is anything but mandatory, and the claim that a state exchange is not an implementation of Obamacare appears difficult or impossible to defend. The Arkansas General Assembly should act immediately to repeal any vestige of the existing state exchange, and therefore obligate the federal government to create an exchange – thus saving state taxpayers from the burden of an eight- or nine-figure line-item in the state budget.

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1. 42 USC § 18041(a)(1)(D)
2. 42 USC § 18031(k)
3. 42 USC § 18041(c)
4. "Arkansas Health Insurance Marketplace Level Two Establishment Grant Project Narrative," AHIM, October 15, 2014, p. 48.
5. "March 31, 2016 Effectuated Enrollment Snapshot," CMS, June 30,

2016.

6. Elizabeth Stelle, "State Health Care Exchange: A Disastrous Contingency Plan," Commonwealth Foundation, May 8, 2015.

7. Aaron Davis and Mary Pat Flaherty, "Maryland Officials Were Warned for Year of Problems with Online Health Insurance Site," *Washington Post,* January 11, 2014.

8. Colleen McGuire, "How Much Are You Paying In State Health Exchange Fees?", Healthcare.com, May 15.

9. Davis, Andy, "Health Hub Slashes What It Will Cost State," *Arkansas Democrat-Gazette*, September 17, 2016.

10. Lauren Gill, "What Hawaii Can Learn From Nevada's Switch To The Federal Health Insurance Exchange Healthcare.gov," *Pacific Business News,* June 9, 2015.

11. Peter Suderman, "Government Watchdog: Billions in Funding for Obamacare's Exchanges Not Tracked Well, Many Functions Remain Incomplete," reason.com, July 20,2015.

Ending Overpriced Government Contracts

When contractors bid on public construction projects in Arkansas over $75,000.00 (not including highways and school projects), state law requires that all workers on that job receive a rate consistent with the 'prevailing wage scale.' The state Department of Labor determines the 'prevailing' wage by surveying contractors on an annual basis; it then publishes a scale of wages based on profession and location. Contractors must, by law, pay their employees the state-published prevailing wage on these public construction projects. The prevailing wage system artificially inflates wages on public construction projects; this limits competition among private contractors, loads higher taxes on citizens, and offers no economic benefit to Arkansas.

Because the 'prevailing wage' is typically far above the market price, it limits competitiveness in bidding. The cramped market for these requirements can therefore discourage contractors from producing a project bid. Because contractors must pay artificially high rates for labor, jobs are less profitable. This dampens competition overall, and contractors can therefore only compete by hiring fewer workers or reducing the quality of the construction that taxpayers get for their money. Because of these artificially high labor costs, contractors are forced to pay higher wages on public projects, and taxpayers ultimately must pay higher prices than private industry would pay for the same construction. This scheme, in its consequences, is not essentially different from any other statutory requirement that forces government to overpay for a service.

Arkansas legislators could provide their constituents with better value for their money by repealing our prevailing wage law. Without that law, competitive bidding among contractors would let Arkansans receive the best service for the lowest price – thus normalizing supply and demand in the construction market. Contract workers on such projects would receive a wage that is equivalent to the market rate, the same rate that other construction workers are paid, in the same fashion that nearly all private-sector employees are paid.

Supporters of Arkansas's prevailing wage law claim that repealing it will only lead to lower wages for workers, which will allegedly dampen economic growth. Although wages might fall for some workers upon repeal, it's worth noting that these same workers are paid the market rate on non-government jobs; furthermore, it is not uncommon for a contractor to pay above the prevailing wage rate. This law wastes taxpayer dollars in administering and enforcing wage rates that discourage competition and provide the public with artificially expensive public construction.

The claim that the prevailing wage law helps the economy is also incorrect. All wages paid to workers for public projects are tax dollars, which are taken out of the private-sector economy. Taking money from citizens through taxes is sometimes necessary, but this always comes at the cost of economic activity. Taking more money from the public in the form of taxes in order to pay artificially higher wages to a particular group of workers is not only unfair to taxpayers who worked to earn that money, but is also economically neutral at best.

Another common objection to the prevailing wage law is that it acts as a kind of minimum wage for public projects which contractors must pay. However, this is factually untrue, because the data used by the Department of Labor to determine its scale is based on actual market wages – not a legislated minimum wage. Even assuming what is not true – namely, that

the prevailing wage law functions as a minimum wage – it is highly unclear why a price floor in this context would have any beneficial effects.

Some opponents of repealing the prevailing wage law claim that higher wage rates exist to ensure higher quality work. However, the law's structure does not lead to this result. Under the prevailing wage law, contractors must competitively bid while accounting for the prevailing wage; a higher price could only bring about higher quality if firms were not competing with each other to offer the best price but instead to offer the best quality. In fact, by requiring that firms pay the prevailing wage, the only other way firms can compete is by sacrificing quality at some level. Ultimately, all projects are inspected to meet quality standards; quality is just another vector, like price, on which construction firms compete.

It is, of course, difficult to measure or quantify the quality of work performed. However, there is some evidence that demonstrates that eliminating the prevailing wage law increases quality. After Ohio suspended its prevailing wage law for school construction, state authorities attempted to determine whether the law's non-enforcement had forced down construction quality. A 2002 study by the Ohio Legislative Service Commission found that 91 percent of the school officials surveyed stated that there was no change in the quality of work done while open bidding was allowed: of the remaining 9 percent, only 3 percent said that quality had fallen, while 6 percent said it had improved.[1]

Because many workers on these higher-paying public projects work on privately-funded projects during other days, it is also reasonable to predict that workers on public projects will attempt to stretch the time they work on public projects in an effort to get paid a higher wage for a longer period of time. Laborers might benefit from inefficiency on prevailing wage projects since it would take them a longer time for completion, while taxpayers must wait to benefit from the project.

Those who believe that prevailing wage laws help the disadvantaged would do well to reflect on these laws' racist origins. America's first prevailing wage act was enacted at the federal level; it is popularly known as the Davis-Bacon Act. This act requires federal contractors to pay the wages and benefits found to be "prevailing for the corresponding classes of laborers and mechanics" employed. The Act's impetus was the construction of a New York hospital in 1927; the Alabama contractor who won the bid employed a large number of black workers. Rep. Robert Bacon, the New York congressman who co-sponsored the Act, was aggrieved that construction workers in his district had been underbid by Southern labor. In 1930, in the throes of the Great Depression, Bacon's bill found strong support in Congress, perhaps because its effects were more apparent on the privileged few whose income it would raise than on the great mass of people it impoverished. The congressional debate over the legislation contained disturbing racial overtones, such as legislative comments about the dangers of "cheap colored labor" forcing down the paychecks of white workers.[2] Perhaps in 2015, Arkansas has advanced enough to avoid playing politics with people's paychecks.

Though opponents of repealing the prevailing wage law will characterize repeal as an attempt to lower workers' wages, this is a mischaracterization; repealing the prevailing wage law will eliminate artificially high wages and allow market rates to prevail. **Keeping wages artificially high only costs taxpayers more money for artificially expensive public construction projects that take longer to complete, while discouraging competition among contractors; in other words, the law requires the government to expend resources enforcing and administering a law that hands the public an economic loss.** Legislators who want taxpayer funds for state contracts to be directed to their highest and best use should study House Bill 1151 of 2013, which reflects similar ideas in legislative form.

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1. Ohio Legislative Service Commission, "S.B. 102 Report: The Effects of

the Exemption of School Construction Projects from Ohio's Prevailing Wage Law," Staff Research Report #149 (2002).

2. David Bernstein, "The Davis-Bacon Act: Let's Bring Jim Crow to an End," Cato Institute Briefing Paper No. 17, January 18, 1993.

Strengthening Education Through the Power of Choice

The idea of "freedom of choice" is central to the American experiment. One of America's greatest public policy successes was popularly known as the "G.I. Bill"[1] – federal legislation that created cash payments to fund tuition for returning veterans of World War II. Arguably, the G.I. bill helped create the modern American college and university system; in the middle of the twentieth century, our nation's colleges and universities were viewed by many as encompassing the greatest higher education system in the world. The school choice movement was in some respects inspired by the success of the G.I. Bill; that movement was given an intellectual foundation by one of the greatest economists of the twentieth century, Milton Friedman.[2] Over the years, K-12 school choice has become a central policy goal of educational reformers; it's a policy that promises a better future for all students, no matter what their demographic or economic background. This chapter provides two proposals that spring from the extraordinary power of school choice.

Changing Charter School Funding to Encourage Excellence

A central goal of charter school reformers is to improve educational outcomes for all students, not just the students who

choose charter schools. That is: when families are given the ability to choose a school (rather than just being assigned to one), schools will either have to compete for students or run the risk of dollars leaving their district. Ideally, the healthy competition that educational choice creates would encourage all schools to improve and adapt in order to satisfy the educational demands of their students. Schools that do not improve will lose students and eventually be forced to close; schools that offer a superior education will grow and open additional campuses. This is a simple illustration of the potential of a free-market system in education. Unfortunately, the Arkansas charter school system is not structured to produce these results.

In fact, very few traditional public schools in Arkansas have made significant changes based on competitive pressures from charter schools. This is partially because local school districts face very little financial impact, on a per-pupil basis, when a student leaves for charter schools. Like most states, Arkansas derives education funding from local, state, and federal dollars, with roughly 86% coming from state or local funds.[3] The state sets a per-pupil adequacy dollar amount ("foundation funding," $6,267 for the 2012-2013 year), that each district is guaranteed to receive, whether the funding goes to a traditional or charter school.[4] The state requires each district to have a minimum millage rate on property; it then determines how much of the foundation funding each district is able to raise from these local property taxes. The state then makes up the difference, so as to provide the remainder of the foundation funding. Districts that tax at a rate higher than the minimum millage level are entitled to keep only those dollars gathered as a result of that higher millage; that is, the high-millage revenue is treated separately, as it is over and above the foundation funding threshold. An illustration of how the funding system works is found in the table at the top of the next page.

Average Student Funding in Arkansas, 2012-13

Local money generated from required millage and state aid to reach the adequacy amount, per-pupil ("foundation funding"):	$6,267
Local money generated from millage above required amount, per-pupil in traditional public schools:	$1,335
Total amount received by average traditional public school student from foundation and millage funding:	$7,602

Charter schools receive only the foundation funding, $6,267, and they receive it directly from the state.[5] When a student leaves a traditional public school, the school no longer receives the state money for that student, but it keeps all local dollars. While total funding drops, funding on a per-pupil basis is unaffected; therefore, there is little competitive effect on the school. Certainly, there are some fixed costs in education; traditional public schools do feel some pressure when students exit their schools. Nevertheless, per-pupil funding does not change when students leave the school district, and so school districts can absorb some losses without much effect on the bottom line.

The education funding described above only pertains to daily operating expenditures. Charter schools do not receive facilities money, which amounted to $432 per traditional public school student in 2012-13. This disparity makes it difficult for charter schools to open facilities of similar quality to local public schools. When all revenues are combined,[6] charter students received $8,034 per student from state and local sources, while traditional public schools received $9,794 per student (a difference of $1,760 per student) in the 2012-13 school year. Since the system puts charter schools at a competitive disadvantage and local school districts feel little market pressure when students leave, it is remarkable that charter schools are still able to provide equal or better student achievement.

Slight adjustments in the charter school funding law

would help charters to be more competitive in the education marketplace. Charter schools should receive a portion of the local dollars raised for daily operations; if they have operated for a reasonable period of time (say, five years) at a high-performing level, they should also receive some funds for building purposes. These adjustments will not only reward successful charter schools, but also encourage traditional public schools to improve. Arguably, such a system has the virtue of giving parents of charter school students proper incentives towards property taxes. Currently, parents of charter school students would likely see no benefit in increasing property taxes, because their child's school wouldn't see any return from it. If the above reform is established, parents of charter school students will at least get something in exchange for higher taxes.

For school choice to work, schools must compete for students. A healthy system of educational competition would constantly seek and discover ways to improve and innovate in order to retain and attract students. Though teachers are well-meaning and schools have the best of intentions, many fail to make needed changes for the betterment of students. Changing charter funding laws, so that our educational system is driven by effective incentives, will encourage schools to improve so that every student benefits.

Improving School Accountability

In an age of transparency in which citizens benefit from information sharing, we need accurate measurements of the quality and the effectiveness of the education offered in our public schools. School "report cards" should produce a rating system that is both fair and evenhanded, while also containing metrics valid enough to provide parents and other stakeholders with information that serves their needs and

inspires improvements to school performance.

In 2013, the Arkansas legislature passed Act 696, which requires the implementation of a state-wide A to F school grading system which evaluates Arkansas schools. This new system is based on assigning schools a letter grade (as opposed to numerical grades, as the previous system did). Act 696 was designed to give the public, education leaders, and other interested parties a fair measurement of school performance. Although it is not a yardstick of an individual student or teacher, it is supposed to determine how well a school's student population performs on standardized or benchmark tests, identify any achievement gaps (especially if they are sizable), and show whether schools are meeting student performance and graduation goals.

A 2014 study conducted by the Education Commission of the States found that parents identified Arkansas as one of six states with the best report-card systems for evaluating school performance. The six states were chosen based on the following factors: ease of reading, overall level of usefulness, and sufficient data provided by the system.[8] The authors of Act 696 had good intentions; however, Act 696 could be improved to provide a more equitable and realistic view of school performance for parents and policymakers.

Critics of Act 696 claim that it fails to account for marginalized groups – including at-risk, impoverished, or minority students with a history of lower test scores. In other words, even if a majority of its students perform well on statewide tests but certain student subgroups do not, a school can receive a lower overall grade. This could indicate that poverty is a significant factor in a student's performance, and that it can have a tremendous effect on a school's overall grade. Those opposing the current report-card system argue that a single letter grade is an inaccurate or oversimplified reflection of a school's overall performance, particularly in schools with a large number of students at a socioeconomic disadvantage. There

is also concern over other potential negative consequences, such as student attendance and teacher recruitment, for schools receiving D or F grades. These arguments suggest that the new grading system does little more than highlight the separation of wealthy and poor school districts, but fails to lead to any closure of achievement gaps.

If critics of the system are correct in stating that the current standards by which schools are graded fail to capture an accurate portrayal of a school's performance, then the problem lies in composition bias. This is "the correlation between the demographics of a school's student body and its performance levels" as an institution of education.[9]

Attempts to compensate for this bias have led many states to include complex processes like regression analysis or value-added modeling in their grading; these are often complicated and difficult methods to explain, but they can be effective statistical tools if sufficient data is collected. Further examination of the study performed by the Education Commission of the States suggests that measuring academic growth rather than absolute academic performance draws a truer reflection of school performance. This raises the question of what we are trying to accomplish when we give schools grades.

First and foremost, what is the long-term goal of our state's grading system? Is it simply to inform the public and parents? Or is it to spur competition, drive improvements in education quality, and better serve students of all demographics for college and career readiness? It will be difficult to tell whether we are reaching our goals until we have a clear idea what they are.

Lawmakers and education leaders should also be aware of unintended consequences, both positive and negative, of grading schools. This may include the increase of performance standards and/or garnering support for school-choice agendas

and further establishment of charter schools. School report cards may also affect teacher recruitment or public investment in failing schools.

Arguably, tracking the academic growth of a student population within a school, rather than the end performance levels of a reporting period, would better reflect student-teacher performance. This might provide parents with a more accurate depiction of their child's progress, especially in the areas of the state where a school's grade is more likely to be affected by demographic or socioeconomic constraints.

Important metrics for evaluating school performance on a student level are: 1) student achievement, 2) student academic growth, 3) achievement gap closure, 4) graduation rates, and 5) college and career readiness. If and when Arkansas should choose to improve upon the A to F Grading System to include more student-level metrics, policymakers should also consider the state's ability to account for the data and the portability of such data across all schools. Arkansas policymakers could look to other states such as Illinois, Arizona, or Ohio, who had nearly perfect scores for their school report-cards systems based on parent and researcher reviews.

Relatedly, the Every Student Succeeds Act (ESSA) will replace the No Child Left Behind Act when it goes into effect during the 2017-2018 school year. ESSA relieves schools of certain requirements of standardized testing while giving states more control to design any assessments they deem necessary and appropriate, including nationalized tests like the ACT or SAT. ESSA will also focus on evaluating assessments in terms of student growth rather than a single peek into a student's academic abilities, which helps to identify and close achievement gaps without penalizing disadvantaged students. It will be essential for the state to adhere to the regulations and policies of ESSA as it continues to operate the A to F grading procedures. Because the 2016-2017 school year is a transition year for the implementation of ESSA, lawmakers should

ensure that the Arkansas Accountability System (public-school grading) is aligned with the Vision for Excellence in Education as outlined by the State's Commissioner.

Appendix: Other Roads to Educational Choice

Education Savings Accounts. Education Savings Accounts (ESAs) allow parents control over the funds the state would have spent on their child's public school education, permitting them to use those funds for a variety of education services and products. ESAs can cover private school tuition and fees, online learning programs, private tutoring, community college costs, higher education expenses, and other approved customized learning services and materials.

Five states in the US now have an ESA program: Florida's, with nearly 6,000 students and 174 participating schools, is perhaps the most successful.

Vouchers. Seventeen states currently have school voucher programs that allow parents to use all or part of their children's public-school funding for private schools of their choice. The money that the school district would spend on each child is instead distributed to parents in the form of a voucher, which pays for partial or full tuition for (religious or non-religious) private school.

In 2015, the Arkansas legislature passed the state's first school-choice program, the Succeed Scholarship Program for Students with Disabilities, which was rolled out in September of 2016.

Tax Credit Scholarships. Tax-credit scholarships provide full or partial tax credits when both business and individual taxpayers donate to nonprofits that award private-

school scholarships. In some states, scholarship-giving nonprofits also provide innovation grants to public schools and/or transportation assistance to students choosing alternative public schools.

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1. More technically known as the Servicemen's Readjustment Act of 1944.

2. Indeed, Milton and Rose Friedman established the Friedman Foundation for Educational Choice "to promote universal school choice as the most effective and equitable way to improve the quality of K-12 education in America." See the discussion at the Foundation's website, "Mission and History," edchoice.org.

3. This figure is derived from the table on p. 4 of the University of Arkansas-Fayetteville's Office for Education Policy report of January 2014 (vol. 11, issue 1).

4. Funding figures come from the 2012-13 Annual Statistical Report, which is made available by the Arkansas Department of Education.

5. This amount was increased to $6,393 for all public school students for 2013-14.

6. In order to keep our explanation simple, we did not describe the non-guaranteed revenues that schools receive from state and local sources. When those revenues are added in, that produces the ultimate per-spending totals in this sentence.

7. The figure for average student funding also comes from the Office for Education Policy report, op. cit. This figure is based on the sum of all student funding (including federal funding), rather than the sum of only state and local sources.

8. Marga Mickulecky et al., *Rating States, Grading Schools* (2014), Education Commission of the States.

9. Id. at 4.

A Higher Education Plan for the 21st Century*

As we emerge from the longest and most severe recession since WWII, our higher-education system is more strained than ever. The Bush-Obama recession forced states to reduce funding for many universities while tuition rates rose and student debt soared. Aside from the new and changing financial environment in higher education, the classroom landscape is increasingly different. The population that we think of as 'traditional' college students (i.e., 18- to 22-year-old first-time college students who are studying for four-year degrees, attend school full-time, and live on campus) make up less than a quarter of all post-secondary enrollments. In fact, nearly 40% of undergraduates are attending classes part-time. Students are increasingly enrolling in distance learning (online) programs, and some experts expect the demand for two-year degrees to drastically increase as a prerequisite for employment in the coming years.[1] Furthermore, growing numbers of high school students are concurrently enrolled in college classes as well. At the same time, the value of a college degree, given quickly rising costs, appears relatively unstable as compared to previous years – and in this context, encouraging students to take on debt to acquire this credential may be irresponsible. In this new higher-education environment, Arkansas can take

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* Many of this chapter's recommendations are taken from Andrew Kelly's and Daniel Lautzenheiser's "Taking Charge: A State-Level Agenda for Higher Education Reform," American Enterprise Institute, July 2013.

several measures to ensure that our higher-education system will remain competitive.

Arkansas policymakers have made several commendable choices in recent years that improve higher education. Legislators changed the Academic Challenge Scholarship, funded by lottery monies, so as to decrease scholarship payments for first-year students and increase them for students who continue past their first year of college; they also made ACT scores of 19 or higher mandatory for recipients. The General Assembly also created ACTS (the Arkansas Course Transfer System), which facilitates transfer of course credit between public colleges and universities in Arkansas. Nonetheless, Arkansas's system of higher education can be materially improved with further modifications.

1. Policymakers should base a significant portion of an institution's funding on student outcomes. Universities who stand to directly benefit by evincing (for instance) high graduation rates, high employment rates for their graduates, and perhaps even impressive rates of graduate school acceptance will respond by designing and testing educational programs that help their students achieve these goals. Just as the charter school system operates in primary and secondary education, legislators need not design a classroom or set administrative policy for universities; rather, legislators should provide them an incentive to innovate by rewarding good performance – namely, by tying funding to the aforementioned desirable outcomes. Current higher-education policy focuses on getting students into college – via financial aid – but few, if any, state and federal policies focus on ensuring student success once they are in college. Policies that encourage both students and universities to perform well while they are in college, perhaps by structuring financial aid to reward students and universities for good academic performance, would align incentives in a more productive way. Additionally, policymakers should also change the way they evaluate the success of higher

education programs: by college graduation rates instead of college acceptance rates. As Governor Hutchinson has noted, the current funding formula for higher education is "outdated"[2] – that formula rewards schools for enrolling as many students as possible. A better policy would reward schools for measurable achievements, such as providing students with degrees, certifications, or even better test scores; Governor Hutchinson's recently announced reform plans include some of these measurable signs of achievement.

2. Qualifications for the Academic Challenge Scholarship should be improved as well. Currently, the only requirement to qualify for the Academic Challenge Scholarship is an ACT score of 19. An ACT score of 19 is, quite literally, below average; the average test-taker gets an ACT score of 20 nationally. Because there is a substantial correlation between test scores and college success, there is reason to believe that a requirement of 19 – which, in effect, says that below-average performance should be rewarded with a scholarship – is setting the bar too low. A scholarship program which encourages a student to go to college when he or she is unprepared for its challenges is doing that student no favors; some students who leave college without a degree, but with college debt, can legitimately blame state government for providing an incentive to make the wrong choice. Policymakers should consider increasing the ACT requirement, and imposing a grade-point requirement, in order to receive an Academic Challenge Scholarship.

3. Relatedly, Arkansas policymakers should think of public education as an investment instead of an expense. As an investment, we should evaluate higher education policies on whether they are cost-effective. More detailed data on higher education revenue and spending will allow legislators to evaluate university performance on different dimensions, which will further allow them to reward good performance and hold accountable those persons and programs

responsible for poor performance. Measuring the outcomes of higher education programs can also help make higher education cost, quality and return on investment more transparent. With more information about student learning outcomes, the data can empower consumers to make informed investment decisions. Although any system of measuring outcomes will have its deficiencies – for instance, one could conduct before-and-after testing of college students or compile data on the salaries they receive over time – there is ultimately no substitute for measurement.

4. Finally, aside from structuring policies that encourage good performance and making effort to measure improvements, legislators should ensure that state regulatory policies should not burden higher education innovation. Licensure boards should not limit new universities or charter universities from entering the market; instead, new and innovative institutions that might employ non-traditional education methods should be evaluated on outcomes. However, the fact of licensure as such should not allow colleges and universities to participate in such programs as ACTS and the scholarship lottery; those programs should be limited to colleges and universities that have received accreditation from organizations with relatively high academic standards, such as regional academic boards.

A competitive higher education system will ultimately benefit the Arkansas economy. An educated workforce is attractive to employers; quality schools will attract families. Economists at the American Enterprise Institute have estimated that "if half of those who drop out actually earned their degree, those new graduates would net $30 billion more in lifetime income and generate $5.3 billion in taxpayer revenue."[3] In short, taxpayers and government stand to gain from improvements in our higher education system.

A high-quality higher education system in Arkansas will benefit everyone in the state. An educated workforce will attract

employers to Arkansas; quality schools will simultaneously encourage families to stay. A competitive workforce can provide more tax revenue for the state without any need to raise taxes. However, the rising costs of education and the rising costs of many other government programs place higher education at risk. A strong higher education system should be a public policy priority, and the legislature should seek to restructure policies to give universities the freedom to innovate on methods for producing better students and reward them for doing so, while more precisely measuring the outcomes of higher education process and ensuring that state regulations aren't prohibiting innovation.

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1. Andrew Kelly and Daniel Lautzenheiser, "Taking Charge – A State-Level Agenda for Higher Education Reform," The American Enterprise Institute, July 2013.

2. Caleb Taylor, "Hutchinson Pairs Higher Ed Funding Increase With Reform," thearkansasproject.com, October 31, 2016.

3. Kelly and Lautzenheiser.

Restricting Arkansas's Budget Growth

Even in the recent era of weak economic growth, as our economy slowly recovered from one of the most punishing recessions in American history, the tax burden that Arkansas placed on citizens continued to grow. Despite increasing tax revenue, Arkansas ranks 13th highest out of 50 states when we measure and compare each state's top-bracket income tax rate.[1] The state ranks about average for state tax collection per person, at a little more than $600 per capita.[2] In short, the state is bringing in plenty of money; regrettably, the nature of Arkansas's Revenue Stabilization Act makes growth in state revenue fuel growth in state government.

A state government flush with taxpayer revenue will always find a way to spend it. A growing state budget both encourages interest groups to lobby the state legislature and makes it easier for politicians to spend more on their pet projects. Arkansas currently ranks in the 20 states with the lowest amount of state debt per capita, but increasing government revenue runs the risk of fueling the growth of government.[3] In order to go from an average or mediocre fiscal situation to being a competitive state that attracts business, protects citizens, and limits government, **the Arkansas legislature should institutionalize some limit to growth in government spending.**

Under a rule that would limit the *growth* of state government spending, when already existing government revenue streams (like taxes) grow faster than inflation and state

population, excess revenues could be refunded to taxpayers. This would both limit the growth of government and require our public officials to spend Arkansans' hard-earned dollars wisely. If the state legislature deems it necessary to raise state spending at a rate higher than the agreed-upon limit provides for, they can simply make their case to the Arkansas citizens who would vote in a referendum.

Similar proposals have been implemented in other states (most notably Colorado) and have become known as the "Taxpayer Bill of Rights" (TABOR). Under most TABOR laws, state and local governments are not permitted to increase tax rates without voter approval; if revenues from these taxes grow faster than inflation and population, government must either refund taxpayers their money or ask voters for approval to spend the 'surplus' funds.

TABOR-style restrictions on the growth of government spending do not, however, take into account all forms of government revenue – only tax revenue. For example, the law does not consider increases in revenue resulting from government enterprises, federal funds (about 1/3 of the current Arkansas budget), government employee pension fund contributions or earnings, or revenues from damage awards or property sales.

TABOR is a simple and transparent way to limit the size and scope of government in Arkansas that would usher in a host of economic benefits to the state. The law would create a stable investment environment for large businesses, since it limits government spending growth and requires a referendum for tax increases. Additionally, it would make the state legislature more accountable to citizens by requiring democratic accountability for bigger budgets and higher taxes. It allows citizens to vote on tax increases, encouraging them to remain knowledgeable about government spending priorities and speak out against those they oppose. The law also encourages transparency in government: because increases in spending require widespread public

support, the law effectively diminishes the power of lobbying and other interest-group activities by giving more power to the populace. In a similar vein, by putting tighter restrictions on taxing and spending increases, the law also serves to restrain the state debt load. Finally, the law would force government to evaluate and prioritize services – a commendable practice that is often forgotten when operating with a budget that is increasing faster than population and inflation growth.

While many citizens and legislators sympathize with the goal of controlling the growth of government, some worry that a measure like TABOR would lead to adverse consequences. Chief among these concerns is that, in the event of an emergency or disaster, when greater government expenses are required, government would be restrained from increasing spending under a TABOR approach. Such a situation would be rare, but can easily be incorporated into a TABOR-type law: it would simply need to allow temporary increases in spending growth when specific conditions that constitute an emergency are met.

Some critics complain that requiring the state government to refund all taxpayers every time there is a small surplus would be expensive. The administrative costs of issuing the refund might outweigh the benefits of the refund itself. This is a reasonable objection, but one that is easily avoided. The state could choose to retain all excess revenues until they meet some threshold that makes it cost-effective to issue a refund to taxpayers.

Finally, a common criticism is that TABOR and TABOR-like laws that restrict spending growth can 'ratchet-down' state spending during a recession. For example, during a recession, tax revenues typically fall as economic activity slows. The new (recession-level) amount of tax revenue becomes the baseline for state spending; after the recession, as tax revenues rise back to their pre-recession levels, TABOR might restrict state spending from immediately growing back to its pre-

recession level. This account of what would happen during a recession under TABOR is true, but not problematic for two reasons. First, this is not a 'permanent' ratchet-down on state spending; rather, it is a control on annual growth in state spending. Second, if the state government wants to return to spending at pre-recession levels immediately, it can simply call for a referendum.

In considering a constitutional limit on state spending growth, it is important to keep in mind that this proposal is not a limit on spending – it is a limit on spending *growth*. Taxpayer dollars allow government to provide many useful services, but politicians often find it easy to spend other citizens' money on projects that are less than effective at serving the public interest – especially if the spending is aimed at helping them win re-election. This proposal only seeks to keep spending growth under control. If enacted, this proposal would bring about a more accountable, transparent, and limited government while simultaneously protecting citizens and encouraging investment in Arkansas. Legislators who want to limit government growth should study House Bill 1041 of 2013, which reflects similar ideas in legislative form.

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1. See "State Individual Income Tax Rates, 2000-2014," Tax Foundation.

2. See "The Facts on Arkansas's Tax Climate," taxfoundation.org.

3. See generally Cory Eucalitto, "State Debt More Than $37,000 per Private Worker, $13,000 Per Capita," statebudgetsolutions.org, October 2, 2012.

The Right to Record Public Events

Representative Richard Womack sponsored Act 1063 in 2015; this measure, which protected the right to record public events, won landslide approval from the House and Senate. A small amendment that was slipped in at the last moment during the 2015 session made the bill less than ideal; the Arkansas Code needs one additional amendment to perfect the legislation in 2017.

The prevalence of new technologies has led to increasing questions about photographers' rights. Some public officials look askance at permitting citizens to photograph public property, accident scenes, or unusual situations where, for whatever reason, some people do not want their presence recorded. In Arkansas, law enforcement officials have prevented citizens from making photographic or video records of accident scenes and public meetings. This leaves citizens who want to exercise their constitutional rights in the uncomfortable position of having to initiate litigation just to maintain the civil liberties that, in theory, they already have.

In order to protect our citizens' already established constitutional rights, **the legislature should move to protect (and eliminate the ambiguities surrounding) every citizen's First Amendment rights to make audio or video recordings in public.** The ideal legislation would include two general components. First, the law should reaffirm, in unambiguous language, that in public places where someone is lawfully present, that there is a right to record anything in plain

view. Second, the law should create civil liability for governments which violate a citizen's right to record or photograph. This second portion is important to establish in the law, so that government officials may not claim that they were without notice that blocking a citizen's First Amendment right to record constitutes a violation of individual rights.

In other districts, courts have consistently upheld citizen's rights in cases related to photography, and the government has ultimately taken action to correct the issue. For example, the recent federal appellate ruling in *Glik v. Cunniffe* states that there is "a constitutionally protected right to videotape police carrying out their duties in public."[1] However, Simon Glik – who started filming police with his smart phone after hearing a bystander scream about improper police conduct – was unable to have these rights recognized until he undertook months of litigation. In order to deter this type of misbehavior on the government's behalf, the federal Department of Justice promulgated a set of photographer's rights guidelines, which were distributed broadly, but there are a mountain of anecdotes that suggest that numerous public officials are ignoring those guidelines.[2] Nonetheless, in *Buehler v. City of Austin,*[3] a federal magistrate judge identified "a robust consensus of circuit courts of appeals" – including the First, Seventh, Ninth, and Eleventh Circuit Courts of Appeals – that "the First Amendment encompasses a right to record public officials as they perform their official duties."[4]

However, while these are all steps in the right direction, we can best protect citizens' civil liberties by passing the legislation described above – in part because many local governments have continued to act as if the DOJ guidelines do not exist.

In late 2007, *Maumelle Monitor* newspaper photographer Bill Lawson was taking pictures of a chimney fire in central Arkansas. A state policeman on the scene, Trooper Tom Weindruch, became angered with Lawson and, handcuffing

him, arrested him for "obstructing government operations."[5] That officer later argued that the camera flash made him fear for his safety, causing him to arrest Lawson immediately. Outcomes like this are no surprise if it is acceptable for the government to face little or no consequences for abusing its authority. (In fact, the trooper who arrested Lawson for documenting the house fire was punished only by having to do office work instead of field work for a short time.[6]) It is hard for a reasonable person to conclude Lawson was at fault; presumably recognizing this, the case prosecutor asked the presiding judge to dismiss the matter in an effort to avoid future complications, which the judge did. The dismissal does not cure the central problem, however, which is that there is no real incentive for government to avoid trampling on its citizens' rights, and no real consequence when government does so.

A similarly disturbing event took place in 2011, when Sheriff Buck Foley of Fulton County pushed away two video cameras that were recording a Quorum Court meeting, so as to prevent citizens from recording images of the Quorum Court's deliberations.[7] This followed a 6-3 vote by Quorum Court members to ban video-recording devices from recording Fulton County Quorum Court meetings. These actions suggest a systemic ignorance of the fundamental First Amendment rights of American citizens to record public events.

Public policy that protects citizens' rights and encourages government not to intrude on lawful behavior is in the interest of all Arkansans. One unconvincing objection to more established photographers' rights is that strong photographers' rights will sacrifice security. Apparently, some fear that, if citizens are free to take unlimited and unregulated photos of public places and buildings, these images may somehow be used for nefarious purposes, such as the enabling of terrorist attacks. In fact, pictures of nearly all public landmarks, roads, and other areas are readily available on company websites, image search engines, and satellite image programs – all for free.

Another unconvincing objection to public liability for the denial of First Amendment rights is that state government should hold the line on any further incursions into sovereign immunity. This argument seems to imply that the government should never compensate those whom it harms, or perhaps that the government can do no wrong. In fact, when the government harms the citizens it is charged to protect, it is simple justice that it should compensate them. We have heard the argument that state government is behaving responsibly when it refuses to compensate the people it harms; in fact, this is an extremely dangerous idea and a ticket to limitless government power. Changes in the law of sovereign immunity are a way to regulate government misuse of power and protect those whom government is supposed to serve; when government harms citizens, making public officials responsible for the injuries they cause people by means of increased liability on the part of taxpayers is the only effective way to deter government from violating the people's rights.

In short, the Arkansas state legislature should take appropriate measures to stop unnecessary violations of our First Amendment rights to record public events. The public has a right to record what it can see, and the state legislature should ensure both that this right is protected and that law enforcement has an incentive to protect it. *All of this can easily be done by passing a law that makes the citizen's right to photograph clear and explicit, while giving us the right to hold the government accountable by providing a remedy for abuses of government power.*

Notably, under the leadership of Leslie Rutledge, the attorney general's office has typically avoided the embarrassing and wasteful spending of public monies that characterized the office under Dustin McDaniel. Nonetheless, farsighted policymakers should consider the reforms described below in order to forestall future abuses.

In the 2015 session, the General Assembly passed Act 1063, which protected the right to record public events. A

last-minute amendment to the bill made it impossible to hold government responsible for interfering with the right to record, unless it could be shown that the government body that acted badly had an official policy of doing so. The Advance Arkansas Institute has an amendment on file that can be used to correct this slight drafting error, and we are happy to make it available to those legislators who wish to perfect this legislation and perfect First Amendment rights.

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1. 655 F. 3d 78 (1st Cir. 2011), at 82.

2. The website photographyisnotacrime.com regularly features news stories and video clips which demonstrate public officials acting on fundamental misunderstandings of First Amendment liberties.

3. Case 1:13-cv-01100-ML (W.D. Texas), Dkt. No. 54.

4. The *Buehler* decision identified appellate cases in multiple circuits as supporting this right. In addition to *Glik* (1st Circuit), it pointed to *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595, 608 (7th Cir. 2012) (stating that making a recording "is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording" and finding that plaintiffs were likely to prevail on their claim that state eavesdropping statute interfered with right to record police officers "engaged in their official duties in public places"); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (finding, in case involving citizens videotaping police, that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing, in case involving citizen filming police officers, a "First Amendment right to film matters of public interest").

5. "Arkansas Trooper Disciplined Following Journalist's Arrest," Associated Press, December 17, 2007.

6. When this 2007 incident was discussed at a 2014 State Agencies Committee meeting, one legislator pointed out that Weindruch was fired several years later for other reasons. The relevance of this point is unclear. See John Lyon, "Lawmakers Hear Arguments For Expanding FOI Law," *Southwest Times-Record*, June 19, 2014.

7. Kenneth Heard, "JP's Ban on Video Sparks Debate," *Arkansas Democrat-*

Gazette, August 14, 2011.

8. See, e.g., "Fort Smith Man Sues Sheriff, Deputy," *Arkansas Democrat-Gazette,* April 16, 2013. There is some discrepancy about what motivated Purcell's arrest: Deputy Michael Grosskreuz stated that Corporal Brian Fuller had advised Grosskreuz that Purcell was under arrest for videorecording a police raid, but Fuller testified that he had never made such a statement. About a year and a half later, after prosecutors declined to pursue any criminal charges against Purcell and after Purcell's phone was mysteriously lost while in the possession of sheriff's deputies, Purcell accepted a settlement offer of roughly $90,000. This figure includes damages, attorney fees, and costs. Jeff Arnold, "iPhone Photo Leads To Settlement Against Sheriff's Deputy," *Southwest Times-Record,* September 7, 2014.

9. See the recent poll at the website of brickhousesecurity.com, which establishes that 72% of those polled believe that police ought to be required to wear cameras.

10. When police in Rialto, California, were required to wear body-mounted cameras, the use of force by officers shrunk by 60% and citizen complaints against police shrunk by 80%. Christopher Mims, "What Happens When Police Officers Wear Body Cameras," online.wsj.com, August 18, 2014.

11. See *Hussein v. County of St. Louis* (E.D. Mo. Aug. 15, 2014) (4:14-cv-01410-JAR).

The Right to Know When Government Is Discriminating By Race

The constitutionality of various forms of affirmative action continues to be litigated; future Supreme Court decisions related to affirmative action will continue to be a fact of life. These constitutional battles are expensive, time-consuming, and often embarrassing for the states with universities that have been found out of compliance with judicial guidelines for affirmative action in higher education. Currently, our public colleges, universities, and schools of graduate education are not required to disclose the methods or metrics they use to give special consideration to various demographic groups during the admissions process. This lack of transparency can easily prove problematic, since educational administrators are essentially unaccountable for the civil rights decisions they make, even though they use resources funded by taxpayers. In order to ensure that institutions of higher education are fully compliant with the current guidelines for affirmative action, the Arkansas General Assembly should require public universities to disclose the methods they use in affirmative action policies.

To protect applicants' civil rights and hold universities accountable, policymakers should require disclosure of the ways in which admissions decisions rely on race, color, ethnicity, national origin, gender, legacy status, regional location, religion, sexual orientation, or socioeconomic status – along with the traditional admissions criteria that universities use, such as grades, class rank in high school, standardized test scores, state residency, and other quantifiable criteria.

The disclosure policy should also require universities

to report how demographic group membership is determined, how it is used to meet targets, goals, or quotas, and how group membership is weighted; specifically, universities should disclose any formula they use for determining what is called the "critical mass" level and its relationship to the particular institution's educational mission. Given this information, social scientists and public administrators will be able to perform statistical analyses to determine whether state universities are complying with federal law or whether they are violating applicants' civil rights. Such statistical analyses might also provide insight into how well affirmative action is working.

The Supreme Court recently emphasized that admissions programs that consider race must meet the highest standard of scrutiny, because race-based decisions are suspect under the Equal Protection Clause. In the Texas-based case that resulted in the Supreme Court's most recent opinion, *Fisher v. University of Texas at Austin*,[1] the Court found that the good-faith intentions of affirmative-action architects do not meet the standards of strict scrutiny and are insufficient to make such programs constitutional. Lower courts are currently working to apply the *Fisher* ruling to other cases, and increased litigation over (and increased judicial examination of) affirmative-action schemes appears to be a long-term fact of America's jurisprudential landscape. In *Fisher,* the Court sent the case back to the district court to determine whether less intrusive methods than racial preferences could be employed in the school's admissions programs, and the *Fisher* district court's latest decision will doubtless be the subject of appellate litigation. Every public school must now meet *Fisher's* standard. The constitutional ambiguity of various affirmative action plans could be significantly reduced if public schools were required to document and disclose the framework of their affirmative action plans. Thus, the proposal suggested here would take admissions decisions out of the shadows and lead to better compliance with Supreme Court precedent.

The results of such disclosure are important not only

because Arkansas taxpayers are entitled to know whether and how their publicly funded institutions are complying with federal civil rights law, but also because potential students should be able to use this information before making an enrollment decision. All applicants should have the right to see how their application will be scrutinized, so that before making an investment of time and money, the potential applicant would have a better picture of his or her chances of succeeding at a particular institution of higher education. Ultimately, applicants deserve the right to calculate the risks of their decisions with the full use of public information.

This policy would not place a large burden on institutions of higher education, since they already have this information on file; furthermore, these institutions already voluntarily disclose their admissions statistics based on more traditional factors not related to affirmative action, such as test scores, grades, class rank, and so forth.

Disclosing this additional information about admissions processes would not require names, or other individual identifiers, to be attached to the statistics. Determining whether universities are complying with federal law, and revealing how public universities make admissions decisions with respect to protected classes, does not require that the data be associated or linked to individual students. Thus, all of the proposals described in this chapter are completely compatible with both Freedom of Information Act requirements and privacy concerns.

It is worth emphasizing that support for this policy should not be confused with support for or opposition to affirmative action, nor with support for or opposition to arguments about the need for diversity in higher education. Rather, the sole purpose of this policy is to promote transparency in government, which will allow citizens and policymakers to hold public universities accountable for their actions; specifically, the measure would ensure that universities are not violating applicants' civil rights by using admissions practices that are incompatible with federal guidelines. Arkansas

citizens and their representatives are entitled to hold higher-education administrators accountable for affirmative-action policy choices. This policy simply requires universities to be honest about the methods they use in the admissions process; it does not require them to justify their philosophy about the ideal student-body composition.

In short, the Arkansas General Assembly ought to require public universities to report whether they grant admission preferences based on race, ethnicity, and other demographic characteristics – and, if so, how the use of those preferences meets the requirements set out by the Supreme Court. Universities and other institutions of higher education are public institutions that are accountable to the legislature and the people. **This policy would protect applicants' civil rights, provide taxpayers with a more transparent government, and help the legislature hold universities accountable – both to protect our state's reputation and shield us from litigation.** Reformers who are sympathetic to this approach should study House Bill 1944 of 2015, which reflects similar ideas in legislative form.

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1. 136 S. Ct. 2198 (2016), *and on prior appeal,* 133 S. Ct. 2411 (2013).

The Right to Have Attorney General Settlements Benefit the Public

One role of the attorney general is to represent the public in class action lawsuits; in such lawsuits, the attorney general's office often arrives at a settlement with the defendant. The settlements entrusted to the attorney general's office are considered to be compensation for the injuries that were caused; these settlements often are based on damages to large numbers of people and often constitute sizeable amounts of money.

Because the attorney general's office has been entrusted with public funds, the office is supposed to use those funds to benefit the entire state (this is known as the "public purpose" doctrine); under the administration of Dustin McDaniel, however, the attorney general's office misused its powers. As a general matter, the attorney general's office should spend settlement funds in a way that compensates citizens, protects them from future similar damages, and prevents similar problems from occurring. Unfortunately, in recent years the attorney general's office has not adhered to these guidelines. It has produced "public service announcements" that seemed aimed at promoting the attorney general himself; these taxpayer-funded commercials conveniently served to give the attorney general plenty of face time on television. Settlement funds were also used to support charities and charitable events that are not only unrelated to the lawsuit from which the settlement funds were acquired, but also are organizations which might support the attorney general's future political prospects.

Furthermore, this abuse of settlement funds illuminates

a larger problem: the attorney general office's use of public monies threatens to assume spending powers that are specifically delegated to the legislature. Using public monies to promote one candidate over another in an election is unethical, and donating public monies to private charities is directly contrary to the principles of our state constitution.[1] To prevent such abuses of power in the future, ease budget tensions, and ensure that public monies are being used in the most productive and ethical manner possible, the Arkansas legislature should apply additional legislative oversight to the use and disposition of the class action settlement funds entrusted to the attorney general.

Currently, the office of the Arkansas attorney general may spend funds obtained by a class action settlement in the following manner: as designated by the court order or settlement agreement; designation of cash funds to a state agency having a nexus to the underlying litigation; payment of attorney's fees to the state treasury; or payment into the "Consumer Education and Enforcement" account. These guidelines, which the attorney general adopted internally in October of 2011, are vague, easily blurred, and do not necessarily require the legislature's participation. It appears that the state legislature attempted to formalize similar guidelines in Act 763 of 2013, but the weak structure of that Act provides nothing in the way of monitoring adherence to the guidelines (or creating consequences in the event of misfeasance) that would ensure that the law is followed.

Appropriate use of taxpayer money from class action settlements requires legislative oversight. The legislature could oversee the spending of class action settlement funds in two ways. *First, the legislature could require the Attorney General's office to prepare a detailed proposal of how such funds will be distributed, with such spending ultimately controlled by legislative authorization. Alternatively, the state legislature could create a special committee, with its determinations also ultimately controlled by legislative authorization, that determines how such monies will be spent.* In addition to legislators, such a committee should include members from the attorney general's office,

crime victims or other injured persons, and citizen experts.

Either of these solutions would create oversight and accountability for spending decisions by ensuring that the public's money would be directed to the public interest, not private interests.

In response to this proposal, McDaniel argued in the past that the distribution of settlement funds is often specified in court orders. This is fair enough. To address this problem, *state law should require the attorney general, when practicable, to suggest in its court briefing that settlement funds should be entrusted to the state treasury, perhaps with an earmark added that such funds could only be spent on specified purposes or transferred to specified public agencies.* Typically, judges decide how settlement funds should be used only after the attorney general's office supplies a proposed court order – and judges often adopt the attorney general's recommendation word for word.

Most importantly, the legislature should require legislative authorization before permitting the expenditure of the public's money from settlement agreements. Legislative oversight of spending from class action settlement funds would ensure that these funds receive the same degree of scrutiny that the expenditure of other public money regularly receives, and it would prevent future attorneys general from returning to the bad old days of spending public money without checks or balances.

In 2013, the Arkansas General Assembly passed Act 763, which appears to be an attempt to address these problems. Although the disclosure portions of Act 763 are commendable, the Act does not address the underlying structural problems that allow the attorney general to disburse public money without legislative oversight. Indeed, the act formalizes a slush fund that the attorney general can draw on: the only practical limit to the "consumer education and enforcement account" is that it can contain no more than $1 million at a time. It is not much of an

exaggeration to note that this gives the office of the attorney general a million-dollar debit card with a regularly replenishing balance.

Even after the passage of Act 763, the office of the attorney general continued to waste public money on unauthorized self-publicizing projects: for instance, two years ago, our journalism website (*The Arkansas Project*) revealed that UALR's Bowen Law School spent the settlement money it received in 2014 from the attorney general's office – $100,000 – on a "fitness center" with seven exercise machines that is essentially unusable by more than two people per hour.[2] (More precisely, it is unusable by more than two people per hour if the users wish to take a post-workout shower, since the shower facilities – which are located six floors below the law school's new gym -– drain at a pathetically low rate; this problem was apparently unanticipated by law school administrators, who spent the bulk of the settlement money on seven different high-dollar recumbent stationary bicycles, treadmills, and elliptical machines as well as the remodeling required to house them. Such pedestrian matters as shower drainage remained unaddressed.[3]) Notably, the $100,000 going to Bowen was designated for "legal education and training." Despite the fact that the attorney general's office designated these funds for education and training in its quarterly disbursement report, and despite the fact that the state legislature approved the funds for educational and training purposes, the fact that the money was spent on a fitness center – marked with a plaque lauding McDaniel's support – suggests a significant failure of oversight and a misuse of public funds.

Legislators who believe in Arkansas's system of constitutional self-government should reassert their legislative role by requiring that all settlement money, whenever possible, must be transferred to the state's general fund. Furthermore, legislators should create a system of budgeting that forces all public monies that cannot go to the general fund to be placed in a government account that is susceptible to scrutiny by the

legislature through the normal authorization and appropriation budget process. More generally, the legislature should take back its proper role and regain its power of the purse. The proper role of the legislature is to authorize and spend public money: in this context, the role of the attorney general should be solely advisory. Legislators sympathetic to this approach might consult earlier drafts of House Bill 2083 of 2013 (which later became Act 763), before it was amended beyond recognition.

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1. "No principle of constitutional law is more fundamental or more firmly established than the rule that the State cannot, within the limits of due process, appropriate public funds to a private purpose." *Chandler v. Board of Trustees*, 236 Ark. 256 (1963), at 258.

2. Caleb Taylor, "The Dustin McDaniel Sweat-and-Sour Experience," thearkansasproject.com, August 19, 2014.

3. The Bowen Law School apparently attempted to address this problem in September of 2014 by announcing on its website that it has "no showers" and advising patrons of the fitness center to bring "sweat towels" with them. A fitness center that lacks post-workout facilities for its patrons to clean themselves is, arguably, missing something. See, e.g., Esther Crain, "Do You REALLY Need to Shower Post-Workout?", womenshealthmag.com, February 10, 2014 (discusses concomitant odor, rashes, bacteria, acne, funguses, and staph and yeast infections). UALR student-athletes are required to shower after working out before any use of school computers. *UALR Student-Athlete Handbook 2011-12,* at 12.

The Right to Prescription-Drug Privacy

In 2011, the Arkansas General Assembly established a Prescription Drug Monitoring Program – a massive new government database in which every Arkansas citizen's drug prescriptions can be monitored by government officials. Advocates of the enabling legislation, Act 304 of 2011, attempted to justify the creation of this new government program by arguing that illegal trade in and use of drugs justified the routine and systemic invasions of privacy that the database would create.

It is likely, however, that Governor Beebe's interest in further regulating Arkansas's Medicaid system also played a role: the Beebe Administration's interest in shifting the Arkansas Medicaid program from a fee-for-service model to a managed/episodic-care model may have been a factor in the Administration's full support for Act 304.

In any event, any advocate of patient privacy should agree that the dangers of this database are simply not worth its supposed benefits: even those who favor Medicaid reform and expanding the government monitoring of the use of prescription drugs should concede that administering a database of every drug prescription that is filled by every Arkansan – which necessarily includes the date, the quantity, the refill data, the patient demographic data, and the source of the payment for the prescription – poses huge threats to every citizen's privacy. Access to the database is not confined to law enforcement; other government regulatory bodies, such as the Department

of Health, may consult the database as well.

As a general matter, citizens should be wary of any government database that mandatorily keeps records of private data about them. Given the unique circumstances of this database, which creates dangers to privacy that are large and supposed benefits that are speculative and weak, **the Arkansas General Assembly should eliminate the funding and the legal structure of the Prescription Drug Monitoring Program, and take measures to destroy all the data that this database has currently accumulated.**

To repeat: although the establishment of prescription drug databases is typically driven by the need to identify people who acquire excess prescriptions for painkillers and tranquilizers, this really cannot justify the exhaustive requirements of Arkansas's prescription drug database: namely, it monitors every single prescription medication taken by every citizen of Arkansas.

This is a classic case of big government run amok. Missouri, our neighbor to the north, has no such prescription drug database;[1] Arkansas should consider following Missouri's lead. Such data accumulation creates tremendous privacy concerns: for instance, in 2009, computer hackers stole the records of roughly 8,000,000 patients from Virginia's prescription database. They then threatened to sell them on the black market unless a ransom of $10 million was paid.[2] This suggests that, as a general matter, policymakers who sacrifice the privacy of millions of citizens in order to deter a much smaller number of prescription drug abusers are likely making the wrong choice – a choice that is prejudicial to the interests of millions of hard-working, innocent citizens who are entitled to medical privacy.

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1. Elizabeth Nolan Brown, "Missouri Is the Only State Not Tracking People's Prescriptions," reason.com, July 21, 2014.

2. Brian Krebs, "Hackers Break Into Virginia Health Professions Database, Demand Ransom," washingtonpost.com, May 4, 2009.

The Right to Your Property: Forfeiture Reform

When government officials seize your property because they suspect it has been used in a crime, you enter the complex world of civil forfeiture. Our government must always retain possession of the tools it needs to fight crime, but it must also respect the rights of its citizens to own property lawfully. Current civil forfeiture laws do not require the level of transparency and accountability we deserve from government. In fact, our current civil forfeiture laws seem to encourage abusive police behavior.

Take, for instance, the case of Guillermo Espinoza.[1] On July 17, 2013, Espinoza was driving through Hot Spring County on his way to Texas. A state trooper (Sgt. Dennis Overton) pulled Espinoza over, searched his car, and discovered that he was carrying $19,894.00 in a computer bag, which Overton seized. Overton found no contraband, drug paraphernalia, or sign of illegal activity.

Espinoza had no criminal record; he was not charged (and was never charged) with any criminal offense. He said that the money came from construction work, and in court he presented checks, receipts, and tax forms to substantiate his income. According to Espinoza, he had previously taken the money to Memphis to buy a truck there, but since he was not satisfied with the vehicle that was offered for sale, he declined to make the purchase and was driving back to his home in Texas. He attempted to explain this to Overton during the stop, but Overton replied: "I've worked this interstate for the last eight

years … Half of my career I've spent out here. OK? Nobody – nobody – carries their money like that but one person. OK? People that deal with drugs, and deliver drugs. That's it. Nobody else. Nobody." In other words, Overton viewed carrying cash *as such* as evidence of illegal activity.

Apparently, however, the local prosecutor disagreed: nine months later, the Hot Spring County prosecutor's office asked the court to drop the case, which would have the effect of refunding Espinoza's money. Presumably, the prosecutor made this decision because there was insufficient evidence to show that Espinoza had broken any law. However, the presiding judge, Circuit Court Judge Chris Williams, denied the motion; this was a highly unusual decision by the court, in that the party which brings an action (in this case, the prosecutor), as a general matter, has the absolute right to dismiss it before trial. Williams went on to find that the state had succeeded in proving its case, even though the prosecutor had declined to pursue it; when Espinoza's lawyer appealed, the appellate court determined that the lower court's decision could not be appealed – on the theory that, because forfeiture is a civil matter, Espinoza's lawyer had improperly relied on criminal procedure deadlines rather than civil procedure deadlines.

The legislature should ensure that Arkansas citizens do not suffer the same miscarriage of justice as Guillermo Espinoza. Today, Arkansans who own cars, houses, cash, or any kind of property are at risk of losing that property via civil forfeiture without being charged with a crime – much less convicted. Police officers need only suspect that a piece of property was used in a crime in order to seize it and begin a civil forfeiture proceeding. Because property seizure is a civil proceeding, not a criminal one, many of the typical rights and safeguards afforded to citizens accused of criminal conduct do not exist; in fact, an innocent citizen faced with forfeiture would have to spend money and time participating in the appropriate judicial process required to regain his or her own property even if the citizen was never criminally charged.

There is little or no incentive for police to be cautious in their use of forfeiture powers. In Arkansas, 100% of the proceeds of any property worth less than $250,000 that is seized and sold under civil forfeiture laws goes to law enforcement. Because law-enforcement bureaucracies only stand to gain from civil forfeiture while facing no consequences for excessive use of the law, and because innocent citizens must expend great time, effort, and money to regain their property, the current civil forfeiture statute encourages overuse of the law. It rewards those who abuse it by allowing those who take property or their colleagues to keep the proceeds from the property they seize.

Arkansas alone has seized a significant amount of money under civil forfeiture. The Institute for Justice found that between 2000 and 2014, Arkansas law enforcement agencies seized more than $80 million in cash and over 9,500 vehicles.[2] This averages out to over $5 million in cash and over 600 vehicles every year. Notably, Arkansas provides no statistical breakdown of what percentage of this *seized* property was actually *forfeited*. When equitable sharing was in effect, Arkansas received roughly $1 to $2 million every year through seizures coordinated with the federal government.[3]

Of course there are times when forfeiture is a legitimate use of police powers, and there are times when it is not. It is a mistake to point to numbers and then to argue that those numbers demonstrate that some particular amount of civil forfeiture proceeds is excessive. However, most Arkansas citizens and government officials have no way of evaluating the excessiveness or the legitimacy of civil forfeiture activity. That is because the facts and details of civil forfeiture are not transparent, nor is there any requirement that detailed records be maintained of how the proceeds are spent. And as noted above, law enforcement in Arkansas reaps all of the rewards of civil forfeiture, which creates a perverse incentive for government agencies to acquire more assets and more power by means of their actions.

Just as the Arkansas legislature has the constitutional power to oversee funding and spending matters, it also has the authority to require transparency in law enforcement collection and use of civil forfeiture funds. Allowing an agency the power to collect funds for its own budget with little or no oversight does not respect the separation of powers by which our government functions; it is also a blemish on the basic rights and the well-being of Arkansans.

The Arkansas legislature should require funds from civil forfeiture to be placed in an escrow account with express criteria for its dispersal and use. The legislation should also institute a publicly accessible reporting system, so that the legislature and the people can evaluate how the funds are being used. The reporting system should include, at minimum, details such as: (i) a description of the seized property, (ii) the alleged crime, (iii) whether charges were brought, (iv) whether a plea bargain was reached, and (v) whether a conviction was obtained or (vi) an acquittal was issued; furthermore, the record should include details on how these funds were spent.

Lawmakers should also ensure that the rights of law-abiding citizens to use and possess their own property are protected. To take a citizen's property, the state only needs to show that it is more likely than not that the property is related to criminal activity and thus subject to forfeiture – a legal standard known as preponderance of the evidence. To recover seized property, an innocent owner must prove his innocence – by showing that he or she did not consent to or know about the crime committed with the property by someone else.

The profit motive in civil asset forfeiture provides an incentive for abuse, and the consequences that this incentive creates should be addressed on multiple fronts. First, Arkansas should require a conviction in criminal court, or its equivalent, as a prerequisite to property forfeiture in civil court. In recent years, Minnesota, Montana, New Mexico, Nebraska, Nevada, and Vermont have established similar or identical

reforms, sometimes in response to improper seizures by local governments.[4] Under current law, people suspected of crimes are dealt with in the criminal justice system (which requires a high burden of proof), but if the suspects' property is thought to have played a part in the suspects' wrongful acts, that property is dealt with in the civil justice system (which requires a much lower burden of proof). Unless lawmakers require that a criminal conviction, or its equivalent, take place before forfeiture, the state risks seizing property from large numbers of people who are factually innocent. Second, Arkansas should also change its "innocent owner" rule, so that innocent owners of wrongly seized property (for example, a spouse or a parent) are no longer required to prove their innocence in order to get their property back;[5] again, unless the current law is changed, the state risks seizing property from large numbers of people who are factually innocent. Finally, it is worth noting that over a quarter of the states in the Union require the standard of "clear and convincing evidence of criminal conduct" in order for property to be forfeited:[6] policymakers who have come to the conclusion that our state's current laws are simply too unfavorable to innocent citizens should follow the lead of those other states.

The current civil forfeiture laws in Arkansas are not transparent, they provide for an agency to raise its own funds in a way not congruent with the separation of powers, and they do not provide Arkansas citizens with strong individual rights that protect their property in civil forfeiture situations. The current laws reward over-the-line behavior by law enforcement, without affording either the government or the people any way to know about abuse, much less the power to hold an abuser accountable. Making civil forfeiture transparent will strengthen the rights of Arkansans. It will also lead to a more transparent government law enforcement system, rewarded for fighting crime instead of expanding its budget.[7] Reformers who want to protect the rights of innocent property owners should study Senate Bill 805 of 2015, which reflects some of these ideas in

legislative form.

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1. See generally Jacob Sullum, "Arkansas Trooper Steals $20,000, Because Nobody Innocent Carries That Much Cash," reason.com, May 11, 2016.

2. Dick M. Carpenter II, et al., "Policing For Profit: The Abuse of Civil Asset Forfeiture (2nd Edition)," p. 52, Institute for Justice, November 2015.

3. Williams, et al., "Policing for Profit: The Abuse of Civil Asset Forfeiture," op. cit.

4. Ibid.

5. For instance, after multiple reports of improper seizures by government agents (see Randy Furst, "Payouts Reveal Brutal, Rogue Metro Gang Strike Force," *Minneapolis Star-Tribune,* August 5, 2012), Minnesota passed a law (SF 874) that required criminal conviction as a prerequisite for the taking of property. See also Nick Sibila, "Minnesota Now Requires A Criminal Conviction Before People Can Lose Their Property to Forfeiture," forbes.com, May 7, 2014.

6. Six states (California, Colorado, Florida, Kansas, Michigan, and Oregon) have an innocent-owner rule, and another six states have some version of the innocent-owner rule for certain kinds of property.

7. Maleka Momand, "At Our Expense: Asset Forfeiture Boon for Police," *Arkansas Democrat-Gazette*, November 10, 2016.

The Right to Your Property: Eminent Domain Reform by Lee McGrath and Christina Walsh

It has been more a decade since the U.S. Supreme Court ruled that the State of Connecticut could take Suzette Kelo's little pink house in New London for a private developer to build private homes and commercial spaces.

In its widely-reviled 2005 decision, Kelo v. City of New London, the high court held that government officials can use eminent domain to take private property based on nothing more than a promise to generate more tax revenue. The decision launched a nationwide backlash – 44 states reformed their eminent domain laws, and nine state supreme courts rejected the Kelo decision.

The neighborhood destroyed in New London remains a vacant lot, but the lesson of Kelo is clear: Eminent domain abuse destroys communities and fails to spark development.

Unfortunately, this lesson remains uncodified in Arkansas, as the state has not joined other states to enact laws that prohibit eminent domain takings for private development.

The time is ripe for much-needed reforms in Arkansas. There is a national resurgence in eminent domain abuse. After years of relative quiet in the wake of Kelo and the housing-market crash of 2008, land-hungry developers are teaming up with tax-hungry bureaucrats in state after state, with controversies brewing from Connecticut to Georgia to California and beyond.

The state legislature would be wise to make a preemptive strike in the name of all Arkansans' property rights by outlawing takings for private development and enacting objective standards before a property is designated as blighted. The power of eminent domain must be used sparingly, and only for the right reasons.

Arkansas has constitutional provisions that are even stronger than that of the federal Constitution. Article 2, Section 22 of the Arkansas Constitution states that "[t]he right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor." This portion of the Arkansas Declaration of Rights plainly indicates that the drafters were not only wary of eminent domain; they were also committed to protecting private property rights.

Historically, the government has used eminent domain as it was intended to be used: for genuine public uses, such as roads and government buildings. But over the past 50 years, the U.S. Supreme Court has expanded the definition of "public use" to include anything that might benefit the public through potential or promised increased tax revenue or jobs generated by luxury condominiums, big box stores, upscale retail, etc. – which is certainly not what the Founders intended. This expanded conception of public "use" means that virtually nobody's property is safe from eminent domain's wrecking ball. A study conducted by the Institute for Justice found that, between 1998 and 2002, there were more than 10,000 actual or threatened condemnations for private development across the country.[2]

When given a perfect opportunity to rein in this expanded power, the Supreme Court failed. In *Kelo,* the Court ruled 5-4 that the working-class Fort Trumbull neighborhood in New London, Connecticut, could be condemned and bulldozed in order to replace it with private development to complement a nearby Pfizer research center.[3] Justice Kennedy's

concurring opinion explained that because the plans for the property were "rationally related to a conceivable public purpose,"[4] eminent domain was justified. The Court said that the mere *possibility* that property can make more money when used in a different way was reason enough to transfer it to someone else. Unfortunately, that can be said about anyone's property. And as Justices O'Connor and Thomas predicted in their dissents, the poor, minorities, and other historically disenfranchised and comparably powerless communities have been disproportionately targeted by eminent domain for private development.

The American people vehemently disagree with *Kelo*. Overwhelming majorities in every poll taken after the decision have disapproved of using eminent domain for private development.

Arkansas is one of the remaining six states that have yet to reform their laws to narrow the scope of the permissible uses of eminent domain. Although Arkansas has been comparatively restrained in its use of eminent domain for private development, the state's law still allows for the possibility of abuse.

Although Arkansas case law prohibits forced private-to-private transfers of property,[6] with the exception of blight removal, it would be beneficial to all Arkansas property owners to codify this restriction. Furthermore, Arkansas should return to a common-sense understanding of the phrase "public use," restricting eminent domain to those situations where property actually is owned or used by the general public, public agencies, or public utilities. Legislative reforms should also foreclose the theory that the public benefits of economic development might qualify as public use.

Arkansas should also provide a definition of blight that means something specific. There must be objective criteria for blight. Currently, an area can be designated as blighted if homes are too old or a neighborhood has too many owners.[7] Similarly

worded laws in other states have often been used to justify the condemnation of perfectly fine homes and businesses for things like shopping malls. Properties should only be condemned if they pose an actual, immediate threat to the public's health and safety.

Finally, local elected officials should be required to take public responsibility for using eminent domain. They should not be able to hide behind non-elected officials who serve on planning commissions or zoning boards. To guarantee democratic accountability for protection of property rights, the state legislature should write basic due-process requirements into law for eminent domain. For instance, state law should require a public hearing, notice to property owners, opportunity for public comment, and a majority vote by elected city or county officials.

In short, Arkansas should take advantage of its opportunity to stop the exploitation and misuse of the eminent domain power by passing common-sense eminent domain reforms that will protect its citizens and their property for years to come. Legislators interested in these ideas should contact the Advance Arkansas Institute, which has model legislation on file that will protect property rights. Advocates of property rights should also study Senate Bill 970 of 2011, which reflects related ideas in legislative form. They may also wish to examine Senate Bill 367 of 2013, which would have required the government to compensate landowners whenever government action reduced the fair market value of real property by 25 percent or more.

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1. *VanHorne's Lessee v. Dorrance,* 2 U.S. 304, 311 (1795).

2. Dana Berliner, *Public Power, Private Gain: A Five-Year, State-by-State Report Examining the Abuse of Eminent Domain*, Institute for Justice, 2004.

3. *Kelo v. City of New London,* 545 U.S. 469 (2005).

4. Ibid.

5. See the castlecoalition.org website.

The Right to Comprehensive Elections

Currently in Arkansas, local government units (such as cities, counties, and school boards) control the date of some local elections. Local government is certainly closest to its constituents and is often well-positioned to attend to their needs, but allowing the people who have an interest in the outcome of an election to control its timing is problematic. A standardized election calendar across the whole state for all local elections would improve voter turnout, allow citizens to obtain more information about the issues being voted on, save taxpayer money, and improve the integrity of elections by removing the perverse incentives for wasteful and biased elections that currently exist.

When Arkansas law permits those who are running in an election or have a stake in the outcome of an election to help determine an election date, this gives local government officials an incentive to hold elections at strategic times. Local elections regarding tax increases have been held after Labor Day, after Valentine's Day, and near other holidays when many ordinary citizens are busy – and only those who know about the issue at hand and have an especially large stake in the election's outcome go out to vote.

The frequency of local elections, combined with the incentives that local officials have to strategically choose election days, has created local election outcomes that do not always reflect the people's choice. In order to restore the integrity of local elections, the legislature should standardize election days

across the state, so that all local election matters occur on two specific days each year: one election day in November and one in May (with the exception of certain special school board elections).

A standardized election calendar would give voters ample opportunity to learn about the issues, make an informed decision, and cast their vote. Different parties, candidates, and interest groups would all have the same timetable to advertise and promote their views; furthermore, they would have an incentive to get the information out to the public, rather than lobbying politicians to hold elections on strategic days and then only promoting the issues to those who they assume will go vote in their favor. Under a standardized election calendar, all sides have equal time to prepare and all voters can be better informed.

A twice-annual voting schedule would also save taxpayers a significant amount of money. Each election requires time and effort from government employees, coordination of volunteers, and organizing of polling sites and the printing of polling materials. All of these costs would shrink in a universe of two elections per year.

Perhaps the most significant benefit to a standardized twice-annual voting schedule is that it will very likely increase voter turnout. Without excessive local elections in which especially interested parties turn out to vote, a standardized twice-annual election will make it easy for voters to vote on all issues at once instead of spreading out decisions over multiple elections. This voting schedule makes it easy for voters passionate about one issue to vote for all issues and positions on the ballot that day, and it encourages them to learn about the issues they will vote for. Higher election turnout further legitimizes government action to act on behalf of the people and allows the government to best serve citizens' desires.

Because some local elections decide whether to approve bond sales, bankers argue that such elections cannot be set,

given that prices in the bond market fluctuate daily. Essentially the argument is that a flexible election schedule will allow buyers to obtain a better price if the vote approves the bond. However, bond sales should not be a problem for local governments under a more structured election schedule, because a vote to approve a bond sale only gives local government the authority it needs to interact with the bank – citizens don't vote on the price. Therefore, voters can approve a bond sale via a vote and the local government and bank can execute the sale on the day they deem most appropriate.

Others who oppose a standardized election schedule argue that local government exists to be more flexible and more in tune with the needs of citizens. Therefore, so the argument goes, a local government should not cede authority to the state government to regulate its elections. However, the current system sets up perverse incentives for local government. The proposed solution does not replace local government with state government; it simply standardizes the election process at the local level.

Many of our surrounding states (for instance, Missouri, Oklahoma, and Texas) have standardized local election calendars. Arkansas should do the same in order to remove the incentive for local government officials to strategically hold elections on certain days at the expense of an uninformed or unorganized electorate. **A standardized local election calendar will reduce information costs for voters, encourage more fruitful policy debates, increase voter turnout, and lead to local governments that are more truly representative of their citizens.** In 2013, the Arkansas General Assembly considered Senate Bill 587 (to align school board elections with other elections) and House Bill 1357 (to standardize the schedule of tax elections). In 2016 (during its Third Extraordinary Session), the General Assembly passed Act 14, which gave school boards the option to align their own elections with the November elections. Those who wish to minimize election expenses and maximize voter turnout should consider these measures.

The Right to Be Free From Crime by Marc Levin and Derek Cohen

Public safety is a central responsibility of government. Both criminal offenders and the criminal justice system should be held accountable for performance. As former Governor Mike Huckabee famously observed, we've got to lock up the people we're afraid of – and distinguish them from the people we are just mad at.[1]

Just as we reject the shibboleth that society causes crime and instead insist on personal responsibility, we also realize that a prison cell is often not the best means for overcoming an addiction or obtaining restitution for a victim. In 2011, Arkansas state legislators overwhelmingly passed Act 570 with the intent of slowing the growth of the correctional population, reducing recidivism, and lowering correctional costs.[2] These reforms included implementing evidence-based practices, focusing resources on moderate to high-risk offenders, providing alternative community sanctions for low-level offenders, and implementing performance-based funding.

In the few years after Act 570 was passed, the state has experienced a declining number of inmates in both state and local facilities, as well as significant reductions in violent crime and property crime. Furthermore, in its wake, Arkansas avoided substantial new prison expenditures. Act 570 was controversial, but some of the changes that Arkansas has seen in its criminal justice climate are presumably attributable to its passage. However, a 2013 murder by a violent parolee – a violent offender unaffected by any provision of Act 570 – led to administrative

changes that have in some respects offset the reductions in incarceration and costs attributable to Act 570. Those changes have extended to incarcerating nonviolent parolees who have missed appointments or committed other technical violations that do not constitute a new criminal offense. Nonetheless, the state would currently be dealing with a far more acute correctional population and cost pressures absent the unrelated changes involving nonviolent offenders made by Act 570.

Correctional Population

Arkansas prison population had doubled in the two decades leading up to 2011. In the two years immediately following passage of Act 570, which focused on diverting low-level, nonviolent offenders, the number of new commitments to the correctional system not only tapered off, but even began to decline. By expanding the use of alternative community-based sanctions for nonviolent offenders in lieu of traditional incarceration, the number of new commitments to state facilities fell 11.3 percent between FY 2011 and FY 2013. The standing prison population had concurrently declined by 8 percent, representing nearly 1,300 individuals who were no longer incarcerated. Correctional capacity is being put to more efficient use; minimum custody prisoners as a percentage of all state-level offenders has dropped about 8 percent to 53.3 percent, from 61 percent in 2008.[3]

However, more recent data indicates that subsequent changes following the passage of Act 570 have contributed to a renewed spike in the prison population. Despite the aforementioned reduction in new commitments to state facilities in the immediate period following the act's passage, there has been a significant increase since then: a 52.2% rise between FY 2013 and FY 2015. Furthermore, there has been a nearly 10 percent increase in the state's prison population.

Act 570's passage was a necessary first step towards right-sizing Arkansas's corrections system, but further work will be needed to ensure its long-term success.

In order to mitigate capacity issues in state facilities, the Department of Correction relies on contractual relationships with counties to house excess inmates as the need arises. In 2011, an average of 1,613 inmates were being held in county jails on behalf of the state, which constitutes over 9 percent of all individuals incarcerated by the state. On December 18, 2012, this number plummeted to its lowest point since the contractual arrangements were started in 1998. The average number of inmates being held in backup county facilities in FY 2013 was 391, a reduction of over 75 percent from FY 2011. However, that number has gone back up to about 2,400 following administrative changes in parole policy in response to the Dennis case (which is described immediately below).[4] The increase in the incarceration of parolees led to millions of dollars in new demands on state taxpayers to house these violators in both state and county lockups.

A May 2013 murder committed by Darrell Dennis, who was on parole for aggravated robbery, triggered the abrupt shift in parole policy. Because Act 570 focused on low-level, nonviolent offenders, it is hard to infer how Act 570 might have affected the Dennis case. Moreover, given that Dennis was arrested more than 24 times on parole, including for new felonies, it is abundantly clear that the Parole Board should have exercised its existing discretion to revoke him. The abject failure to apply existing law in Dennis's case indicates the need to hold corrections agencies more accountable. However, the administrative changes made in response to the mishandling of that case were far-reaching. These include requirements that parolees must be jailed if they miss a second hearing or it is found that they need a mental health evaluation. These requirements remove the discretion that administrators need to apply graduated sanctions prior to revoking parole in cases that, unlike the Dennis case, do not involve chronic violations, do

not involve new offenses, and do not involve offenders with a history of violence.

These recent "zero tolerance" parole policy changes should be reevaluated to determine if they should apply to nonviolent, low-risk parolees facing revocation for a nonviolent technical infraction. Furthermore, the Parole Board has made the wise decision to re-examine technologies such as GPS, which can be used to place appropriate offenders under house arrest. While it makes sense to incarcerate parole violators whose behavior and record indicates a danger to public safety, identifying such cases requires that risk and needs assessments are properly administered. Moreover, in many instances the need for extended periods of incarceration can be avoided by intervening early with effective monitoring, swift and sure sanctions such as a curfew in response to violations such as a missed appointment, and mental health and substance abuse treatment referrals that are consistent with the offender's identified risk level and needs.[5] Arkansas's current prison population of 18,813, up nearly 3,700 inmates since the conclusion of fiscal year 2013 (and the Darrell Dennis incident) highlights the cost that one-size-fits-all, zero tolerance policies can pass on to the taxpayer at no benefit to public safety.

Public Safety

Just as the correctional population showed initial positive results following passage of Act 570 only to start regressing more recently, so too did crime rates start declining in the period following the act's passage before creeping up again.

Between 2011 and 2012, the rate of violent crimes per 100,000 Arkansans dropped by over 2.8 percent. Over the same period, the rate of property crimes dropped by 2.7 percent. Felony convictions of probationers, a reliable proxy for

recidivism caused by offenders under community supervision, declined over 48 percent from November 2010 to August 2012. Between 2012 and 2015, however, both violent and property index crime rates increased, by 11.1% and 17.8%, respectively.

While any increase in crime rates is concerning and all of the reasons for this increase are difficult to determine, it should be reiterated that Act 570's reforms targeted *non-violent* offenders for alternative sanctions and recidivism-reduction programs, and was silent on violent offenders. Therefore, attributing any increase in violent crime to this reform legislation would be erroneous.

Furthermore, there are reasons to be optimistic about the effect Act 570 has had on the Arkansas justice system's performance. An early goal of the act was to prioritize finite prison space for more serious and/or repeat offenders while seeking to divert amenable lower-risk offenders: so far, this goal has been met. Since 2011, the proportion of violent offenders to the entire population has increased by two percent. This represents a small shift, but an encouraging one, as Arkansas is making good on the wisdom of imprisoning more of those "we're afraid of, not those we're mad at." Further reforms are necessary, however, to continue this trend and start bringing crime rates back down again.

Cost Containment

Act 570 was projected to result in significant savings, allowing legislators to avoid the appropriation of $875 million in additional construction and operational costs over the next decade. If taken in tandem with the expected growth under Arkansas's then-unreformed criminal justice system, it was forecast that taxpayers could have otherwise been saddled with a cumulative $1.1 billion increase over the same period.

Indeed, in the few years following its passage, Act 570 did produce substantial savings. Despite the reduced economies of scale expected when housing fewer inmates, the operational cost-per-inmate has increased no faster than the consumer price index. Between FY 2012 and FY 2013, according to the Arkansas Department of Correction annual report, prison appropriations fell by nearly 8 percent, nearly $26.5 million. Construction expenses, having added an average annual expense of $17.6 million during the five years before reforms were passed, have dropped by nearly 61 percent between FY 2011 and FY 2013. Further, Arkansas's reliance on county jail backups has also trended downward, costing the state over 57 percent less (a savings of over $800,000) in the year following the passage of Act 570 than in the year before it.

While some of the avoided expenditures Act 570 was projected to achieve (such as those attributable to projected reductions in supervision revocations) have not materialized due to subsequent developments, Arkansas's prison population would be even higher today were it not for the provisions of Act 570 that adjusted property offense thresholds for inflation and reduced low-level drug possession from a Class C to a Class D felony.

Juvenile Justice Opportunities

Arkansas has the potential for further reductions in correctional costs if it institutes evidence-based practices for juveniles. In 2010, the Department of Youth Services (DYS) implemented practices to reduce overreliance on costly, inefficient incarceration, such as using a risk assessment tool prior to placement and increasing interagency coordination. Between 2008 and 2011, commitments of youth for felonies declined 20 percent, while the number of youth committed for misdemeanors has dropped by almost 25%. Total commitments

rose from 481 in 2011 to 496 in FY 2012 before dropping to 468 in FY 2013. However, during 2014 and 2015, commitments increased even as juvenile arrests declined.[6]

Also, length of stay has increased, going from 132 days in 2011 to 183 days in 2013. Therefore, despite a period of a few years in which commitments decreased following DYS administrative reforms in 2010, from 2000 to 2014 the record in Arkansas is far different from its neighbors. During this period, juvenile incarceration rose 21% in Arkansas while declining between 40 and 75% in the ten other southern states.

Moreover, Arkansas is one of the minority of states that continue locking up children for status offenses, which involve conduct such as truancy and minor in possession of alcohol that would not be criminal for an adult. In 2015, media reports highlighted 10- and 12-year-old kids who had only committed status offenses and were locked up in local detention centers for violating court orders alongside serious and violent offenders.

When it comes to state commitments, Arkansas has not followed other states which have greatly reduced, or in the case of Texas, stopped committing misdemeanors to state facilities. According to the most recent 2015 DYS annual report, some 46% of state commitments in fiscal year 2015 were misdemeanants, of which 30% were direct sentences and 16% were probation revocations.[7] Furthermore, taking into account both felony and misdemeanor commitments, some 90% were for nonviolent offenses.

Recommendations

- *Continue to strengthen probation supervision and treatment programs that reduce recidivism and revocations from community supervision. Adopt graduated sanctions for missed appointments and other technical supervision violations, such as curfews, electronic monitoring, and*

weekends in jail that allow individuals to maintain employment. On the other hand, those on supervision who commit a new offense which is serious or violent should continue to be subject to both revocation and prosecution for the new offense, resulting in the possibility of consecutive prison terms.

- *Ensure that decisions regarding releases and revocations are made based on actuarial risk assessment scores, with offenders being periodically reevaluated.*
- *Continue to strengthen the innovative use of alternative sanctions for nonviolent offenders, such as drug and other problem-solving courts, while ensuring transparency and rigorous performance measures to ensure these sanctions are effective and applied in appropriate cases.*
- *Reduce incarceration of youths for nonviolent offenses through greater use of diversion and probation programs and reducing average length of stay to no more than 90 days which research has found sufficient for recidivism reduction programming.*
- *End detention of status offenders and instead utilize the child welfare system in emergency cases such as a when a child is truant and a parent or guardian cannot be immediately located to pick that child up.*
- *Implement evidence-based practices such as the use of swift, sure, and commensurate sanctions in response to technical violations, which can include curfews, increased reporting, electronic monitoring, and weekend confinement at the local level, which could reduce the number of youths and adults incarcerated at the state level for reasons other than committing a new offense.*

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1. This is a paraphrase of Huckabee's remarks at the Republican Presidential Forum at Morgan State University, September 27, 2007.

2. Ark. Code Ann. § 16-90-402.

3. The state expenditure statistics in this chapter are taken from the Arkansas Department of Corrections' Annual Report, Fiscal Years

2007-15. The crime statistics in this chapter are taken from the Federal Bureau of Investigation's Uniform Crime Report, 2007-2015.

4. See, e.g., "Update: Little Rock Man Held on $1 Million Bond in Teen's Kidnapping, Robbery, & Killing," fox16.com, May 22, 2013.

5. See Angela Hawken and Mark Kleiman, Managing Drug-Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE (Report to the U.S. Department of Justice), 2009.

6. See Dick Mandel, "What's the Matter with Arkansas," Juvenile Justice Information Exchange, jjie.org, August 5, 2016.

7. DYS Annual Report FY2015.

The Right to Freedom of Information by Robert Steinbuch

The right of the people to know what government is doing is one of the most important rights that Americans possess. That right is protected by the state's Freedom of Information Act (FOIA). Arkansas's FOIA was passed into law nearly a half-century ago without a dissenting vote from the House or Senate; Governor Winthrop Rockefeller later called it one of his most important achievements. Nonetheless, the FOIA remains in need of minor improvements so as to perfect transparency in state government.

FOIA Denials Deserve Explanations

Currently, when a member of the public makes an unsuccessful FOIA request, the state agency often provides scant description of its reasons for refusing to provide documents. Yet the philosophy behind public access to governmental documents presumably should require some explanation of why state government would deny a FOIA request.

Thus, the legislature should require any government actor or body which denies a request for public records to notify the requester in writing of the decision to deny the request, the specific and *complete* basis for the denial (including, when possible, the factual basis for the application of any exemption claimed), and the names and titles or positions of each person responsible

for the denial. This "signature" requirement is designed to hold government actors responsible for their decisions on FOIA requests. And the requirement for furnishing the basis for any denial will preclude agencies from shifting explanations if and when some asserted exception proves unavailing. Case law in other jurisdictions has highlighted the anti-transparency effect of allowing state entities to proffer shifting defenses at their leisure.

FOIA Denials Deserve Review

Currently, when a member of the public is denied a FOIA request, his or her only recourse is to sue. This is expensive and difficult. In contrast, any member of the legislature can get an opinion from the attorney general. In other states, this right is afforded to the public as well. In Illinois, for example, a member of the public can file a request with the attorney general's public access counselor (PAC) for an opinion on the state or local entity's refusal to provide documents. Indiana also has a public access counselor. In Texas, if a state-based institution invokes an exemption, it must go to the attorney general for a confirming (or denying) opinion. Other states, such as Connecticut and New York, have established administrative bodies which review denied FOIA requests. Arkansas should follow this trend.

Thus, the legislature should permit citizens, upon request, to get an opinion from the attorney general which opines on the state or local agency's denial of a FOIA request. Unless the attorney general determines that the alleged FOIA violation is wholly unfounded, state law should require the attorney general to gather information and documents from the agency to determine whether a violation has occurred. Thereafter, the attorney general should make findings of fact and conclusions of law and issue an opinion in response to the

request for review within 60 days after its receipt. The opinion should be binding upon the public body, subject to judicial review.

Citizens Are Entitled to the Preservation and Transparency of Public Information

Even today, citizens are often confused about their FOIA rights. To assist the public in gaining access to the workings of state agencies, the legislature should require governmental bodies to provide the public with a description of the agency's structure and the means to make a FOIA request. As such, the legislature should require each public body to prominently display each of the following (both at its central office and on its website):

(a) A brief description of itself, which will include, but not be limited to, a short summary of its purpose, a block diagram giving its functional subdivisions, the total amount of its operating budget, the number and location of all of its separate offices, the approximate number of full and part-time employees and their annual salaries, and the identification and membership of any board, commission, committee, or council which (1) operates in an advisory capacity relative to the operation of the public body, or (2) which exercises control over its policies, procedures, or operations, or (3) to which the public body is required to report and be answerable for its operations; and

(b) A brief description of the methods whereby the public may request information and public records, a directory designating the Freedom of Information officer or officers, the address where requests for public records should be directed, and any fees allowable under the Act.

Unfortunately, it appears that some agencies have failed

to follow required (and reasonable) record-retention procedures in an effort to avoid having to respond to public information requests, and that certain retained documents remain hidden from the public. As such, the legislature should require all agencies to maintain and post online key operating documents on a regular basis, and report annually on record-retention efforts and compliance.

Furthermore, policymakers should use the machinery of disclosure requirements to achieve educational and policy ends. For instance, Lieutenant Governor Tim Griffin has suggested that policymakers who are concerned about the manner in which the extensive reach of the federal government threatens the values of federalism and local control might respond by mandating disclosure of the amount of federal funding each state agency receives: for instance, legislators could require the percentage of federal funding received by each state agency to be prominently posted in some area where that agency receives visits from the public. Online disclosure would be even better, as long as it is easily discoverable.

The Legislature Should Clarify the Higher Education Records Exemption

The legislature should amend A.C.A. 25-18-603 to ensure that it creates transparency for all appropriate facets of higher education. Currently, that Act defines "state agencies" subject to record-retention obligations as including all departments, boards, commissions, and public institutions of higher education – but, with respect to higher education, the Act excludes some portions of records from retention requirements. In particular, with respect to higher education, the Act excludes academic, research, health care, and existing information and technology applications and underlying support.

Under this language, a public university is generally required to retain records (including, for example, financial and personnel records) but does not have to maintain (1) academic research records; (2) health care records; or (3) records reflecting existing information and technology applications and underlying support. (The placement of commas in the statute indicates that the third set of records described above is properly read as one requirement, rather than as an additional three.) These limited exemptions for higher education records were designed to afford higher education the opportunity to get up to speed under its more limited retention obligations. Indeed, higher education institutions often fail to meet even this low threshold, in part because the Department of Finance and Administration failed to include higher education in its original record-retention schedule. The upshot is that while higher-education institutions remain bound by law, they have been given no regulatory guidance.

Almost a decade has passed since the creation of this records-retention statute. There is no policy justification for the exemption that higher education continues to receive: it has been given ample time to catch up with the other agencies covered by the statute, and its partial exemption should be written out of state law. Furthermore, regardless of the scope of higher education's record-retention requirements, an express record-retention should be mandated for institutions of higher education.

The Legislature Should Clarify the Juvenile Records Exemption

Certain state agencies have interpreted A.C.A. 9-27-217, which governs certain juvenile records, as a blanket exemption to the FOIA. This interpretation is incorrect: juvenile records should be subject to the same standards as any

exemption found in the FOIA. That is, the FOIA exemption should require the redaction of any identifying information for juveniles; otherwise, our FOIA should require the disclosure of relevant records. The legislature should revise A.C.A. 9-27-217 to address this situation.

Public Policy Should Deter FOIA Violations

Recent events show that the letter and spirit of the FOIA still is subject to willful disrespect. This demonstrates that the legislature should create a greater incentive for compliance. Thus, the legislature should empower courts to order civil penalties – as courts are able to do in other states – for each willful violation of the FOIA. Because the willful violation of FOIA is presumably a rare and isolated problem, this will not result in significant costs to taxpayers. Rather, it will result in greater transparency, to which all citizens are entitled. Furthermore, regardless of the scope of higher education's record-retention requirements, an express record-retention should be mandated for institutions of higher education.

Furthermore, reformers should lower the hurdles that current law provides that make attorney fee and expense awards for wrongful government conduct nearly impossible to get; they should also end the disparate treatment that current FOIA law applies to state government as compared to local government. Current law permits the award of attorney fees and reasonable expenses if the requestor prevails in a subsequent lawsuit. However, current law (A.C.A. 25-19-107) provides two loopholes which are difficult to justify. First, attorney awards are disallowed if the court finds that "the position of the defendant was substantially justified or that other circumstances make an award of these expenses unjust." While the language of this exception seems reasonable, its application has been inconsistent – resulting, at times, in the inappropriate denial

of attorney fee awards. Second, attorney fee awards cannot be assessed against the state of Arkansas or against state agencies directly. A successful litigant must go through a separate administrative – and sometimes legislative – process in order to receive compensation because of the wrongful behavior of state actors. Reformers should revise these two aspects of the Freedom of Information Act: the first aspect should be narrowed considerably (perhaps by eliminating the entire clause which invites the court to subjectively decide, without any guidelines, which fee awards are unjust), and the second aspect should be expanded so that attorney fee awards can be assessed against state government.

The Right to Buy and Sell Tickets

Unlike many states, Arkansas criminalizes the resale of sports and entertainment event tickets for more than their face value. Reselling tickets can trigger a fine of up to $500.00. It is past time for Arkansas to join the majority of states that have repealed this outdated law, so that willing buyers and sellers may set the price of resale tickets.

History has shown that interference in the free market typically causes more harm than good. By prohibiting the resale of tickets, the General Assembly overreached: the consequences of this legislative overreach included the creation of a black market that is detrimental to the consumers of our state. Prohibiting the resale of tickets:

- *Places unfair and counterproductive limits on individual liberty and free trade between consenting adults.* When fans purchase tickets, they own those tickets; it should be their decision as to how to use those tickets, and their range of decisions should include selling tickets for whatever price a willing buyer agrees to.
- *Forces secondary sellers to move outside the state and beyond the reach of Arkansas law.* The current legal regime gives consumers no option for redress if they purchase a fraudulent ticket. If Arkansas consumers were allowed to buy and sell tickets freely, they would have choices among vendors – and, more particularly, they could choose from an array of resellers which would be encouraged to provide high-quality service and ticket guarantees. Such resellers would also be subject

to the Arkansas consumer protection and anti-fraud laws;

- *Prevents legitimate resale businesses from starting in Arkansas.* Under current law, these businesses would be involved in an illegal activity whenever they sold tickets for more than face value, making banking and securing business loans impossible.
- *Encourages street scalping.* Criminalizing ticket resale forces resellers into shadow markets, enabling unscrupulous operators to take advantage of unsuspecting consumers who often pay in cash and have no way of getting in touch with the reseller if they have any issues with their ticket.
- *Criminalizes what many people think of as normal and acceptable behavior.* The criminalization of ticket reselling uses scarce law enforcement, prosecutorial, and judicial resources that are better applied to regulating conduct which actually harms people.

A common argument for capping prices is that event creators and ticket sellers set the price of a ticket, and that price is the price fans should pay to attend. But this argument ignores how free markets work. If sports teams and artists decide to purposely underprice their tickets, that is their choice; however, once those tickets are sold, the original seller should be out of the picture when resales are negotiated. We do not permit car dealerships to determine what price we resell our cars for; the same should be true for event tickets. More generally, although many people feel that, for certain goods and services, prices should be set low enough so that everyone can get what they need, this cannot be true for sports and entertainment tickets. A ticket to a Justin Bieber concert is a classic case of a luxury good, and concerns about distributional equity of luxury goods are much more difficult to justify.

To summarize: laws prohibiting ticket resale for more than face value make it illegal for consumers to buy and sell tickets at a price they are willing to pay. Regulating the price of a

resale ticket does not protect consumers, instead, it encourages black-market activity that undermines consumer protections and leave consumers without a chance for redress if they purchase fraudulent tickets.

In 2013, the state House of Representatives considered House Bill 1404, which appears to be an attempt to address and eliminate the problems described above. **Legislators should consider a similar policy in 2015 – one which would repeal the state's antiquated ticket resale law, open the secondary ticket market to market forces, improve the welfare of Arkansas consumers, and give ticket-holders the right to use or sell their tickets like other property.**

The Right to Trade During Emergencies

When the federal or state government declares an emergency, Arkansas price-gouging laws go into effect. Price-gouging occurs when a store owner or supplier of goods raises prices in a manner that seems unfair in order to take advantage of consumers. Even though these laws are designed to protect consumers, price-gouging laws end up harming everyone involved and endanger consumers.

Price-gouging laws are the result of public outrage at increased prices during natural disasters. During times of emergency, consumers buy more batteries, gasoline, food, hardware-store materials, and other necessary items to help them weather the storm. The increase in demand for goods that people need during an emergency may lead business owners to raise prices. Citizens desperately trying to preserve their property (and sometimes their lives) during an emergency may feel burdened by price increases, and understandably so. The last thing anyone wants when trying to fill up his car in order to evacuate his home and avoid a hurricane is to find that the gas station is charging $8.00 per gallon.

In Arkansas, price gouging was defined by Act 376 of 1997: it occurs when prices increase by 10% or more for certain goods and services (emergency supplies, medical supplies, gasoline, and building materials, to name a few) before an emergency is declared. Once price-gouging laws go into effect, businesses cannot raise prices more than 10% for 30 days, and the state can extend the restriction by another 30 days if it desires.

Price increases more than 10% are not unlawful if the seller is able to prove that the price increase was directly attributable to additional costs imposed by a supplier. But if a seller raises prices by more than 10% but cannot prove an absence of gouging, Arkansas's attorney general can seek injunctive relief, restitution to consumers, attorney's fees, and other civil penalties of up to $10,00.00 per single violation. The attorney general's website even goes so far as to say that criminal sanctions 'may' also apply to violators.[1] The upshot of all of this is that businesses which increase their price above a certain point may only do so at the risk of litigation – litigation in which a business manager would have to prove his or her own innocence.

The current price-gouging law suffers from a reality deficit. In reality, businesses that continue to operate during disasters also face increased costs and burdens. In order to produce and sell goods during emergencies, keep the business's doors open, pay employees to work during crises, and ship in products from out of town under harsh weather conditions, businesses will often have to demand a higher price to cover higher operating costs. Protecting the ability of businesses to raise prices in order to provide products during a disaster is a good thing. Without such protection, the alternative is not that pre-disaster prices are maintained; rather, the alternative is that no goods are sold, and furthermore that no additional goods are brought into inventory to meet the increased demand. Shortages benefit no one. Higher prices allow companies to get us the products we need in the quantity we need them during difficult conditions.

Moreover, higher prices tend to discourage low-value or frivolous consumption. When prices rise, consumers will restrict consumption to the most highly valued uses. When prices are restricted, the allocation of goods may become arbitrary. In 2003, for instance, price caps on batteries during Hurricane Isabel led stores to give them out first come, first served. This rationing system led to some consumers having many batteries

for less valuable uses, but other consumers having no batteries at all.[2]

Current Arkansas law acknowledges that sellers may raise prices as a result of increased costs from suppliers, not because the sellers are trying to increase their profits. Nonetheless, prices should be permitted to rise during an emergency as a general matter for two reasons: first, consumers often demand more of certain products during an emergency (which requires sellers to buy and stock more of a product), even if that product's production costs haven't increased; and second, there is a cost to time and place.

Not accounting for the cost of time and place can lead public policy astray. Consider that some cities will object to price increases on the grounds that products already in stores shouldn't be subjected to price increases – after all, they were in stock and were being sold for lower prices before the emergency. This argument fails to recognize that there is a cost to time and place. When time and weather change, the opportunity cost on stores' inventories is more expensive; this new opportunity cost for restocking is reflected in price changes.

Price gouging laws have long been proven to be ineffective at achieving their intended end, yet the laws still exist. We pay government officials to punish business owners and make us worse off during times of emergency. Although we often choose to allow markets to provide us with all the services we need in our daily lives, we sometimes believe groundlessly that government is capable of doing what it cannot.

Government is competent at taxing and distributing money – and less so at distributing goods and services. Because free markets are the best and most efficient way to distribute goods and services, even in emergencies, **legislators who want to ensure that people get the goods and services they need (whether in normal times, or during disasters) will work to repeal Arkansas's anti-gouging laws.**

1. http://arkansasag.gov/programs/consumer-protection/my-money/price-gouging
2. See Dr. David W. Meyer's paper, "The Virtues of 'Price Gouging' "; Meyer is an economist at the Federal Trade Commission.

The Right to Know Health Care Costs

Insurance plans in Arkansas are increasingly moving towards a high-deductible model, in which insurance clients must first pay a substantial out-of-pocket cost each year before they receive any benefits from their insurance policy. Without additional reforms that spur competition among providers, it seems clear that this model will be of limited value to consumers, who ideally should be able to purchase health care products and services in competitive markets. More precisely, such insurance policies will likely be unsatisfactory to consumers unless there are significant advances in the transparency of prices that health-care providers offer.

For instance, a 2013 article in *Time* revealed that the prices that hospitals bill patients for medical goods and services are routinely inflated by staggering amounts. The *Time* article begins with a case study of a patient at Houston's MD Anderson Cancer Center, which billed a patient for a cancer drug at 4 times the market rate, for a chest X-ray at 14 times the market rate, for a series of blood tests at 20 times the market rate, and for a generic Tylenol pill at over 100 times the market rate.[1] Although it is difficult to produce precise estimates of the relationship between actual costs and actual charges, one health-care expert has suggested that the charge to patients across all U.S. hospitals is, on average, nearly triple the cost of those services.[2]

When hospitals conceal their prices and insulate themselves from the efficiencies of market competition, this is bad for the public. One regrettable consequence of hospital

price secrecy is that the hospital administrators who set health care fees apparently lack the motivation or incentive to appeal to consumers through lower prices. In 2014, a *New York Times* article described the bureaucratic horrors that Kim Little, a history professor at the University of Central Arkansas, faced in the course of paying for her Mohs surgery. The Mohs procedure is a kind of skin cancer surgery; according to the *Times*, a random sample of 100 instances of similar Mohs surgeries varied in price from $474 to $7,594 – depending only on which provider performed the service. (In our experience, it is unusual to see a 16-1 variance in prices for similar services in a well-functioning, competitive market.) Professor Little was ultimately able to bargain the $25,000 that hospital administrators wanted to charge her down to less than one-fifth of that figure.[3] Many private-option clients will lack the social, financial, and intellectual wherewithal that a Ph.D. implies; they will likely be less capable negotiators when it comes time to pay hospital bills.

The prices that hospitals charge – typically contained in an internal document called a "chargemaster" file (or "charge description master") that often contains around 25,000 items – "are written in code, so that hospital administrators and only a few experts in the field can understand them."[4] One journalist, after surveying chargemaster data from a variety of hospitals released by the federal government in 2013, wrote that they "reveal an irrational system in which list prices at a hospital have practically no relationship to what competitors charge or what Medicare, the dominant payer of hospital bills, actually shells out for treatments and tests."[5]

When asked to defend high chargemaster prices, chargemaster advocates have responded with startling defenses of the practice – such as suggesting that chargemaster prices are merely a starting point in negotiations; it seems only fair to respond that hospital clients, to say nothing of those who need emergency medical care, are typically without the opportunity to negotiate. It seems likely that private-option clients using funds

from medical savings accounts will often encounter chargemaster prices. The establishment of high-deductible insurance policies implies a universe of cost-conscious consumers; health-care providers who do business with those who pay some portion of health care costs out of pocket should be required to supply a transparent menu of those costs.

There is no other field besides medicine in which consumers receive services but are not concurrently informed of the financial obligations which receipt of those services creates. **Lawmakers should create a system of price transparency in Arkansas hospitals – perhaps by requiring that all chargemaster prices be made public, or perhaps by requiring the posting of a table of prices for some ordinary medical procedures.** California and Arizona have made progress in the latter area (see, for example, Arizona Revised Statutes 36-437); at a minimum, Arkansas should do the same.

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1. Steven Brill, "Bitter Pill: Why Medical Bills Are Killing Us," *Time,* March 4, 2013.

2. Gerard F. Anderson, "From 'Soak the Rich' to 'Soak the Poor': Recent Trends in Hospital Pricing," *Health Affairs* 26, no. 3 (2007), at 780-89, Exhibit 1. The data specific to Arkansas are unavailable, but it appears that Arkansas's disparity may not be quite as shocking: instead of a national ratio of charge/cost of 3.07, the ratio of charge/cost for rural hospitals is a mere 2.42.

3. Elisabeth Rosenthal, "Patients' Costs Skyrocket; Specialists' Incomes Soar," *New York Times,* January 19, 2014.

4. Anderson, "Recent Trends," p. 784.

5. Jeffrey Young, "Hospital Procedure Prices Vary Greatly, New Data Show," huffingtonpost.com, June 6, 2013.

The Rights of Students

Students who attend Arkansas's public colleges and universities must sometimes walk a thin line. Although our students are often treated as autonomous adults, they must also coexist with administrators who are charged with protecting the social, legal, and intellectual climate of the campus. Sometimes this tension can erode the rights of students; the Arkansas General Assembly should resolve this tension by protecting student rights at public universities.

Anti-Harassment Legislation That Protects Students' Rights

Federal anti-discrimination law requires colleges and universities receiving federal funding – virtually all institutions, both public and private – to prohibit discriminatory harassment on campus. Simultaneously, public universities are required by the First Amendment to honor students' freedom of speech. While private institutions of higher education are not bound by the First Amendment, those that explicitly promise free speech (which is to say, most of them) must honor that commitment.

Actual harassment, properly defined, is not protected by the First Amendment. The Supreme Court of the United States has set forth a clear definition of discriminatory peer harassment in the educational setting: that definition both

protects free speech and prevents harassment. In *Davis v. Monroe County Board of Education*,[1] the Supreme Court defined student-on-student harassment in the educational context as targeted, unwelcome, discriminatory conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." Universities are legally obligated to maintain policies prohibiting such harassment.

Unfortunately, institutions sometimes punish protected speech that is far outside the boundaries of the Court's definition. Despite the Supreme Court's guidance, some universities continue to maintain overbroad harassment policies that fall far outside the Court's *Davis* standard. These policies may threaten the zone of speech protected by the First Amendment – or, in the case of private universities, speech protected by the school's own promises of free speech and expression. These policies are regularly struck down on First Amendment grounds by federal courts, yet unconstitutional definitions of harassment remain widespread.

This problem has been exacerbated by the actions of the federal Department of Education's Office for Civil Rights under the Obama Administration, which has regularly issued "Dear Colleague" letters that, while purporting to explain the law, have instead provided highly controversial interpretations of it. Several federal legislators, such as Sen. Lamar Alexander and Sen. James Lankford, have suggested that these letters issued by the Department of Education have exceeded that organization's legal authority; more precisely, because these letters are viewed as providing regulatory guidance but are produced without any kind of comment period (as required under the Administrative Procedure Act), they are improper.[2] The spectre of federal bureaucrats attempting to illegally extend their regulatory authority should motivate Arkansas state legislators to push back; the General Assembly should do its best to confine the actions of federal bureaucrats to constitutional norms.

The Arkansas General Assembly should pass anti-harassment legislation resting on a definition of harassment that tracks the standard set forth by the Supreme Court in *Davis*. Omitting *Davis*'s requirements will infringe upon free speech; it will likely also create a significant vulnerability to constitutional challenge. Adhering to *Davis's* requirements will ensure that institutions meet their legal and moral obligations to maintain campus environments free from discriminatory harassment while protecting free speech. In short, the fix is simple: the Arkansas General Assembly should require its public colleges and universities to implement anti-discriminatory harassment policies that precisely track the Supreme Court's *Davis* standard.

Protecting the First Amendment on Campus

The First Amendment protects expressive activities including, but not limited to, all forms of peaceful assembly, protests, speeches, distribution of literature, carrying of signs, and circulation of petitions. Despite decades of legal precedent establishing that the First Amendment completely protects students on public university campuses, many schools dramatically limit the areas on campus available for expressive activity to tiny designated areas – by creating so-called "free speech zones."

Restricting student speech to tiny free speech zones diminishes the quality of debate and discussion on campus by preventing expression from reaching its target audience. These free speech quarantines persist despite a string of defeats in court. The continued maintenance of free speech zones is detrimental to all campus community members. Institutions are at risk of litigation exposure, while students risk being punished for protected speech and learning the wrong lesson about their expressive rights, as the logical conclusion is that speaking one's mind is not worth the punishment. Establishing in legislation

that outdoor areas on public campuses are *traditional public forums* will ensure that our public universities continue to protect intellectual freedom and keep their status as an environment recognized by the Supreme Court as "peculiarly the 'marketplace of ideas.' "[3] The legislature should address the problem of zones that limit free speech by passing legislation to guarantee that public campuses are once again places where expressive activity may flourish, subject only to reasonable, content- and viewpoint-neutral time, place, and manner restrictions.

Protecting Students' Access to Counsel

Despite serious, life-altering consequences, colleges and universities routinely suspend and expel students as a result of verdicts reached in campus hearings that fall woefully short of providing meaningful due process protections. Many institutions do not allow accused students access to counsel or the advisor of their choice during a disciplinary hearing when expulsion or suspension is at stake. This substantial shortcoming casts a significant shadow over the reliability and basic fairness of these crucially important proceedings.

Allowing access to counsel to students facing suspensions or expulsion is necessary to ensure basic fairness. Recognizing students' important interest in pursuing their educations, Congress provided the right to counsel to disabled students who face hearings under the Individuals with Disabilities Education Act (IDEA).[4] Similarly, on August 23, 2013, North Carolina Governor Pat McCrory signed House Bill 74, mandating that students facing non-academic disciplinary actions have the right to hire an attorney – or a non-attorney advocate if the student so chooses – to actively represent their interests during the proceeding. This common-sense measure passed by an overwhelming vote of 112 to 1 in the North Carolina House and by a large margin in the Senate.

Tens of thousands of Arkansans rely on higher education as a path to career advancement. Students whose academic careers are put in jeopardy during disciplinary hearings risk not just their degrees, but their futures. Meaningful due process protections must be provided to ensure that students are punished only after they receive a fair hearing. Allowing accused students access to counsel when serious penalties are at stake will help guarantee the fundamental fairness of those proceedings and ensure that no student's academic career is unfairly cut short.

It is simply unfair to require a student faced with serious and consequential charges to represent him- or herself in such a circumstance – especially when that student must face experienced and professionally trained deans, administrators, and university attorneys in proceedings which fail to guarantee central components of due process. To say the least, disciplinary hearings are serious business. Some institutions may allow a student's lawyer to attend the hearing, but prevent the lawyer from participating in the proceedings. Others ban lawyers altogether. Universities, on the other hand, may send as many attorneys as they wish in order to prosecute the student.

This imbalance is particularly exacerbated for students with disadvantaged backgrounds. While wealthier students with powerful parental resources or connections might confidently face these tribunals, first-generation students or those who rely on substantial financial aid have the added burden of knowing their livelihoods – and often the dreams of their families – are on the line. For these students, having legal representation to consult with during a hearing could make a difference that lasts for decades.

The Arkansas legislature should support students' due process rights by requiring institutions of higher education to allow access to counsel to students who are the subject of any hearing that might result in suspension or expulsion. In 2015, Reps. Grant Hodges and Warwick Sabin authored Act 1194,

which began to address this problem by requiring such institutions to allow access to counsel – but only in *appeal* proceedings. Act 1194's scope should be expanded to all disciplinary proceedings that might result in suspension or expulsion, rather than being confined only to appeal proceedings.

Protecting the Free Press on Campus

Independent student media at our nation's public colleges and universities enriches campus debate; informs students, faculty, and the surrounding community; and sharpens skills necessary for a thriving democracy. Unfortunately, student journalists too often battle threats to their independence by college administrators seeking to exert editorial control.

Administrative attempts to impose prior restraints or other restrictions on campus media at public institutions have been buttressed by the incorrect application of a case involving high school students to the collegiate setting. In *Hazelwood School District v. Kuhlmeier*,[5] the Supreme Court limited the rights of high school journalism students who printed a school newspaper as part of a journalism class. The Court found that, under those circumstances, the school could regulate so-called "school-sponsored" speech (with the administration acting, in effect, as the publisher) as long as the regulation was related to "reasonable pedagogical concerns." Thus, a high school may skirt the First Amendment's general prohibition against prior restraint through the fiction that the high school itself is the editor of the school newspaper and therefore enjoys editorial control.

Unfortunately, one court has applied *Hazelwood* to a university newspaper. In the 2005 case of *Hosty v. Carter*,[6] the United States Court of Appeals for the Seventh Circuit found that Patricia Carter, Dean of Student Affairs and Services at Governors State University, had not violated the First

Amendment rights of student editors of the student newspaper by requiring that the paper must be reviewed by school administrators prior to publication. The court's analysis made clear that it believed that *Hazelwood* was as applicable to college campuses as it was to high schools.

Luckily, the effect of the Seventh Circuit's ruling in *Hosty* has proven limited. Indeed, in response to *Hosty*, several states including Illinois (Dean Carter's own state), California, and Oregon have passed legislation protecting collegiate student journalists and expressly forbidding administrative prior review of the type at issue in *Hosty*. Ultimately, *Hazelwood* and *Hosty* only provide perspective on what the federal Constitution says about students' First Amendment rights: nothing in either case prevents state governments from taking additional measures to protect students' First Amendment rights under state law.

It is inappropriate for public colleges and universities to impose editorial control over independent student newspapers. The application of *Hazelwood* to public institutions of higher education is legally incorrect and morally wrong, and state legislatures should ensure that its holding does not extend past high school. Student journalism plays an important role in educating and bringing issues to the campus community, and universities that do not allow a free student press deprive the campus community of an important component of the open discussion, debate, and expression that universities exist to foster. (Indeed, it appears that Arkansas law protects the First Amendment rights of *high school* journalists passably, but ignores the First Amendment rights of college journalists completely.[7]) Arkansas should enact a law protecting college student media on public campuses from prior restraint.

Protecting Religious Liberty on Campus

Religious liberty is a cornerstone of our nation. Yet on

many college and university campuses, the right to associate on the basis of religious belief and even the right to express those beliefs is under attack. Students who express religious beliefs in public are condemned for "hate speech" or "intolerance." Under the guise of "nondiscrimination" or "all comers" policies, religious groups are often told that they may not choose the membership or leadership of their groups using religious criteria. Unfortunately, in 2010 the Supreme Court upheld this practice in *Christian Legal Society v. Martinez*.[8]

This is a deeply disappointing ruling, one that is a dangerous threat to students' First Amendment rights. *Martinez* contradicts longstanding Supreme Court precedent upholding the freedom of association as fundamental to the exercise of one's First Amendment rights and allowing private organizations to make belief-based choices regarding membership and leadership; the *Martinez* ruling has had bad policy consequences, and it is reasonable for state legislators to attempt to counteract or reverse its detrimental effects.

Under an "all comers" policy, hostile takeovers – as well as increased opportunities for spying, dirty tricks, and, perhaps most likely, the dilution or unwanted alteration of a group's viewpoint – are a threat to any belief-based organization on campus. The proliferation of these so called "all comers" policies unjustly forces groups such as the Christian Legal Society to choose between allowing hostile students to become voting members and leaders, or operating on the outskirts of campus life.

Since the Court ruled in *CLS v. Martinez*, states like Ohio, Virginia, and Idaho have passed laws that guarantee freedom of association for religious student organizations and protect the right of those campus groups to choose leaders who share their core beliefs. Arkansas should pass similar legislation for public campuses to ensure that students may form religious organizations on campus and practice their faiths freely. Legislators interested in protecting religious freedom on

campus would do well to examine, for instance, the legislation that Ohio passed to address this problem,[9] which provides an excellent role model for Arkansas.

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1. Emma Brown, "U.S. Senator: Education Dept. Overstepped Authority on Sexual Assault Complaints," *Washington Post*, January 7, 2016.

2. 526 U.S. 629, 652 (1999).

3. *Healy v. James*, 408 U.S. 169, 180 (1972) (internal citation omitted).

4. 20 U.S.C. 1400 et seq., and in particular § 615 of the Act.

5. 484 U.S. 260 (1988).

6. 412 F.3d 731 (7th Cir. 2005) (en banc), cert. denied, 126 S. Ct. 1330 (2006).

7. A.C.A. 6-18-1201 *et seq.* (the "Arkansas Student Publications Act"). See also Tyler J. Buller, "The State Response to *Hazelwood v. Kuhlmeier,*" *Maine Law Review,* vol. 66 (2013), pp. 89-162, especially pp. 116-130.

8. 130 S. Ct. 2971 (2010).

9. Ohio Code Section 3345.023.

The Right to Know Legislative Votes

The legislative process is well-known to legislators, but little-known to the public. In the Arkansas state legislature, the committee hearing is the first step in the legislative process. Proposed bills must be passed out of committee before being voted on by the full House or Senate. Unfortunately, some deserving bills do not make it out of committee; the lack of accountability that is inherent in some of the General Assembly's rules sometimes creates unnecessary hurdles for good policy.

Although establishing a public record of legislators' votes seems fundamental to democratic accountability, committee votes in the Arkansas General Assembly are typically unrecorded. Bills are first presented, and can first be killed, in committee – so recording these votes should be at least as important as recording the votes on the floor of the state House or Senate. However, a little investigation into the incentives politicians face in order to hide their votes, and the benefits they receive from doing so, sheds light on why that status quo is maintained.

Making any committee vote public currently requires several legislators to simultaneously request a recorded vote. This request creates benefits for the public, but costs for officeholders. Legislators do not call for a public vote on issues that are difficult for them; out of fear of raising the ire of their colleagues, the norm is that legislators typically do not request public votes, because some committee votes might prove difficult for some officeholders to defend. However,

without an objective public record of the votes that are cast, the people will remain uninformed about legislative choices. In 2011, for example, in the 8-person Senate State Agencies and Governmental Affairs Committee, House Bill 1797 (a bill to require the showing of photo ID at the polls) failed by a voice vote. In order to advance from committee, the bill needed the support of 5 legislators. The committee included 4 Democrats and 4 Republicans. We might assume that the 4 Republicans supported the bill, but (because there was no motion for a recorded vote) we might also assume that those 4 Republicans were more interested in currying favor with their colleagues than with creating a record of how each legislator voted. The outcome: the bill failed to pass, and the public has no record to determine why.

Similarly in 2011, when the Senate's Transportation, Technology & Legislative Affairs Committee voted in favor of sending House Bill 1902 (a gas tax increase bill) to the full Senate, the public was also left without any explanation of who was accountable for this decision. As noted above, an 8-person committee requires a 5-person majority to pass legislation forward. Even though this committee had 5 Republican members, many of whom claimed to oppose new taxes, the bill was sent to the Senate, and ultimately passed by both branches of the legislature. Indeed, some of those committee members who would have had to vote for the bill to pass it out of committee voted against it on the floor. We know this because, on the Senate floor, their votes were publicly recorded.

Legislators are entitled to vote any way they want on bills, but whether they pass bills out of committee or kill them in committee, their votes should be recorded. The presumption in legislative committees is that votes are not recorded unless two members of the committee request recordation. As a general matter, since their votes are not recorded, public officials face little accountability or oversight for their committee actions. This procedure makes it nearly impossible for media outlets, or even a legislator's own

constituents, to hold anyone accountable for their committee actions; this lack of committee accountability is poisonous to self-government.

By choosing to keep committee votes shrouded in mystery, politicians are insulating themselves from the type of feedback that is crucial to our system of representative government. Politicians who reject proposals to make committee votes transparent are displaying a certain arrogance: this posture conveys the attitude that they know what is best for their constituents, even if those constituents are without the opportunity to support or oppose legislation. Committee votes ultimately dictate the bills that will compose the legislative agenda of an entire legislature, and the legislators making these decisions are currently allowed to do so without record of their votes. Concealing committee votes fosters partisanship, insulates politicians from feedback, encourages parliamentary trickery, and embarrasses the democratic process.

There are other measures that the Arkansas General Assembly might consider in order to increase the transparency of its deliberations, but requiring recorded votes in House, Senate, and joint committees should be at the top of its reform list. Other transparency reforms the Senate should consider include **the broadcasting or livestreaming of Senate committee meetings, joint committee meetings, and the sessions of the full Senate** (so as to be consistent with House practices). Finally, senators should **abolish vote-rolling in the Senate**, which automatically deems all senators to have voted for a measure, whether or not they support the bill in question and whether or not they are even in attendance on the Senate floor. The practice of vote-rolling regularly produces the embarrassing spectacle of state senators arguing that they should not be held responsible for their recorded votes – but, because senators have received notice that the vote may be held, their insistence that their particular vote shouldn't count is a pathetically weak argument that should embarrass both them and their colleagues. In the past, after state senators have

been recorded as voting for a vote-rolled measure, some have responded by inserting a letter in the Senate's official record that argues that the rolled vote shouldn't be counted. Such a statement is a wholly cosmetic practice without any legislative significance – a senator might as well insert a letter into the record explaining how his or her parents or children might have voted on the matter.

Furthermore, the state House of Representatives should change its practice of secret voting for the House Speaker. At the federal level, each legislator announces his choice for House speaker publicly; the Arkansas legislature should conduct its business the same way. Requiring a public vote to elect the Speaker (preferably one that takes place on or near the first day of each legislative session that takes place in an odd-numbered year) will eliminate much of the wasted time, uncertainty, and pointless distractions that have historically characterized House speaker elections.

One other transparency-related measure that legislators should consider involves the public discussion of the constitutionality of proposed legislation. The constitutionality or unconstitutionality of most proposed legislation is not a matter of serious dispute.[1] The General Assembly should assign sufficient resources to the Bureau of Legislative Research so that legislators, upon request, could receive a reasonably short and simple (and publicly available) nonpartisan assessment of the constitutionality or unconstitutionality of a given piece of legislation in a reasonably short time – in much the same way that legislators, upon request, can receive an attorney general's opinion on constitutionality currently (except, of course, much faster). The proposal and passage of legislation that is virtually certain to be found unconstitutional is depressingly routine in the General Assembly; perhaps the leading example in recent years was the passage of Act 301, the pro-life "Human Heartbeat Protection Act."[2] The passage of this bill accomplished little or nothing except the award of nearly $100,000 of taxpayer money for attorneys' fees to the Arkansas Civil Liberties Union

– money that presumably provided a substantial boost to that organization's left-wing litigation and lobbying agenda.[3] The availability of such an evaluation would likely make legislators more serious about their oath to uphold the state and federal Constitutions and lead to a healthier legislative process.

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1. Every generalization, of course, has exceptions. It is fair to say, however, that most bills that are filed either have obvious constitutional problems or they lack them. To the extent that a bill does not fall into either of these two categories, the process of legislative deliberation would likely be improved if the bill's possible unconstitutionality became a matter of public discussion.

2. During the discussion of the bill that became Act 301, James Bopp Jr. noted that, because it was almost certainly unconstitutional, "it is futile and it won't save any babies." Eric Eckholm, "Arkansas Adopts a Ban on Abortions After 12 Weeks," *New York Times*, March 6, 2013. Act 301's subsequent failure to survive judicial scrutiny suggests that Bopp had a point. Bopp, a former Republican national committeeman, has been the general counsel for National Right to Life for more than a quarter-century; on matters of abortion law, he is arguably the most knowledgeable pro-life attorney in the nation. Legislators who sincerely wish to advance pro-life legislation that courts are likely to uphold might consider consulting Bopp or this volume's chief editor, Dan Greenberg; both are attorneys who have given this area of law some thought. On the question of other bills that the General Assembly considered in 2013 that were almost certainly unconstitutional, see the discussion of Senate Bill 38 of 2013 in this book's "The Dangers of Suspicionless Drug Testing."

3. See Marc Kilmer, "Choose Better Counselors, Senator Rapert," thearkansasproject.org, March 17, 2016.

The Right to a Friendly Game of Cards by Marc Kilmer

Do you like to get together with some friends and play cards or place a small wager on a football game? If you do, make sure not to let anyone know if you and your buddies bet "any money or any valuable thing" on the outcome. This type of betting is against the law in Arkansas. If you violate this law, you could face a fine of between $10 and $25.[1]

Arkansas Code spells out which games you cannot bet on: "brag, bluff, poker, seven-up, three-up, twenty-one, vingt-et-un, thirteen cards, the odd trick, forty-five, whist…" However, just in case this list does not cover a betting game, it goes on to apply the prohibition to "any other game of cards known by any name now known to the law or with any other or new name or without any name."[2]

The same prohibitions and penalties apply to betting on games of hazard and skill.[3] Arkansas is one of 24 states that ban social gambling. Another five states have laws that are ambiguous about whether this type of gambling can occur.

Prohibiting bets on games of chance, hazard, or skill seems like an absurd anachronism in a state that has, since 2009, run a state lottery. Visit the Arkansas Scholarship Lottery webpage, and you'll see bright graphics for Mega Millions, PowerBall, the Natural State Jackpot, and other ways to bet your money. It appears that friends can't get together to wager a couple dollars on a poker game, but the state can run a multi-million dollar operation that promotes numerous games of chance. Furthermore, the continued expansion of gambling in

Hot Springs and West Memphis suggests that our citizens are no longer shocked to find gambling in Arkansas.

Most importantly, however, Arkansas legislators have a reason to reconsider the ban on what is called "social gambling" that goes beyond the official hypocrisy of prohibiting it. Experience in other states shows that enforcing laws against this type of gambling can have tragic consequences.

In Virginia, one jurisdiction has a lengthy history of using heavily-armed SWAT teams to break up illegal home games. In 2015, the *Washington Post* reported on Fairfax County police raiding one game, using a SWAT team to confiscate money and other items from an unarmed group of 10 men. *The Post*'s story noted that this was part of a larger pattern by that county:

> *Raids by Fairfax police on private poker games are not new — a similar game in Great Falls was raided in 2005. But in 2006, a SWAT team was called in to arrest a single suspect accused of betting on football games, and Officer Deval Bullock accidentally shot and killed optometrist Salvatore J. Culosi Jr. After that, the Fairfax police said they would use their tactical teams more judiciously. Still, the Fairfax police have continued to be unapologetic in their aggressive enforcement of gambling laws, as seen by their willingness to bet and lose large amounts of money to take down sports bookies. They will even make the effort to place an informant in a poker game and they are still willing to wield their heavy artillery to take down a roomful of unarmed poker players.*[4]

There are other instances of armed officers raiding games in states around the nation. Radley Balko, a columnist for the Washington Post, wrote about some of them in his book The Rise of the Warrior Cop. He points out the absurdity of using military-style arms and tactics on these home games:

> *It's absurd to think a bunch of poker players are going to open up on a couple of uniformed cops who come to a game, politely knock on the door and then hand out light fines. It isn't at all absurd to think that a few poker players in a state with friendly gun laws might mistake a group of raiding, mask-wearing cops for armed robbers and fire at them out of fear. And that's just the practical argument here. There's also the more fundamental question of whether this sort of force and violence is justified against a bunch of people who are doing nothing worse than playing cards for money.*[5]

Regardless of whether certain tactics make sense, police can choose to enforce the law using whatever means they view as necessary. Having this prohibition against social gambling in Arkansas gives law enforcement the authority to undertake the same heavy-handed actions here that we see taking place in other parts of the nation.

Legislators should consider whether this law is really accomplishing anything worthwhile. Would the state be hurt if friends were allowed to bet on home games of poker? Is there a public rationale to prohibiting sports fans from wagering $5 on the outcome of a football game? Is it worth having this law in effect, given that police could possibly use lethal tactics to enforce it?

Other states have considered these questions and have determined that, indeed, there is no good reason to keep these prohibitions in place. Where such bans exist, legislators are moving to protect social gamblers from armed interference by the state. For instance, in the 2016 Maryland legislative session, there was not a single vote in either the House of Delegates or the Senate against a bill to legalize betting on Mahjong and card games that take place at homes by people who are 21 years old or older.[6]

Arkansas could do something similar. The state can place reasonable limits on gambling and legalize the home

games that are undoubtedly common, though forbidden, in the state. Legislators who are concerned that people would abuse this reform so as to set up a casino in a home can create a narrower prohibition that blocks games which afford the house different odds from the player. Legislators already recognize that gambling itself does not deserve strict prohibition, as the lottery is operated by the state government. It only makes sense to allow private citizens to bet a little money on a Friday night card game, too.

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1. Arkansas Code, § 5-66-112 - Card games – Betting.
2. Ibid.
3. Arkansas Code, § 5-66-113 - Games of hazard or skill – Betting.
4. Jackman, Tom, "Fairfax SWAT Team Raids High Stakes Great Falls Poker Game, Seizes Cash, Terrifies Players," *Washington Post*, January 27, 2015.
5. Balko, Radley, "Fairfax Police Stage a SWAT Raid on Poker Players," *Washington Post,* January 28, 2015.
6. HB 127, passed 136-0 in the House of Delegates and 44-0 in the Senate, signed by the governor on May 19, 2016.

The Right to Raise Your Children by Marc Kilmer

When you were a kid, were you sent outside to play until it got dark? Were you left home alone while your parents ran errands or finished work? Were you turned loose to explore your neighborhood or the forest with no adult supervision?

These were common experiences just a generation ago. But today, parents who allow their children to enjoy these uncomplicated life experiences sometimes face investigations and punishments from the state. Today, we live in a society where crime is at a 50-year low – but we live under a government which is far too quick to criminalize traditional parenting practices.

Across the country, agents of government are harassing parents who let their children exercise freedoms that were once commonly enjoyed by kids. Here are some of the more egregious examples of state overreach:[1]

- For three days over summer vacation in 2014, a South Carolina mom let her 9-year-old play at the local sprinkler playground while she worked her shift at McDonald's. A woman asked the girl where her mom was, and upon learning she was at work, called 911. The police threw the mom in jail for 17 days. She lost temporary custody of her daughter. Despite public outcry, it took over two years before the charges were dropped.

- A 6-months-pregnant mom in Lexington County, Kentucky, was arrested for letting her kids wait in the air-conditioned car for 3-5 minutes while she ran an errand. The sheriff

said that a parent simply stepping out of the car is one thing, but "if someone has abandoned a child, even for a short time, that's another matter." The errand qualified as abandonment, and the pregnant mom spent the night in jail.

- Austin, Texas mom Kari Anne Roy's 6-year-old was playing outside for about 10 minutes when a woman saw him and marched him home, 150 feet away. Shortly afterward, Roy's doorbell rang again. It was the police. They interrogated her and asked for I.D. A week later, Child Protective Services came to the house and interviewed each of Roy's three children separately, without their parents, asking the 12-year-old if he had ever done drugs. and the 8-year-old girl if she had seen movies with people's private parts – something she'd never even heard of. "Thanks, CPS," said the mom.

- In December 2016, firefighters in New York State smashed the window of a car to "rescue" a four-year-old boy who had been left sleeping in the car for 20 minutes. His parents had run into a store to buy Christmas lights. Even though there was no sign of harm, the boy was then rushed to the hospital in an ambulance and his father was arrested. State workers then came to the house, rifled through the family's belongings, stripped the boy and his sibling naked, photographed the naked boy, and then observed the child playing in his pre-kindergarten class.

- A vacationer in Rehoboth Beach, Delaware, was arrested in August for leaving two children (ages 8 and 9) alone while she went grocery shopping. The children went outside to walk their dog, but the dog got away and was almost hit by a car. The motorist, upon learning that the children were unsupervised, called the police. The state eventually dropped the charges.

- State officials investigated a Maryland couple who let their 10- and 6-year-old children walk home alone from a neighborhood park. The police intervened twice when

neighbors reported children walking alone from the park. The second time, authorities detained the children for four hours without telling the parents.

- The state of Illinois cited a woman for neglect after she let three children, aged 5, 9, and 11, play in a nearby park where she could see them from her window. A state appellate court later overturned the finding of neglect.
- A woman in Connecticut was arrested after her 8-year-old stepson got himself dressed and began walking to school. She overslept and did not realize that he was gone. The police said that her son should have been supervised at all times.
- Florida police took away the children of a couple who let their 11-year-old play in the yard unsupervised for 90 minutes.

In such incidents, government involvement is often triggered by neighbors or others who report children who are playing unsupervised – a concern which reflects the common but misguided view that there is danger lurking around every corner in today's world. These misperceptions are unfortunate, but they only cause harm for families when the government becomes involved. Only the state can take away children based on perceived or imagined harms.

In Arkansas, as in many other states, a broadly-worded state law that penalizes child neglect has been aggressively interpreted so as to give bureaucrats and law enforcement personnel broad discretion to intervene in the everyday life of families. The state's Child Maltreatment Act defines "neglect" as putting a child "at risk of harm" (see A.C.A. 12-18-103 (14)(a)(vii)-(viii)).

Regrettably, it appears that someone charged with the supervision of a child who subjects that child to any imaginable risk might violate the statute. So, for instance, someone who has a child under his or her care who requires the child to (for

example) walk alone to a nearby school, house, or park without supervision could run afoul of the statute. To address this problem, lawmakers should consider amending the statute with language similar to the following:

A parent or guardian has violated no law, and shall not be charged, formally investigated by any government agency, for permitting or requiring a child to do any of the following, so long as it appears reasonably likely that the child is of sufficient capacity such that the child faces no immediate or serious danger:

1. *Travel to and from school by a means approved by the parent or guardian and with that parent or guardian's permission. This includes, but is not limited to, walking, jogging, skipping, biking, skateboarding, taking public transit, or rollerblading.*

2. *Travel to and from or engage in unsupervised outdoor play with the parent or guardian's permission. This includes, but is not limited to, playing in playgrounds, public parks, front and back yards (with owner's permission), and other areas where children gather.*

3. *Wait in a car a brief time, with the permission of the owner, when the temperature inside the car is not dangerously hot or cold. For instance, while the owner leaves the car briefly to perform a brief commercial transaction or personal errand.*

4. *Wait at home before or after school as a "latchkey" child, so long as the parent knows where the children are, is reachable, has made some provisions in case of an "emergency," and returns home that same day.*

The activities described above – namely, letting children travel to school, play outside unsupervised, ride their bikes, wait at home, or stay in the car during an errand – are all presumed to be lawful unless there are exceptional circumstances in which the child is in immediate and serious danger.

This adjustment in state law would signal an important change to both Arkansas law and Arkansas culture by underscoring the central role of parents, not government, in making private family decisions. It would eliminate the

possibility of being irrationally blamed for subjecting children to risks of such tiny magnitude that no reasonable person should be forced to take them into account. It would also encourage wider understanding of a basic proposition about every child's transition to mature adulthood, which at present is underappreciated in American life: namely, parents who constantly hover around their children and deny those children the freedom to make small mistakes by themselves are doing those children no favors.

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1. These examples are from Lenore Skenazy's wonderful blog "Free Range Kids," found here: www.freerangekids.com.

The Right To Amend Our State Constitution by Dan Greenberg

Many of the articles in this book are written in a general or impersonal tone. This one is not. This one is personal. It is based on my experience in attempting to help my past client, Health Care Access for Arkansans, amend the state Constitution. The state Constitution guarantees to the people "the power to propose legislative measures, laws and amendments to the Constitution, and to enact or reject the same at the polls independent of the General Assembly."[1] Regrettably, that power has been hamstrung by a variety of laws and regulations over time; that power has been so weakened that it barely survives. In order to protect the right of the people to amend their state Constitution, the legislature should consider a variety of reforms.

- Currently, those who wish to amend the state Constitution must first receive the certification of the Attorney General for their proposed amendment, ballot title, and short title. The office of the Attorney General conducts its own review process; sometimes it accepts proposed amendments; sometimes it rejects them; sometimes it rewrites portions of them. With respect to the tort-reform amendment I was associated with in 2016, the Attorney General rewrote the short title of the amendment – inserting, among other things, the technical term "non-economic damages." Some months thereafter, the state Supreme Court struck that amendment off the ballot: the only reason it gave was that the amendment used that same technical term "non-economic damages," but did not define it. As state Senator

Bart Hester noted shortly afterward, this places petitioners in a "Catch-22" situation: petitioners must get the consent of the Attorney General to move through the process, but if the state Supreme Court doesn't like the changes that the Attorney General has demanded, then the petitioners are out of luck.[2] *It is, at this point, quite unclear what value the mandatory review and approval of the Attorney General adds to the petition process; that step in the petition process should be eliminated.* There may be some value in having an agency of state government, such as the Secretary of State, serve as a registry for proposed constitutional amendments, but there does not seem to be any additional value in having the Attorney General provide legal review.[3]

- The procedure for court challenge to the sufficiency of a ballot title is topsy-turvy. Ordinarily, petitioners must go over several hurdles before a measure appears on the ballot: first, they must acquire Attorney General certification; second, they must collect tens of thousands of signatures (often expending a great deal of time, talent, and treasure in the process); third, they often must face a ballot-title challenge in the courts. To put it another way, petitioners must typically spend months and months collecting signatures on any proposed amendment before they can get a ruling from the state Supreme Court as to whether the ballot title is appropriately written. The current structure of this procedure may create a bit less work for the Court (currently, it only has to review ballot titles which receive a sufficient number of signatures), but it leads to massive waste: why shouldn't the review process take place earlier, so that petitioners will not have to gamble as to whether their proposed language will be satisfactory to the Court? *The state Constitution should be changed so that the procedure for ballot title challenges requires much earlier filing of challenges, and much earlier judicial resolution of them:* the threat that petitioners' work – work which has produced tens of thousands of signatures – will be thrown on the junk heap

just days before the election is enough to burden the right of the people to petition their government significantly.

- Finally, *the legislature should streamline the petition process significantly*; it is so administratively cumbersome that it seems almost designed to choke off proposed amendments. The law requires federal criminal background checks for paid signature-gatherers to be conducted by the state police; as a general matter, the state police will not carry out such checks. The law requires a petition sponsor to "obtain, at its cost," criminal background checks; those who challenged the measure I worked on contended that it was illegal for paid signature-gatherers to rely on the background checks that the canvassers had already furnished and passed unless the sponsor paid for them directly. The law requires "certification" that paid canvassers were subject to criminal background checks, but does not explain what certification is, how it operates, or how to tell whether certification has been successfully accomplished. These are only three requirements out of many which seem to accomplish no public purpose, except to make signature gathering more difficult.

In short, the entire process of amending the Constitution deserves reform so as to ensure that the many obstacles to amending that document serve a legitimate policy purpose.

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1. Arkansas Constitution, Article 5, Section 1.

2. Bart Hester, "The State Supreme Court's October Surprise," *Arkansas Democrat-Gazette*, October 16, 2016, p. 2H.

3. The Supreme Court decision that struck the tort-reform ballot measure off the ballot noted, "we will consider the fact of Attorney General certification and attach some significance to it; however, we will not defer to the Attorney General's certification or give it presumptive effect." Here, the Court seems to overstate the weight it gives to Attorney General certification; in practice, the Court has given that certification no weight at all.

Amending Our State Constitution

The Arkansas General Assembly is empowered by our state Constitution to propose three constitutional amendments to the people every two years, who then can write them into the Constitution by popular vote. In the past, special interests and legislative squabbling have diverted legislators' attention away from what should have been their main goal: using the amendment process to encourage freedom, transparency, and economic growth. Because legislators can only choose three amendments to send to the people, they should consider what policies are best enacted by means of constitutional reform. Following are several possibilities:

Tort Reform

As discussed in the first section of this book, the Arkansas General Assembly will almost certainly be unable to reform significant parts of our civil liability system absent state constitutional change. After the state legislature passed tort reform in 2003, the state Supreme Court then struck down large parts of it, on the theory that portions of the 2003 reforms intruded on the rule-making powers of the state's judiciary.[1] If the legislature wants to enact effective tort reform (such as, for instance, "loser pays" reforms or other fee-shifting legislation), it will almost certainly have to create constitutional reforms so as to restore its policymaking powers in this area. Lawmakers

who are interested in this approach should consult Senate Joint Resolution 6 of 2013, which contains a workable proposal in legislative form.

Over 130,000 Arkansans wanted tort reform on the ballot in 2016, but the state Supreme Court had other plans: that court decided that the ballot title of the proposed amendment contained an undefined technical term – and, according to the court, this required that it be stricken from the ballot. Oddly, when confronted with other ballot titles that contained undefined technical terms, the Court has permitted them to stay on the ballot. Many observers inferred from this decision that the state Supreme Court would do whatever it could to block the people from making decisions on tort reform. As state Senator Bart Hester wrote in his criticism of the Court's decision, it is hard to understand how the Court's decision was principled:

> It's also worth noting that the Court's prohibition of "technical terms" in ballot titles is more than a little inconstant. According to the Supreme Court, the term "non-economic damages" is not self-explanatory and needs a definition. I don't believe there has ever been any confusion about what this term means in state or federal law: Non-economic damages are damages which are not measurable economically – which is to say in dollars … Notably, the Supreme Court issued a second opinion on the same day it knocked tort reform off the ballot: In its second opinion, it unanimously approved a ballot title for medical marijuana, and in that approved ballot title, marijuana users have to have "certification" of illness to qualify for drug use, they cannot be subject to "discrimination" once they qualify, and they have an "affirmative defense" for medical marijuana use. Curiously, in that nearly simultaneous second opinion, the Court was completely untroubled by the undefined legal

> terms in the medical marijuana proposal. How many non-lawyers do you know who can define what an "affirmative defense" is?[2]

The Court's decisions on tort reform legislation strongly suggest that advocates of tort reform should focus on legislatively-produced reform amendments: that pathway to the Constitution does not encounter the kind of hurdles that have been created by the Attorney General and the state Supreme Court. As described earlier in this book, any tort-reform measure worthy of the name will almost certainly have to modify Amendment 80, because past state Supreme Court decisions interpreting it appear to have intruded on the legislature's policymaking power. (More precisely, it is difficult to pass legal reforms without changing legal procedure, and the state Supreme Court's insistence that any change in legal procedure is an intrusion on the state Supreme Court's prerogatives has made policy changes in the area of legal reform difficult or impossible.)

Voter ID

In the 2013 legislative session, the General Assembly passed Act 595, which required Arkansas voters to produce proof of identity when voting at the polls. The Act required Arkansas voters to show photo ID when voting in person generally; it also provided that those who were without ID could acquire a state-funded ID at no personal cost. On October 15, 2014, however, the state Supreme Court struck down Act 595. According to the Court:

> Act 595's added requirement of providing a proof of identity as a prerequisite to voting runs afoul of article 3, section 1, of the Arkansas Constitution. Section 1 of article 3 plainly states that any person may vote in an election who

> is (1) a U.S. citizen, (2) an Arkansas resident, (3) eighteen years of age, and (4) lawfully registered to vote in the election before voting in an Arkansas election. Ark. Const. art. 3, § 1. These four qualifications set forth in our state's constitution simply do not include any proof-of-identity requirement.[3]

In plain language, the Supreme Court's argument is that any Arkansan is entitled to vote if he or she passes four tests ("qualifications") – as long as there's no other pertinent language in the Constitution – and that the legislature can't create any additional tests that would bar anyone who meets these four criteria from voting.

This was a peculiar line of reasoning for the state Supreme Court to endorse, because appellate courts in many other states have been dismissive of it – typically finding that a voter ID requirement is merely a procedure that tests or proves an existing qualification so as to protect the rights of voters, rather than itself being a new qualification.[4] Although the Arkansas Supreme Court noted that those out-of-state courts typically interpreted their respective states' Constitutions and not the Constitution of Arkansas, that argument is a weak one, because other states' sets of voter qualifications are quite similar. Was Arkansas's Constitution really so different as to compel a substantive result? (If so, the Court's opinion didn't explain why.) Alternatively, as Attorney General Dustin McDaniel once suggested in a related context, was this simply a case of the Arkansas Supreme Court once again living up to its "reputation of being a results-oriented court"?[5]

At this point, it appears that the only way a voter ID requirement will ever be legal in Arkansas lies in changing the language of the state Constitution. Indeed, members of several other state legislatures who want to protect the integrity of the ballot have considered writing a voter ID requirement into their own state Constitution. The vast majority of citizens appreciate

that a voter ID requirement is a common-sense measure to fight voter fraud. Indeed, it is hard to believe that some of the opponents of voter ID are really persuaded by the arguments they make. Former Attorney General Eric Holder has insisted that requiring ID threatens Americans' right to vote; curiously, the Justice Department that Holder oversaw required visitors to show ID in order to enter its buildings, and that same Justice Department permitted federal courthouses to impose an ID requirement upon courthouse visitors. By the logic of voter ID opponents, these policies unconstitutionally burden the people's First Amendment right to petition their government as well as their Sixth Amendment right to attend and witness trials.

It is a simple fact that vote fraud is a part of Arkansas's and America's history; those who support voter ID do not want vote fraud to be part of our state's and our country's future. Those who support the policy goals of Act 595 of 2013 should consider changing the state Constitution with a short and simple amendment that allows the legislature to make new laws that would guard against election fraud, require voter ID at the polls, and provide for taxpayer-funded IDs when necessary so as to comport with the federal Constitution. That new amendment should also modify or eliminate the troublesome parts of Amendment 81; Amendment 81 was apparently intended to protect the secrecy of the ballot, but because it hampers forensic investigation of vote fraud, it has caused more mischief than it solves.

Reapportionment Reform

Because of changes in demographics and population, Arkansas must redraw its legislative districts once every ten years; the next legislative session to address reapportionment will occur in 2021. It is dangerous for lawmakers to have any influence on the design of their own legislative districts, but it

is a danger that our current system of legislative line-drawing invites; the lure of self-interest can produce (and has produced) gerrymandering in Arkansas. There is a bipartisan consensus that making redistricting more politically neutral would result in a more open and competitive political system that better represents the people of Arkansas. As Warwick Sabin and Max Brantley once wrote in the *Arkansas Times*, Arkansas should take the politics out of redistricting:

> Since the problem will only get worse as more of our personal information is organized and analyzed, we should respond by at least adopting a non-partisan redistricting process. In Iowa, for instance, the panel that draws legislative boundaries is prohibited from considering previous election results or even the addresses of incumbents. Less information, not more, is the key to fairness in these matters. Only geographic common sense should govern where the lines go.[6]

Creating a reapportionment process that isn't subject to incumbent-oriented or partisan politics can only be accomplished through reform of our state Constitution. Legislative districts should be drawn on the basis of political boundaries (such as city and county lines) and geographical lines (such as mountains or rivers), with an emphasis on contiguous and compact legislative districts. The practice of using the voting records or the political affiliation of regions or precincts in order to draw lines should end, and the existing residences of incumbents should not be part of the process. Legislators who want a fair and neutral political system in which the voters choose their own representatives, not the other way around, should look to Senate Joint Resolution 8 of 2013, which contains a workable proposal in legislative form.

Returning to a Part-Time Legislature

In 2008, the people of Arkansas amended the state Constitution so as to permit the Arkansas General Assembly to meet and to craft a budget yearly; previously, the legislature had done its work only once every two years. Government in Arkansas should be small and non-intrusive, and our state's legislators should work hard to limit their own taxing and spending. The time our legislature spends in session needs to be limited, so that legislative attention is concentrated on matters of only the greatest importance. But having annual legislative sessions risks establishing just the reverse of these conservative Arkansas values.

Annual sessions make it harder for our representatives to be citizens of their districts. Annual sessions create pressure for pay increases, higher travel allowances, and other perquisites for legislators, who increasingly find it harder and harder to have real jobs that, every year, allow four months time off. Annual sessions weaken the connections between the people and those who are supposed to represent them. Annual sessions attract candidates who seek government sinecures, not private-sector successes. And annual sessions also give more publicity to incumbent politicians and drain competitiveness out of our current political campaigns, which are already heavily biased toward incumbent re-election.

Annual sessions are also likely to lead to big government in Arkansas. Political scientists have demonstrated what everybody knows: the longer legislatures are in session, the more legislation they produce – which generally leads to bigger, more expensive and more complex government. States with full-time legislatures generally rank near the top of the list of biggest per-person taxers and spenders. In contrast, our neighboring state of Texas is consistently near the bottom of the list when ranked by per-person taxing and spending – despite the fact that its legislature only meets once every two years.[7]

Anyone who genuinely advocates government that is smaller, cheaper and closer to the people should favor a return to Arkansas's traditional biennial legislative calendar. In this context, the experience of former South Dakota Senator George McGovern is relevant. After almost 20 years as a full-time federal legislator, McGovern tried (and failed) to run a small business. When discussing his time in both government and business, he famously said: "I wish I had known a little more about the problems of the private sector. I have to pay taxes, meet a payroll: I wish I had a better sense of what it took to do that when I was in Washington."[8]

Some have compared government to fire, calling it "a dangerous servant and a terrible master."[9] Our system of part-time sessions has been a firebreak to big government, but moving to annual sessions runs the risk of being an accelerant.

Legislators who want to return to the part-time legislature that Arkansas had until 2009 should look to House Joint Resolution 1004 of 2011, which contains a workable proposal to repeal the current system of annual legislative sessions.

Controlling the Growth of the State Budget

In the chapter "Restricting Arkansas's Budget Growth" above, we discussed the dangers that our citizens face if Arkansas government grows faster than Arkansas's people. Although one solution is legislation that puts the brakes on the growth of state taxing and spending by tying it to population and inflation, a more long-term solution lies in a constitutional restriction. Writing a limit to government growth into the state Constitution would provide an outer limit to taxes and spending in Arkansas and encourage job creation and economic growth by preventing investment capital from being captured

by expanding government.

Protecting the U.S. Constitution from a "Runaway Convention"

Finally, Arkansas should amend its state constitution to block the ratification of any amendment from a "runaway convention." Specifically, such an amendment would make any proposed federal constitutional amendment impossible for Arkansas to ratify if it came from an Article V convention originally called for a different purpose. Such an amendment could require delegates to take a pledge to limit their actions to those required by state law, or even provide for the automatic resignation of those delegates who violated that pledge. Lawmakers interested in this proposal may wish to study North Dakota's HCR 3039 of 2013, which its House of Representatives passed that year. Such an amendment would secure the people's and state's rights under the Tenth Amendment to limit a convention that they call for; it would therefore help empower two-thirds of the states to force Congress to propose a federal constitutional amendment those states wanted.

Because three-quarters of the states must ratify any proposed amendment after an Article V convention, it would be easy to block a "runaway convention" if as few as 13 states adopted this state constitutional amendment. If just one-quarter of the states' constitutions contained such a provision, it would be mathematically impossible for three-quarters of the states to ratify an amendment from a "runaway convention." (Since three-quarters of the states – or 38 states – are required for ratification, one-quarter of the states – or 13 states – would be sufficient to block ratification.) As a result, such a state constitutional amendment (once enacted by 13 states) would empower two-thirds of states – if they agreed on a federal constitutional amendment – to limit an Article V Convention

to an up-or-down vote only on that federal constitutional amendment. When faced with such a threat, Congress would almost certainly propose the amendment that the states wanted, so as to avoid a convention. Congress has a history of proposing the federal constitutional amendments that the states want – beginning with the Bill of Rights – in order to avoid the possibility of a convention that would be more powerful than Congress. The logic of this proposal is discussed at greater length two chapters below, in "Ending the Risk of a 'Runaway Convention.'"

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1. See, e.g., *Broussard v. St. Edward Mercy Health System, Inc.,* 386 S.W.3d 385 (2012).

2. Bart Hester, "The State Supreme Court's October Surprise," *Arkansas Democrat-Gazette*, October 16, 2016, p. 2H.

3. *Martin v. Kohls*, 2014 Ark. 427 (2014).

4. See, e.g., *League of Women Voters of Indiana v. Rokita*, 929 N.E. 2d 758, 767 (Ind. 2010); *Democratic Party of Georgia, Inc. v. Perdue,* 707 S.E.2d 67 (Georgia 2011).

5. Roby Brock, "AG Says Supreme Court Decision Creates Risk of Malpractice For 'Every Case In Arkansas' ", talkbusiness.net, April 24, 2014.

6. "Too Much Information," arktimes.com, December 7, 2006.

7. See, e.g., "State and Local General Expenditures, Per Capita, 2004-2011"; "State and Local Tax Revenue, Per Capita, Indexed to U.S. Average," September 20, 2013, taxpolicycenter.org.

8. *Washington Post,* December 1, 1989.

9. This language is often falsely attributed to George Washington, but the evidence for this attribution is unpersuasive.

Amending Our Federal Constitution

In our federal system, the influence that state legislators have on federal or national matters is typically quite minor. However, the Constitution does give states one method of creating a national impact: amending the Constitution. This option is difficult for states to use, and rightly so – but it certainly doesn't follow that the option of amending the Constitution should always be avoided.[1] Arkansas legislators should judiciously exercise their power by proposing amendments to the federal Constitution that (1) rein in burdensome federal regulations and (2) give states an appropriate role in resisting overly expansive federal power.

Article V of the Constitution lets Congress call an amendments convention, as long as legislatures in two-thirds of the states call for one. Such an amendments convention has never occurred in American history. However, the threat to call an amendments convention probably helped spur Congress to pass the 17th, 21st, 22nd, and 25th Amendments.

Because of gridlock and institutional resistance, Congress is unlikely to pass important constitutional amendments that limit the powers of the federal government unless pressured by state legislatures to do so. One amendment that the Arkansas General Assembly should consider would alleviate the burden that federal regulations impose on the citizens of Arkansas as well as the rest of the nation. Another amendment worth considering would give states the power they need to encourage Congress to limit the scope of the federal

government by further regulating the amendment process.

The Regulation Freedom Amendment

The Regulation Freedom Amendment would amend the Constitution to restrain the unchecked growth of the regulatory state:

> *Whenever one quarter of the Members of the U.S. House or the U.S. Senate transmit to the President their written declaration of opposition to a proposed federal regulation, it shall require a majority vote of the House and Senate to adopt that regulation.*

The burden that regulations impose on Americans is immense. During the first five years of the Obama Administration, federal bureaucracies issued 157 new regulations that have a major impact on the U.S. economy. In 2013 alone, the Federal Register (the publication that lists all new federal regulations for the year) was over 80,000 pages.[2] According to a Heritage Foundation study, these new regulations cost our economy $73 billion each year.[3] This cost will likely increase in the final years of the Obama Administration, as rules for the Affordable Care Act go into effect.

The Obama Administration is following the lead of a long line of Democratic and Republican presidents who have increased Americans' regulatory burdens. The George W. Bush Administration, for example, imposed $30 billion in new regulatory costs on Americans.[4] The burden of increased regulations is a bipartisan policy failure that slows growth, destroys jobs, and reduces the economic well-being of Americans.

Proponents of some particular regulation often claim there is a beneficial trade-off to the job destruction or economic

harm that such a regulation causes. In many instances, however, regulations do not achieve their intended goals, for reasons described by economist David Henderson:

> *There are two main reasons that regulation generally works out badly. One is that the regulators have little incentive to get things right. Indeed, when their regulations fail, they often use this fact to argue for more power and more regulation. Astonishingly, the argument often works. The second reason is that regulatory agencies are often captured by the politically powerful and used to stomp out competition.*[5]

Congress does not approve new regulations, even though these regulations are, in effect, the laws that govern us. There is little or no accountability placed on the shoulders of the bureaucrats writing these laws. If we do not like the actions of our member of Congress, we can vote him or her out of office. An unelected bureaucrat faces no such constraint.

The Regulation Freedom Amendment would address this problem. By giving Congress something like a veto power over counterproductive regulations, this amendment would restore lawmaking power to democratically accountable public officials. Members of Congress would be ultimately responsible for the regulations that affect people's lives. Those federal legislators would have to answer to the voters for the rules that impose such a heavy burden on us.

The Regulation Freedom Amendment is especially timely in light of the increasing tendency of the Obama Administration to bypass Congress and enact far-reaching policy changes via regulations. Without a constitutional amendment that requires some sort of regulatory review by the legislative branch, future presidential administrations will continue promulgating expansive regulations that marginalize our elected representatives. In short, the Regulation Freedom Amendment will serve as a rejection of politically unaccountable bureaucracy and a restoration of self-government.

In 2015, the state House of Representatives approved the Regulation Freedom Amendment; however, the partisan split in the Senate State Agencies committee served as a roadblock. Seven states have ratified this measure so far (Indiana, North Dakota, South Dakota, Tennessee, Utah, West Virginia, and Wyoming); five more, including Arkansas, have seen the Regulation Freedom Amendment pass in at least one legislative chamber. Arkansas almost approved this amendment in 2015; friends of limited government should get this done in 2017.

The Madison Amendment

As mentioned above, state legislatures can call for an amendments convention, but it is a more difficult task to limit the scope of the convention's agenda. State legislatures can attempt to limit the subject of an amendments convention, but Congress or the convention itself might try to expand any such convention's agenda. This inherent uncertainty has made both state lawmakers and Members of Congress wary of convening an amendments convention.

The so-called "Madison Amendment" would allow state legislatures to propose a particular and specific amendment to the Constitution, and to limit the amendments convention that would result only to the consideration of that amendment. When two-thirds of the states proposed some particular constitutional amendment, this would trigger an amendment convention – but a limited convention that could only consider that particular amendment. Were the amendment approved by the convention, it would then be sent to the states for ratification. Such a procedure would end the possibility of a "runaway convention" – which is to say, it would eliminate the danger of a convention that produced other proposals to change the Constitution.

State legislatures should have some power to join the deliberations over amending the Constitution – that is, they should share in some degree of the power that Congress currently has. Currently, only Congress can propose amendments for ratification. As was evident in the debate over the constitutional amendment to balance the federal budget, members of Congress may resist constitutional changes that would curtail their own powers. Giving state legislators a power that is similar to the one that Congress currently has would bypass such congressional inaction – and avoid the uncertain outcome that an open-ended constitutional convention could produce.

Other Federal Constitutional Amendments

Of course, the discussion of these two proposed constitutional amendments should not be understood as a suggestion that other constitutional reforms are not worthwhile. State legislators should also use their powers to push for amendments to the federal Constitution that will curb the federal government's powers, such as an amendment to balance the federal budget or to limit congressional terms. But because the Regulation Freedom Amendment and the Madison Amendment offer especially promising routes to expanding individual freedom and reducing the size and scope of the federal government, legislators should accord them special consideration. Fulfilling the promise of dual sovereignty – by making the 50 states equal partners with the federal government – is likely best accomplished by means of these two federal constitutional amendments.[6]

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1. See generally Dan Greenberg, "Restoring the Role of State Legislators in our Federal System of Government," *Inside ALEC,* November/December 2009.

2. Leah Barkoukis, "The 2013 Federal Register: 80,000+ Pages of Regulations," townhall.com, January 13, 2014.

3. Diane Katz and James Gattuso, "Red Tape Rising: Five Years of Regulatory Expansion," Heritage Foundation Backgrounder #2895, April 3, 2014.

4. James Gattuso, "Red Tape Rising: Regulatory Trends in the Bush Years," Heritage Foundation Backgrounder #2116, March 25, 2008.

5. David Henderson, "Are We Ailing from Too Much Deregulation?" *Cato Policy Report*, Cato Institute, November/December 2008.

6. See Greenberg, "Restoring the Role of State Legislators in our Federal System of Government," op. cit.

Ending the Risk of a "Runaway Convention" by Roman Buhler

The federal government currently holds more power over the states than ever. Because of the power the federal government has acquired, it is able to force states to implement unfunded mandates and carry out other policies that state officeholders would likely never endorse. The ever-increasing amount of federal control over the states has led to an era of confused accountability, in which state officeholders are regularly blamed for policy decisions of the federal government. This is one of several sources of legitimate dissatisfaction with an intrusive federal government; this problem should motivate state policymakers to exert appropriate control over the federal government through the passage of federal constitutional amendments – such as those which would balance the federal budget, end federal mandates, curb the abuses of federal regulators, and require term limits for members of the federal legislature. This chapter provides a way to reduce or eliminate the risk of proposing such amendments to the federal Constitution.

Our Constitution lays out a procedure by which the states can influence federal policy; it is a procedure states can use to propose and enact amendments to the Constitution. Under Article V of the Constitution, two-thirds of the states (34 states) can call a convention for proposing amendments. (This is typically labeled an 'Article V convention' or an 'amendments convention.') Amendments proposed at that convention will be part of the Constitution after they are ratified by the legislatures in three-fourths of the states. Article V of the Constitution is not very well known, because it has never been used. One

of the reasons why the states have never called an Article V convention is the fear that such a convention would become a "runaway convention." That is, during a "runaway convention," delegates might propose amendments that are not related to the convention's purpose or not consistent with the integrity of the existing Constitution. Ultimately, the argument is that if a "runaway convention" were to take place, it could significantly alter our nation's Constitution. The fear of a "runaway convention" has allowed this argument to become the principal objection to the constitutional reforms that could come from an Article V convention.

However, there are two measures that could protect against a runaway convention. By passing either or both of these measures, Arkansas could encourage an Article V convention that is free of the risk of a "runaway convention." That would mean that Arkansas could play a role in forcing Congress to act with more accountability, or it could allow state legislators to advocate the creation of constitutional amendments that make it easier for us to hold the federal government accountable.

In short, Arkansas should pass a law that calls for the automatic and immediate replacement of any delegate to an Article V convention who ignored state instructions to limit the convention to an up-or-down vote on just one amendment.

Such a law could require delegates to take a pledge to limit their actions to those required by state law, or even provide for the automatic resignation of those delegates who violated that pledge. A majority of states armed with this provision (which is to say, states that control a majority of electoral votes) could prevent Article V Convention delegates from approving any unauthorized amendment. With this provision limiting convention delegates' powers, 34 states (the 2/3 required to call a convention) could successfully and safely propose an Article V resolution without the risk of a runaway convention. Lawmakers interested in such a proposal should

examine Indiana's Senate Bill 224 of 2013 (which was signed into law by Governor Mike Pence), Tennessee's Senate Bill 1432 (signed into law by Governor Bill Haslam), or Arkansas's Senate Bill 1156 of 2013. Many states bind the votes of presidential electors who are sent to the Electoral College, either by state law or party rules, and measures that bind Article V convention delegates can be justified by the same logic.

Once states have implemented the rules that guarantee the impossibility of a "runaway convention," they will be very likely to call such a convention (or threaten to do so) whenever enough states believe that the federal government has overreached; the very possibility of calling a convention will help hold Congress accountable. The states would acquire new bargaining power and leverage over the federal government that would force Congress to attend to the interests of state governments, since failing to do so could be very politically costly.

Adopting the provisions described above in order to eliminate the risk of a "runaway convention" will empower states to hold Congress accountable. (Arkansas could also amend its state Constitution so as to reduce the risk of a runaway convention. That alternative is described in "Amending Our State Constitution," above.) These changes will help to reset the modern imbalance of powers between the states and the federal government that has led to today's lopsided concentration of federal power. With the power to call an Article V convention safely, states could have the upper hand in amending the federal Constitution so as to limit federal power. Unlike lobbying for legislation that can be overturned whenever an election changes the composition of a legislative body, this strategy allows limited-government supporters to bring about long-term or permanent institutional change. Legislators serious about the long-run health and prosperity of our nation should seriously consider implementing these provisions at the state level so that state legislators might safely use already-existing constitutional provisions to limit federal power. Legislators who are interested

in this idea should study House Bill 1475 of 2015, which encapsulated similar ideas in legislative form.

The Dangers of a "Buy American" Mandate by Marc Kilmer

At least 21 states have passed "Buy American" laws.[1] These laws require that governments purchase American-made products, even if they could buy foreign-made products at a better price. "Buy American" may be a nice slogan, but it betrays the interests of Arkansas taxpayers.

The 2013 session saw an attempt to bring "Buy American" laws to Arkansas. Senate Bill 54 of 2013 would have required the use of American-made iron, steel, and other construction material in Arkansas public works projects. The intention of such legislation is to keep money in the American economy. Regrettably, this way of thinking accomplishes little except to impose large burdens on taxpayers.

When it comes to completing public works projects, the state government's goal should be to build them at the lowest cost to taxpayers. Too often, state contracting does not work this way. But easing the burden on taxpayers should be the goal, rather than writing into law a policy that increases the price of taxpayer-funded projects.

No one should expect that a "Buy American" requirement will accomplish much of anything besides hiking costs. That has been the experience in other states. As economist Douglas Irwin pointed out in an article in the *New York Times:*

> *History has shown that Buy American provisions can raise the cost and diminish the effect of a spending*

> *package. In rebuilding the San Francisco-Oakland Bay Bridge in the 1990s, the California transit authority complied with state rules mandating the use of domestic steel unless it was at least 25 percent more expensive than imported steel. A domestic bid came in at 23 percent above the foreign bid, and so the more expensive American steel had to be used. Because of the large amount of steel used in the project, California taxpayers had to pay a whopping $400 million more for the bridge. While this is a windfall for a lucky steel company, steel production is capital intensive, and the rule makes less money available for other construction projects that can employ many more workers.*[2]

Senate Bill 54's "Buy American" mandate also had a provision that it could be waived if it raised costs by 25% or more. Such a clause is an admission that a "Buy American" policy is likely to impose additional costs on taxpayers. By permitting a waiver only at an increased cost of 25% or higher, the bill still allows for a significant price hike. Consider the Arkansas Highway and Transportation's proposed I-30 and I-40 widening and reconstruction project, which is the subject of a great deal of discussion as this book goes to press. Without a "Buy American" law, this project is predicted to cost $650 million of taxpayer money. With a "Buy American" law, the cost of this project would be materially increased.[3]

Senate Bill 54 would have accomplished little more than short-term economic protectionism. While some may think protectionism is a good way to help U.S. industry, it actually hurts American businesses. The steel industry is a perfect example. In post-World War II America, high tariff barriers insulated companies like U.S. Steel and Bethlehem Steel from foreign competition. This kept the price of their products high, but also dampened their incentives to improve their product. Over the long run, protectionism failed to protect the U.S. steel industry; instead, it led to its current weakness.[4]

Furthermore, "Buy American" laws send the wrong signal to foreign consumers. Senate Bill 54's sponsor argued that he would rather have the state buy relatively expensive American-made goods rather than cheaper Chinese-made products.[5] But the Chinese people don't just make things: they also buy them. Tyson Foods, for instance, has found a foothold in the Chinese market.[6] Trade works both ways, and many Arkansas companies rely heavily on overseas consumers. To be more blunt: Senate Bill 54 invited retaliatory protectionism, which would harm people both inside and outside Arkansas.

It is good to see legislators focused on creating opportunities for American workers and business owners. However, a much better way to create American jobs is to reform regulatory and tax policies that stand in the way of economic growth. **Forcing Arkansas taxpayers to subsidize higher-priced American iron and steel would be an unsuccessful and self-defeating strategy that would make Arkansas citizens and taxpayers poorer.**

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1. Elizabeth Dwoskin, " 'Buy America' Laws: Feel-Good Politics, Little Real-World Impact," businessweek.com, May 24, 2013.

2. "If We Buy American, No One Else Will," nytimes.com, January 31, 2009.

3. Arkansas State Highway and Transportation Department, "Little Rock/North Little Rock I-30 Corridor Project: Tiger VII Grant Application," June 2015, p. 30.

4. Stefanie Lenway, et al., "Rent Seeking, Protectionism, and Innovation in the American Steel Industry," *The Economic Journal,* vol. 106, issue 435 (March 1996), pp. 410-421.

5. Nic Horton, "Why Government Should 'Buy Chinese to Save a Nickel,'" thearkansasproject.com, January 23, 2013.

6. Kim Souza, "China Is a Land of Opportunity for Poultry Growth," thecitywire.com, September 12, 2013.

The Dangers of the Equal Rights Amendment
by Britney Logan

When any policy is implemented, there will always be effects – large or small – that could neither be predicted nor anticipated; stated differently, there will be *unintended consequences* to any action performed by individuals – especially those in government. The Equal Rights Amendment (ERA) has been considered by the Arkansas General Assembly in several previous legislative sessions – most recently by the 89th General Assembly of Arkansas in 2013. The ERA is a classic case of the possibility of unintended consequences.

The ERA (Senate Joint Resolution 19 of 2013) proposes an amendment to the Constitution of the United States asserting "that equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex."

As Milton Friedman famously noted, however, "one of the great mistakes is to judge policies and programs by their intentions rather than their results."[1] **The Equal Rights Amendment might be rooted in the best of intentions, but the possibility that it could result in substantial negative and unintended consequences is very real.**

That is because when you change the Constitution, it creates the *possibility* of changes in various other areas of the law. When lawyer and former state legislator Lindsley Smith spoke to the legislature about the Equal Rights Amendment in 2013, she argued that the Equal Rights Amendment would

require courts to throw out any rules that might involve sex discrimination that did not pass the test of "strict scrutiny," which is the highest and most demanding standard of judicial review.[2] It is not hard to see how strict scrutiny review of legislation that currently treats men and women differently could change the landscape of American law.

As such, a federal Equal Rights Amendment, in particular, *could* affect many existing laws or policies that touch on "sex" and "equality of rights," including:

- **Abortion rights.** An expansion of the constitutionalization of abortion rights, and in particular taxpayer-funded abortion rights, could be required because of the ERA. In New Mexico, courts have already read their state Constitution, which contains a state-level Equal Rights Amendment, as requiring taxpayer-funded abortions – because that amendment forced equal treatment for men and women "with respect to their medical needs." [3]

- **Affirmative action.** Existing sex-based affirmative action legislation could be endangered because of the Equal Rights Amendment.[4]

- **Athletic and educational programs.** Athletic programs – namely ones that don't permit males and females to play on the same team – could be on the line. The ERA could force the integration of fraternities and sororities on public college campuses, and threaten the tax status of private colleges and universities that treat men and women differently.

- **Top freedom.**[5] The ERA could require the protection of the right of women and girls to be topless in public, on the same basis that men and boys are permitted to go about barechested today.

- **Co-ed bathrooms.** The mandatory institution of unisex bathrooms and showers (in, for instance, public universities)

could be a result of a federal ERA.

In short, it seems reasonable to conclude that the Equal Rights Amendment would likely change the country's social and legal landscape in notable ways. For example, it seems reasonably likely that the ERA could provide a litigant with a colorable claim against a university that lacked unisex bathrooms and showers – and that, under an Equal Rights Amendment, the litigant could win. (After all, there are plenty of universities that have unisex bathrooms and showers now.)

It should be noted that taking a stance against the Equal Rights Amendment is not necessarily a stance for or against co-ed bathrooms – or any of the aforementioned policies and laws, for that matter. **It is a stance against federal and judicial overreach; it is a stance for federalism and local governance.** The fundamental question that the Equal Rights Amendment invites is whether state legislators want to hand over their policymaking powers to the courts and to Congress.

The ERA states that "the Congress shall have power to enforce […] the provisions of this Article." In other words, there is a substantial danger that the freedom to set policy would be taken from state legislatures, private institutions, and individuals and deeded to the federal government and the judiciary – all in the name of equality. Therefore, the federal government and the judiciary could gain significant policy control over such issues as marriage and divorce, child custody, abortions, property, insurance regulations, sexual crimes, and state prison rules – power that rightfully belongs to the states or to the people.

To speak loosely, the Fourteenth Amendment of the Constitution prevents *irrational* or *unfair* sex discrimination.[6] Irrational or unfair sex discrimination, like race discrimination, is an intolerable evil that should have no place in Arkansas (or American) law. But there is also a second type of discrimination: it is not clear, for instance, that exempting women in the military

from combat roles is an irrational or unfair practice, although it is obviously a discriminatory one. The better way to eliminate this second type of discrimination, however, is by means of statute or administrative policy, because that method allows policymakers to address concrete issues in detail.[7] Because unintended consequences are likely inevitable at the high level of generality of a constitutional amendment, amending the Constitution with the ERA is a sloppy and high-risk way to address the problem of sex discrimination. It is hard to avoid the conclusion that state legislatures are far better equipped than courts to deal with the practical questions of social policy that the ERA invites. When something with unforeseen consequences is written into state law, it is comparatively easy to correct for unseen problems in a future legislative session. When something is written into the federal Constitution, however, it is (to state the obvious) comparatively more difficult to change that document.[8]

Regrettably, the superiority of a statutory approach to reform was not always appreciated by legislative advocates of the ERA when the proposed amendment was discussed in the state Senate's State Agencies Committee in 2013.[9] One member of the committee, when discussing the ERA resolution, repeatedly asserted that he couldn't see where the ERA's text would require (for example) many of the policy implications that are numbered and briefly described above. This is an essentially irrelevant argument, because it conflates possibility with certainty: it skips over the fact that courts use the abstract principles that are implied by the text of constitutional amendments to decide cases and make concrete policy decisions. Another pro-ERA senator suggested ERA opponents who had, in the past, predicted the consequences of proposed legislation with some confidence had contradicted themselves when they later suggested that the consequences of a change in the federal Constitution were difficult to predict. That senator's accusation was naïve: to repeat, in the case of legislative code that addresses a discrete situation, the effects of that change are

restricted, much easier to foresee, and much easier to change – but changing the federal Constitution, and foreseeing all the consequences of such a change, is much more difficult. One implication of this is that changes to the Constitution will, as a general matter, be larger and riskier than changes to Arkansas code; another implication is that predictions about changes in Arkansas code are safer and easier to make.

Milton Friedman also noted that "a society that puts equality before freedom will get neither. A society that puts freedom before equality will get both."[10] **If we actually want to foster an environment of equality within our state and throughout the country, the freedom to set policy on controversial social questions should be zealously preserved at the individual and state level, not surrendered to the courts and the federal government.**

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1. Friedman said this on the *Open Mind* television program, broadcast on December 7, 1975, while being interviewed by Richard Heffner.

2. The view that the Equal Rights Amendment would subject governmental actions to strict scrutiny by courts if those actions treated men and women differently is almost certainly correct: that view is endorsed by Roberta W. Francis, co-chair of the ERA Task Force of the National Council of Women's Organizations. See their "The Equal Rights Amendment: Frequently Asked Questions," August 2014, p. 2. To pass a strict scrutiny review, a law must be justified by a *compelling governmental interest;* it must be *narrowly tailored* to achieve that goal or interest; and the law must be the *least restrictive means* for achieving it. These terms of art within the definition of strict scrutiny are best understood in the context of concrete cases. See, e.g., *Grutter v. Bollinger,* 539 U.S. 306 (2003).

3. *New Mexico Right to Choose/NARAL v. Johnson,* 975 P.2d 841 (1998), 126 N.M. 788.

4. Roughly four decades ago, the United States Supreme Court decided that equal-protection gender claims should be measured by a different standard from equal-protection race claims. The government must subject race classifications to strict scrutiny, but must subject gender

classifications to intermediate scrutiny: namely, proof that the law is fairly and substantially related to the achievement of an important government interest. See *Craig v. Boren,* 429 U.S. 190 (1976), at 197, 208, 218, as well as several later cases which developed these ideas – in particular, *Califano v. Webster,* 430 U.S. 313 (1977). Space does not permit an extended discussion of the race-versus-sex divergence in equal protection law, but the weight of authority suggests that this divergence continues today: there is an excellent discussion of this question in Rosalie Berger Levinson, "Gender-Based Affirmative Action and Reverse Gender Bias: Beyond *Gratz, Parents Involved*, and *Ricci*," *Harvard Journal of Law and Gender*, vol. 34 (2011), at n. 81.

5. The "top freedom" coinage is not ours. See, e.g., tera.ca, the website of the Topfree Equal Rights Association.

6. See the series of women's equality cases that began with *Reed v. Reed*, 404 U.S. 71 (1971). In *Reed,* the U.S. Supreme Court found that a law that favored a man over a woman, in the appointment of an administrator for a decedent's estate, had no "rational relationship to a state objective." However, a discriminatory law that had a rational relationship to a state objective would be evaluated by a different standard; to speak loosely, that different law might be viewed as establishing rational or fair discrimination. An example of rational or fair discrimination might be the exemption of women in the military from some combat roles.

7. In early 2013, Defense Secretary Leon Panetta lifted the military's ban on women serving in combat. This triggered a three-year process of internal implementation, which is not yet complete. See Tom Vanden Brook, "Officials: Panetta Opens Combat Roles to Women," *USA Today,* January 24, 2013. This kind of administrative procedure is likely to have better consequences for effective implementation of gender equality than a court's order.

8. In order to amend the Constitution, the House of Representatives and the Senate must approve a joint resolution by a two-thirds supermajority vote in both houses. If that resolution is approved, it must then be ratified by three-quarters of the states.

9. Most or all of this 2013 State Agencies discussion can be viewed by searching for "Equal Rights Amendment Arkansas 2013" at youtube.com.

10. This quote is from a lecture of Friedman's at William and Mary College. It is available at youtube.com: those who are interested can search for "Milton Friedman – Equality and Freedom" at that site.

The Dangers of Suspicionless Drug Testing

In an effort to save everyone – especially taxpayers – time and resources, it is imperative for any legislator to stay away from legislation if it it is very likely or certain that such legislation will eventually be rejected by the courts on grounds of unconstitutionality. When courts reject such a bill, it reflects not only a waste of time and money, but an extraordinary embarrassment for the legislators who supported it in the face of their sworn oaths to the Constitution.

People may disagree about whether requiring drug testing in exchange for the receipt of government benefits or gifts is good public policy; however, presumably everyone agrees that good public policy must be *constitutional* public policy. As such, Senate Bill 38 of 2013 (which required "that applicants for and recipients of unemployment benefits be tested for illegal drug use") would have to be substantially altered in order to pass the constitutional tests that courts would surely have applied to it.

The Fourth Amendment to the federal Constitution protects citizens from, among other things, unreasonable searches.[1] Constitutional challenges to drug testing typically involve determining which types of searches are indeed reasonable. Of course, we all know that government agents cannot choose people on the street at random and begin rummaging through people's pockets any time they feel like it; the general rule is that there must first be some reasonable suspicion of wrongdoing. There are, however, exceptions to

that rule. The relevant exception, in the case of passing a drug test in exchange for unemployment benefits, would be that there must be some sort of special circumstance (e.g., public safety) that justifies the search.

The underlying problem with Senate Bill 38, however, was that it failed to supply any special circumstances that could justify the system of drug testing it proposed.[2] In contrast, a bill that only called for drug-testing of those who behaved suspiciously might be invulnerable to constitutional challenges. But it appears that the regime of suspicionless drug testing that would have been created by Senate Bill 38 would have failed to meet basic constitutional standards.

Those who want to understand the constitutional constraints associated with suspicionless drug testing would do well to examine the U.S. Supreme Court's past treatment of this issue. Several recent Supreme Court cases discuss the matter, and policymakers should familiarize themselves with them:

- *Skinner v. Railway Labor Executives Association* (1989).[3] In *Skinner,* the Court determined that some railroad employees have diminished expectations of privacy in the railroad industry – as well as, more generally, industries that are "regulated pervasively to ensure safety."[4] Stated differently, because railroad trains – which consist of many tons of metal with great mass and velocity – are dangerous, it is acceptable to have special rules to test railroad employees for drugs.

- *National Treasury Employees Union v. Von Raab* (1989).[5] In *Von Raab,* the Court concluded that U.S. Customs employees could be drug-tested if they sought a transfer or promotion to sensitive positions, such as those involving drug interdiction or the carrying of firearms. Largely because the government has a compelling interest in preserving the integrity of the border, drug-testing these employees was found to be constitutionally sound.[6]

Notably, in the two cases described above, a special (specific) policy need received higher priority than the general rule forbidding drug-testing people at the government's whim. However, both of the above cases state that general Fourth Amendment protections against individual searches of the public at large remain in effect; that is, the government must have a special and powerful reason to trump the Constitution's Fourth Amendment protections.

- *Vernonia School District v. Acton* (1995).[7] The Court found in *Vernonia* that schools have a custodial relationship over children that permitted drug-testing,[8] but this custodial relationship – which permits some degree of supervision and control – does not apply to adults.[9] The Court made clear that one cannot assume that its permission to drug-test students applies in other contexts.[10]

- *Board of Education of ISD No. 92 of Pottawottamie County v. Earls* (2002).[11] As in *Vernonia*, the Court in *Earls* determined that government can test students who wish to join extracurricular activities because the state is essentially acting as a "guardian and a tutor."[12] In this case, the Court discussed in some detail how test results were kept in separate and confidential files that were not generally available to school employees or law enforcement; these results also carried no disciplinary or academic consequences, other than limiting extracurricular participation.[13]

- *Chandler v. Miller* (1997).[14] This is perhaps the most relevant case to the issue at hand. The *Chandler* Court examined the constitutionality of drug-testing political candidates for, among other positions, the state legislature. The Court struck this law down; its reasoning is important to understand. Namely: because there are apparently no special circumstances that suggest political candidates are uniquely vulnerable to drug use, the Court reasoned that there is no justification to depart from the general rule of prohibiting unreasonable searches.[15]

(Additionally, several non-binding lower court opinions echo the idea that government must demonstrate a "special need" to overturn the general rule against searches without suspicion. For brevity's sake, these cases are not discussed here.[16])

To sum up, Senate Bill 38 would be less constitutionally offensive if it confined its drug-testing to searches based solely on reasonable suspicion. For instance, if an applicant for benefits were to miss a regularly-scheduled meeting with his or her caseworker, or if that applicant otherwise failed to meet the standards his or her caseworker imposed, this might constitute reasonable suspicion. Perhaps it could be argued that the failure of an applicant to get hired after a series of job interviews could demonstrate reasonable suspicion of drug use, although that appears to be a much weaker argument. As a general matter, however, prolonged unemployment as such does not seem to provide evidence for drug use.

In short, the structure of Senate Bill 38 would have to be significantly changed to have any serious chance of being upheld as constitutional by the courts. Such a change is especially necessary in this case, because there are apparently no real differences between the population asking for unemployment benefits and the population at large; that is to say, applicants for unemployment benefits do not seem to be prone to drug problems or to criminality in a way that is different from the rest of us.

Requiring recipients of public benefits to pass drug tests has its merits in some circumstances, but the passage of unconstitutional legislation is meritless. The rules that the Constitution and the Supreme Court of the United States lay down in this area are not mysterious; they are not especially difficult to understand. The central idea of the Constitution is that government must be prevented, in certain respects, from doing everything that its agents want to do. The promises of limited government contained within our Constitution – to

which every single legislator swears fidelity – deserve everyone's respect.

In 2015, the General Assembly passed Act 1205, "An Act to Establish the Drug Screening and Testing Act of 2015." That measure requires government drug-testing agents to establish reasonable cause to believe that a prospective welfare recipient is using drugs, and to provide a statistical report on the number of screened individuals about whom there was reasonable suspicion of drug use. Although it is somewhat unclear just how this would work in practice, the sponsor and drafters of Act 1205 deserve praise for anticipating and addressing the constitutional prohibition against suspicionless drug testing.

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1. The Fourth Amendment to the federal Constitution reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. This issue came up during the Senate Public Health Committee meeting in which the bill was first introduced. When the sponsor of the bill was asked if there was any difference between the population of those receiving unemployment benefits and the population at large, he answered that there was no difference between the two populations.

3. 489 U.S. 602.

4. Ibid., at 627.

5. 489 U.S. 656.

6. Ibid., at 679.

7. 515 U.S. 646.

8. Ibid., at 654.

9. Ibid., at 654-56.

10. Ibid., at 664-65.

11. 536 U.S. 822.

12. Ibid., at 830-31.

13. Notably, Senate Bill 38 did make some provision for privacy of results, in that it stated that "the results of the drug screen shall not be released or used as evidence for criminal prosecution." This attempt was commendable from a constitutional perspective; however, it seems unlikely that the denial of law-enforcement access to drug-testing results is enough to pass the federal Constitution's gauntlet.

14. 520 U.S. 305.

15. Ibid., at 318-319.

16. See *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000); *Lebron v. Wilkins,* 820 F. Supp.2d 1273 (M.D. Florida 2011).

The Dangers of Taxpayer-Subsidized Business

It is remarkable that Arkansas taxpayers, through Arkansas government, continue to expand corporate welfare. When the average person thinks of welfare, he or she imagines negative images involving laziness, irresponsibility, the breakdown of the family, and wasted tax dollars. And yet welfare to businesses, furthered by Arkansas government, continues to grow. Many of the people we conventionally think of as welfare recipients are poor, individually powerless residents of public housing. But some of the most elaborately subsidized welfare recipients in America are corporations.

Corporate welfare has the same debilitating effects – including dependency and self-destructive behavior – as welfare payments to individuals. Furthermore, corporate welfare destroys actual economic development – because, for every corporate-welfare dollar that taxpayers are on the hook for, that is one dollar less for job creation and capital investment. The availability of corporate subsidies creates large incentives for businesses to invest money into lobbying, not into legitimate business expansion – a process that itself creates more subsidies. Finally, as the Arkansas Economic Development Commission has demonstrated again and again, government is hilariously bad at picking winners and losers.[1]

Most educated people will not even attempt to defend taxpayer subsidies to businesses on general public-welfare grounds – because they realize that consumer choice will typically provide support to viable businesses without

the necessity of subsidies. We have now reached the point where even subsidy recipients concede that such subsidies are hard to justify in principle. Indeed, when *Arkansas Business* interviewed the CEO of Big River Steel, John Correnti, asking him "What's the role of government in big private-sector projects?", Correnti explained: "Stay out."[2] He added, "As far as government is concerned, they should stay out of private industry." Because the Arkansas General Assembly, one year previous, had approved a corporate-welfare package for Big River Steel that included a $125 million bond issue, Correnti's candor was refreshing. He also had some choice words for one of his competitors, Nucor Corporation; Correnti charged that Nucor had attempted to raise Big River Steel's costs of doing business through legal machinations:

> *Nucor has lost its way. You compete on the playing field, and that is the marketplace. You don't compete in the courtroom … What Nucor was trying to do is cause doubt and concern in our investor group and in our debt-holders. They were basically trying to chase away our investors and chase away our banks from doing the project for fear there would be a long, drawn-out litigation process, which nobody wants. At the end of the day the lawyers win. Nobody else wins. It would be like Wal-Mart or Costco or Target complaining if they put a store across the street from each other. Guess what happens when you put a Target or a Costco across from a Walmart? All three of them become better operators. And you know who benefits? You and I – the consumer.*[3]

Correnti's explanation of the extraordinary waste caused by diverting resources away from consumer-good creation and toward litigation squabbles illuminates a parallel phenomenon: namely, the waste that is created when resources that could be used to produce valuable goods are diverted to lobbying for corporate welfare. His interview demonstrates something important: it reveals that **even the recipients of corporate welfare must admit that the practice is indefensible as a**

general matter. Policymakers in Arkansas would do well to learn from Correnti's honesty.

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1. See our chapter earlier in this book entitled "Arkansas's Best Economic Development Plan: Cutting Corporate Welfare."

2. "Big River Steel's John Correnti on Government's Role in Private-Sector Projects? 'Stay Out'," arkansasbusiness.com, July 28, 2014.

3. Ibid.

The Dangers of Requiring Government Reporting of Private Giving by Marc Kilmer

In a world that is increasingly connected online, protecting our citizens' privacy is of utmost importance. Disclosure of personal information, even if accidental, cannot be undone once it happens on the Internet. Once information is out there, it remains available. The permanence of information online makes it all the more important to protect sensitive information entrusted to government. Given the threats that some donors to non-profit enterprises (such as charitable or educational organizations) may face due to intentional or accidental disclosure online, Arkansas should end the requirement that nonprofits report their donors to the Attorney General.

One of the tax forms that the IRS requires nonprofits to complete is Form 990's Schedule B. On that form, nonprofits must list their major contributors – along with a set of addresses and dollar figures that denote how much they contributed.

As part of Arkansas's charitable registration process, the state Attorney General requires that nonprofit organizations provide a copy of their federal 990 forms, which include Schedule B. This places donors' sensitive information in the offices of the Attorney General, exposing it to a variety of employees. Presumably, these employees are legally barred from disclosing that information, but that prohibition can be violated intentionally or accidentally. If this information is exposed, it has a chilling effect on donors. And once it is online, there is no way to stop that information from spreading.

Confidential information about charitable donations listed on one Arkansas charity's Schedule B became public in 2015, resulting in a significant hit to the privacy of several donors.[1] (It is unclear exactly how the Schedule B information was released to the public, or who released it, and several Freedom of Information Act requests to the custodians of that information provided no answer to such questions.) There are issues with donor privacy in other states, too. California Attorney General Kamala Harris has demanded that nonprofits in that state turn over copies of their donor list. Nonprofits fought this demand and won in court. They had ample reason to be fearful of what Harris would do with this information.

When the nonprofit Americans for Prosperity (AFP) brought suit against Harris, a trial judge found that "the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms."[2] The judge went on to note, "During the course of this litigation, AFP conducted a search of the Attorney General's public website and discovered over 1,400 publicly available Schedule Bs."[3] Harris blamed these disclosures on human error and underfunding, but the judge found this level of privacy violation to be "shocking" and "careless."[4]

AFP had brought suit against Harris because it wanted to protect the privacy of its donors. The judge in the case concluded, "the Court heard ample evidence establishing that AFP, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known."[5] These incidents include threats to slit the throat of AFP's CEO, individuals taking down license plate numbers of AFP employees, and even threats against individual donors who had contributed to AFP.

The AFP case demonstrates that nonprofits, especially those with a perceived ideological mission, can face violence from those who are unsympathetic to that mission. Donors to these organizations can easily face the same type of violence or

other forms of harassment. That is why it is so important to keep such information confidential.

The downside of providing this information to the attorney general is clear, but there is no corresponding benefit to requiring that Schedule Bs be handed over to the state attorney general. The IRS already has this information, so if it is needed for investigatory purposes, it could be obtained by the state without much complication. If there is no reason to keep these schedules on file for investigations, it is difficult to see what public purpose is served by a gratuitous mandate to turn them over to our state government.

There is exactly one thing that is accomplished by requiring that nonprofits give information about their donors to our state's Attorney General: it puts donors' names and addresses in a place where they can be made public. This disastrous consequence occurred in California, and it has likely occurred in other states. Because of the need to keep this information confidential, and because there is no way to rectify the inappropriate release of this information, the best course of action is for the Attorney General to stop collecting it.

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1. See, e.g., Max Brantley, "UPDATE: Lamoreaux Explains His Work for $120K Consulting Payments," arktimes.com, October 22, 2015.

2. *Americans for Prosperity Foundation v. Kamala Harris*, CV 14-9448-R (California 2016).

3. Ibid.

4. Ibid.

5. Ibid.

Three Mistakes Legislators Should Avoid

1. **Don't Put Things Off Until Later.** As the legislative session begins, any capable legislator will pay special attention to the deadlines that the rules of the legislature impose – in particular, the deadlines for bill-filing and the deadline imposed by the end of the session. There is always a reason to procrastinate, but that reason is typically not a very good one. It is all too easy to miss legislative deadlines, and it is too often the case that nobody else will remind you about the things you need to accomplish. Getting bills drafted and filed can take longer than you might think, and it's better to start sooner rather than later.

2. **Don't Fetishize Compromise.** Legislators attempting to write important policies into law sometimes behave as if they misunderstand what is valuable about compromise. Compromise about means and methods can be an essential part of getting your values written into law, but compromise about values can be dangerous and self-destructive. There is nothing praiseworthy about compromise, as such – in the legislative process, compromise is best understood as a method of getting part of what you want. Make sure that, when you compromise, it is in service to advancing your values – otherwise, what's the point? Your goal as a bill sponsor should always be to protect at least some of what is valuable about the policy of your bill – not simply to pass something.

3. **Don't Be Trapped By The Fear of Losing A Vote.**

Legislators sometimes outsmart themselves by not pushing for a vote on a measure they favor. This is a failure of will that is an example of flawed reasoning – that is, the flawed reasoning in question is that one can avoid embarrassment by avoiding losing a vote. One problem with this reasoning is that it can lead to timidity and failure. People lose votes every day during the legislative process, and those losses are almost immediately forgotten by almost everyone. Another problem with this reasoning is that, as a matter of substance, premature surrender is a guaranteed way to lose a vote, because a measure that is never voted on will never pass. Most legislators do not spend their time after the session regretting that they did too much, but there are a significant number of legislators who regret that they did too little.

The Basics of Arkansas's Legislative Process

Legislation, in order to pass through the Arkansas General Assembly, must pass in identical form through both the House and the Senate. There are 100 House members and 35 Senators; each bill must pass through a House committee (requiring 11 votes), the House floor (requiring 51 votes), a Senate committee (requiring 8 votes), and the Senate floor (requiring 17 votes) in order to pass. There are exceptions to this rule, because (for instance) some tax bills require a supermajority, not just a simple majority, to pass. As a general matter, however, one consequence of all of this is that if you don't like a bill, you have at least four different venues to try to assemble a large enough group of legislators to block it.

The Senate is a more informal institution than the House. Now that House policy committee proceedings and House floor proceedings are televised, the transparency created by technology is encouraging more professional conduct and professional behavior in that body. The Senate is different, and sometimes more informal; in the Senate, for instance, legislators often 'roll' the vote, which means that unless a Senator is in the chamber and objects, his vote is recorded as a 'yes' vote. Another informal aspect of legislative committees – this one common to both houses – is that votes are not recorded unless several legislators simultaneously ask the committee to do so. This means that a lot of bills make it through the committees that may not actually have the votes.

The state Constitution permits the governor to veto

legislation after majorities of the House and Senate pass it. However, that veto can be overturned by a subsequent majority vote of both bodies. It is reasonable to conclude that a gubernatorial veto will carry little force if the legislators who originally passed the measure out of both bodies remain convinced, even after the veto, that passage is a good idea – because they may simply pass the measure again.

The above paragraphs deal with what are called "policy" bills or "substantive" bills. The system for allocating spending through the state budget is a bit different. The state budget's spending gets allocated by each year's version of the Revenue Stabilization Act. The legislature passes hundreds or thousands of "appropriations" bills in each yearly session, and each one gets a grade in that year's version of the Revenue Stabilization Act, such as A, B, or C. The grade of the appropriations bill determines whether there is money for it. That is, suppose there's a shortfall – suppose that there is not as much income to the state treasury as planned. What might happen is that the A bills get fully funded, the B bills get half funded, and the C bills don't get funded at all. Given that it's the RSA that assigns grades to each appropriations bill, there is always some controversy over the RSA and the grades that it contains. The amount of money in the state treasury helps to determine which bills get funded and which don't.

Some observers of the legislative process assign disproportionate significance to appropriations bills. To repeat, each appropriations bill receives a grade in that year's RSA. If an appropriations bill gets a low grade in the RSA, it is possible that it will ultimately lead to no allocation of actual spending at all. An appropriations bill with a low grade is therefore something like a check that has been written on a defunct checking account. Anyone can write such a check, but it would be unwise to pretend that it represents real money.

Legislative procedure is a complex subject, and our description of it can only scratch the surface. Those who

have additional questions about this subject should begin by consulting the Rules of the House and the Senate.

Further Reading

The Advance Arkansas Institute has produced approximately 60 different publications on government reform; they are posted on our website, advancearkansas.org. Those who seek a deeper grounding in the bedrock American principles of free markets, individual liberty, and the rule of law should explore some or all of the following texts:

Frederic Bastiat, *The Law*

James Bovard, *Lost Rights*

James DeLong, *Ending 'Big SIS' (The Special Interest State)*

Dinesh D'Souza, *What's So Great About America*

Richard A. Epstein, *Simple Rules for a Complex World*

Morris Fiorina, *Congress: Keystone of the Washington Establishment*

Milton and Rose Friedman, *Free to Choose*

Nick Gillespie and Matt Welch, *The Declaration of Independents*

John Gray, *Liberalism*

F.A. Hayek, *The Road to Serfdom*

Henry Hazlitt, *Economics in One Lesson*

Mark Levin, *The Liberty Amendments*

Robert Levy and William Mellor, *The Dirty Dozen*

Clark Neily, *Terms of Engagement*

Tom G. Palmer (editor), *Why Liberty*

Jonathan Rauch, *Government's End*

Thomas Sowell, *A Conflict of Visions*

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The Advance Arkansas Institute (www.advancearkansas.org) is a nonprofit research and educational organization committed to advancing public policy based on free markets, individual liberty, and limited, transparent government.

The quote from Ronald Reagan at the front of this book comes from his gubernatorial inauguration speech of January 5, 1967.

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The Action Plan for Arkansas sets the standard for policymakers who favor freedom, lower taxes, and conservative values. This book contains an issue-by-issue blueprint to reduce the size and scope of state government and to transform Arkansas into a land of opportunity.

Providing both in-depth analysis and concrete recommendations, the Action Plan is an invaluable resource for policymakers and anyone else who is interested in securing liberty through limited government.

The Action Plan for Arkansas is a project of the Advance Arkansas Institute – a nonprofit research and educational organization committed to advancing public policy based on free markets, individual liberty, and limited, transparent government.

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