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The Politics of Professionalism: Reappraising Occupational Licensure and Competition Policy

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Abstract

Elite economists and lawyers contend that occupational licensure raises consumer prices and unemployment. Billed as a bipartisan boost to market competition, this technocratic policy agenda rests on thin empirical foundations. Studies of the wage effects of licensing rarely couple this analysis of its putative costs with convincing analysis of the benefits of the professional or vocational education validated via licensure. While some licensing rules may be onerous and excessive, licensing rules are inadequate or underenforced in other labor markets. Furthermore, by limiting labor market entry, occupational licensing rules, like minimum wage and labor laws, can help stabilize working- and middle-class wages. Although current antitrust law provides an ideological framework for technocratic attacks on licensing, it is fundamentally unsuited for evaluation of labor markets. Contemporary antitrust law's arcane concept of efficiency reflects neither the legislative objectives animating the antitrust statutes nor popular understanding of what competition policy should do.

1. INTRODUCTION

The market is not a natural or organic entity. Markets cannot and do not exist apart from the state. The state defines and enforces the foundational feature of a market economy: property rights. In any modern, complex economy, transactions require conventions and laws to be successfully and reliably consummated. Questions of interpretation and enforcement of contracts inevitably arise and require the decision making of a court or another entity that exercises coercive authority. Property and contract law show that it is nonsensical to speak of state interference in the market when state action begets and supports market activity in the first place.

Contemporary social orders are not just dependent on common law doctrines such as trespass, alienability of property, and negligence. They also rely on laws concerning copyright, patent, trademark, and corporate governance and the management of monetary policy by the Federal Reserve. Administrative agencies govern entire sectors of the economy. In short, the production and distribution of wealth are the result of conscious political decisions by the state, not preordained outcomes (Hale 1952, McCluskey 2012).

Sadly, these basic points are frequently forgotten among both policy makers and practicing lawyers. Some aspects of law are treated as natural and unquestionable (e.g., tort and contract), whereas others are persistently painted as a statist incursion into Edenic laissez-faire (e.g., labor law and consumer protections). Even more troublingly, certain areas of law have come to not merely reflect but exemplify this one-sidedness. Over the past several decades, American antitrust law in particular has come to embody this ideology, naturalizing certain forms of state action and casting a suspicious eye toward others.

In recent decades, neoliberal technocrats have exploited the broad language of antitrust statutes to undermine the power of professionals and associations of workers, even as they treat some of the most powerful firms ever to exist—and those firms' collusion against workers—with kid gloves (Pasquale 2010b, Vaheesan 2018, Whitney 2015). This bias in antitrust law reflects a larger cultural tilt in the United States toward consumer interests and away from those of producers (or, at least, the interests of productive workers at firms, as opposed to rentiers and capital generally) (Whitman 2007).[1] Chicago School teachings have made an esoteric, mathematically defined account of consumer welfare the defining inquiry in antitrust. It is troubling enough that crabbed interpretations of monopolization and merger doctrine have acted as a shield to permit extraordinary levels of concentration in major US industries (*Economist* 2016, Pasquale 2013b). On top of this deferential posture toward large businesses, the Federal Trade Commission (FTC) and Department of Justice (DOJ) use antitrust law as a sword to challenge professions and worker associations that go too far in establishing standards of fair conduct, stable employment, and quality service in their fields. Reminiscent of President Trump's executive order directing federal agencies to repeal two regulations for every new regulation they issue, a leading antitrust scholar has even called on the FTC to attack local regulations governing Uber in exchange for prohibiting the company from deceiving riders about its privacy and data security policies (Crane 2017). Having largely ignored workers in their hearings on the gig economy (Scholz & Pasquale 2015), the FTC agreed with this scholar and sided with the US Chamber of Commerce in an amicus brief challenging Seattle's efforts to boost drivers' bargaining power vis-à-vis powerful platforms (Fed. Trade Comm. 2017).

Even as these initiatives, aimed at labor ranging from dentistry to ice skating coaching, may sometimes deter anticompetitive activity that hurts consumers, they can stifle beneficial

[1]Note, however, that there is no necessary tension between the interests of labor and consumers along several axes. For example, consumers prefer well-trained doctors and plumbers, and those laborers who are well-trained do not want to face unfair competition from fly-by-night operators who have not sufficiently invested in the skills necessary to do these jobs well.

collective action by workers. They signal a general disapproval of workers acting in concert and may undermine one of the few tools of self-assertion that workers can now brandish against powerful firms (ranging from digital labor platforms, like Uber or Amazon's mTurk, to an increasingly concentrated health care industry). Most problematically, current antitrust doctrine does not take into account the societal value of occupational licensure or professional standards. Instead, it reflects mainstream economics' bias against occupational licensure and a more general belief that government is the principal obstacle to competitive markets (Vaheesan 2015).

This article exposes weaknesses in the mainstream case against occupational licensure and worker self-organization (Section 2). Antitrust law has failed to grapple with the thin empirical case against occupational self-governance (Section 3). Therefore, antitrust law must evolve toward a new position of respect for and openness to democratic governance within professions and occupations themselves, as well as laws recognizing that self-governance (Section 4).

2. THE UNEASY CASE AGAINST OCCUPATIONAL LICENSURE

During the *trentes glorieuses*, labor's share of income relative to capital increased in the United States, thanks to favorable terms of globalization and legal protections for both unions and professions, among other factors (Pasquale 2014, Piketty 2014). Consumer protection and disclosure laws also complicated the lives of firm managers. These progressive measures proved vulnerable to attack, however. Just as the Taft-Hartley Act of 1947 marked a backlash against labor's gains in the 1930s, the 1970s would see a variety of efforts to roll back what was perceived as a regulatory juggernaut of the 1960s.

The Powell memo outlined several initiatives to combat what its author perceived as undue liberal influence in universities, labor movements, and civil society generally (MacLean 2017, Powell 1971). Regulators also came under attack. Those suspicious of the administrative state offered critical perspectives on the motives and results of licensing boards that controlled access to certain types of jobs. Gellhorn (1976, pp. 16–18) complained,

> Occupational licensing has typically brought higher status for the producer of services at the price of higher costs to the consumer; it has reduced competition; it has narrowed opportunity for aspiring youth by increasing the costs of entry into a desired occupational career; it has artificially segmented skills so that needed services, like health care, are increasingly difficult to supply economically; it has fostered the view that unethical practices will prevail unless those entrenched in a profession are assured of high incomes; and it has caused a proliferation of official administrative bodies, most of them staffed by persons drawn from and devoted to furthering the interests of the licensed occupations themselves.

Gellhorn's laundry list of objections is a hodgepodge of cynical public choice modeling and crabbed rejection of modernity. Its economic foundations are shaky. One wonders, for instance, what Adam Smith would make of a thinker dismissing the division of labor into expert health professions as artificial segmentation of skills. To be sure, at this point in the development of integrated delivery systems, there is more demand for the coordination of care—but that is coordination of the very types of specialized experts (from physician assistants to respiratory therapists) that are now cornerstones of contemporary health systems.

Nevertheless, Gellhorn's critique has blossomed into think-tank position papers and economic research. The American Enterprise Institute now laments the "terrible economic burden of occupational licensing" (Pethokoukis 2014). Technocratic liberals join the dirge and often put the dismantling of many occupational licensure requirements at the very top of a proposed bipartisan agenda to promote economic growth (along with cuts to entitlements and health care spending).

A rough typology of complaints against occupational licensure would include the following: It raises prices for consumers without commensurate increases in quality and blocks out would-be competitors who cannot or will not undergo requisite training and tests. However, each of these objections is not sufficiently theorized, justified, or empirically grounded to support the types of interventions now routinely pursued by the FTC and DOJ. Commentators all too often extrapolate from horror stories to make claims about the entirety of licensing, peddling anecdata disconnected from the complex and variegated reality of contemporary labor practices.

2.1. Price and Quality

In the basic case against occupational licensure, the focus is on the higher prices arising from these regulations. There is a presumption that the price increase in, say, medical or legal services, owing to the training and testing of licensed professionals in such fields, is not worth the wedge of price increase attributable to the cost of such training and testing. But there is little awareness of the real potential for consumers to capture that wedge of price. For example, if training requirements for nurses declined, perhaps hospitals would pay them lower starting salaries because they would not be burdened by the high student loan payments necessary to finance their training. But it is by no means clear that patients would see their bills fall. Instead, managers and shareholders may simply pocket the reduced wage—resulting in a hat trick of declining quality of labor, rising inequality, and less resources for the types of professional schools whose research advances nursing practice.

A more advanced version of the higher-price-without-greater-quality case depends on the rise of big data and forms of popular assessment to empower consumers to make their own judgments as to price/quality trade-offs. Herzlinger proposes ratings for drugs, rather than Food and Drug Administration approval or nonapproval decisions; a similar regime could rate doctors or lawyers, displacing extant licensing of such professionals (Pasquale 2010c, 2013a). According to the usual economic logic, such tiered rating (rather than all-or-nothing licensure) of medical and legal professionals would expand access in both fields.

However, this perspective ignores the serious limitations of these reputational systems, especially in the context of complex products and services. It presumes that consumers—or at least a critical mass of consumers—always have the time, interest, and ability to engage in comparison shopping and distinguish qualified providers from incompetent ones. Empirical evidence from several markets undercuts this assumption (Flannery & Samolyk 2005, Mehrotra et al. 2017). Even when consumers do comparison shop, they often focus on one or a few product or service dimensions, not the entire universe of relevant terms and features (Ausubel 1991, Korobkin 2003). Moreover, reliance on reputational screening without funding extensive monitoring and regulation of such screening is an open invitation to fraud and abuse. It is easy to game rating and ranking systems (Reagle 2015). There is widespread public funding for medicine, or contingent or state funding for legal services. The United States has developed several redistributive mechanisms to fund health care, ranging from the Medicare payroll tax to general funds derived from progressive income taxation. Fly-by-night operations can easily take advantage of such funds.

There is also a question concerning how providers would earn their first-star ratings or other indicia of quality. Perhaps those looking for experience would be a cheap option for the poor and disadvantaged. But creating such second-rate options for the poor undermines the unitary standard of care now underwritten by communal funding sources. Even if tiering and low-cost options would reduce the cost of care in many instances, there is no guarantee that this reduced cost would actually increase the real incomes of poor or middle-class persons. Instead, it may simply result in reduced health care subsidies from employers or reduced state support. Moreover, those who would undermine extant institutions of medical or legal training rarely account for the value of the research generated by such institutions.

Opponents of occupational licensure have an unfortunate tendency to treat the most marginal or extreme cases of inappropriate or excessive licensing requirements as paradigmatic of the entire field. Parades of horribles quickly emerge: S. David Young (2002) complains about licensure of "falconers, ferret breeders, and palm readers"; Gellhorn (1976) marvels at the need to license "beekeepers and taxidermists"; cosmetologists and florists are a frequent go-to example for libertarian litigators [*Vong v. Aune* (2014); Slivinski 2015]. We obviously cannot comprehensively demonstrate the wisdom of training requirements in each of these diverse areas of human occupation (though at least in the case of beekeepers, the risk of disastrous mismanagement of stinging insects suggests some regulation is wise). But they are scarcely reflective of the hundreds of occupations now licensed by some jurisdictions in the United States (and certainly not of the 65 occupations required to be licensed in all 50 states).

Reflexive incredulity toward licensing requirements in certain fields is presumptuous, often reflecting an elitist, antiworker outlook. It is also frequently hypocritical: Often the same commentators who would generalize from a critique of ferret breeder training to a deregulatory labor policy in general would impose evidentiary strictures akin to the Data Quality Act on regulators before they expanded the scope of their authority. Critics should demonstrate humility before upsetting arrangements that have long governed these fields (Browne 1993). As Law & Kim (2005, p. 723) have observed, "The evidence from the Progressive Era suggests that regulation arose to improve markets as specialization and advances in knowledge made it increasingly difficult for consumers to judge the quality of professional services."

2.2. Restrictions on Entry

Once one moves beyond the easy cases of libertarian outrage at licensure, the uneasiness of the wholesale case against licensure becomes clear. For example, many occupations govern decisions that have sizable and long-term consequences for those who do not directly engage in the economic transaction giving rise to the decision. For example, a thrifty apartment owner may find an unlicensed plumber to install pipes. If the pipes later leak thanks to the cheap plumber's lack of expertise, it is not merely the apartment owner who suffers—neighbors and the entire building may be stricken with mold, structural damage, or worse. Similarly, granting prescribing authority to unlicensed medical professionals may create cheap options for the uninsured—but increases the risk of pill mills and other accoutrements of opioid epidemics.

Opponents of occupational licensing also rarely acknowledge that many professions do not require enough training before permitting relatively young and inexperienced individuals to take on enormous responsibility. One criminal justice expert argues that the current crisis of police shootings would be a far less widespread problem if officers had better training (Haberfeld 2016). Kuttner (2008) has argued that elder care in the United States is, at present, abysmal in many nursing homes—and that more professionalized home health aides would provide much better care. Tragically, extant licensing laws are all too often underenforced even in very sensitive areas. Over a 10-year period, there were 43 deaths in unlicensed Virginia day care facilities (Falls & Brittain 2014). The extreme vulnerabilities of ordinary citizens in each of these all-too-human experiences—being arrested, or being cared for during old or very young age—commend more regulation of personnel in these fields, not less (Butler 2017, Commit. Sci. Child. Birth Age 8 2015).

Excess consumerism also skews scholarly perspectives here. Although the harms of purchasing flowers from an unlicensed florist are not easy to fathom, consumer protection is not the sole goal or benefit of occupational licensing. A decision by the state to assure certain standards of quality in the provision of services like these is not entirely different in kind from a decision to decree a minimum wage or mandate closed shops as a way to promote unions. Each regulation necessarily stops certain kinds of competition and shrinks a market relative to a less regulated benchmark.

Occupational licensing establishes what Freidson (1986) called "market shelters." With these market shelters limiting entry, employers cannot draw on a large reserve army of unemployed individuals. By conferring greater bargaining power on workers, occupational regulations can raise wages and promote more stable employment. As history and more recent experience have shown, unfettered competition between workers in labor markets can be harmful. It can lead to below-subsistence-level wages and unstable employment arrangements that harm individual workers, families, and entire communities. As with unionization and minimum wage laws, occupational licensing can grant workers greater power vis-à-vis employers and thereby has the potential to enhance the welfare of workers. Empirical research has found that licensing yields higher wages for workers (Gittleman & Kleiner 2016). It is arguably no coincidence that, as unionization rates have declined in the United States, the percentage of the workforce seeking licensure has increased (Kleiner & Krueger 2010). Licensing may also mitigate the effects of persistent gender and racial discrimination in the labor market and reduce wage disparities between African Americans and whites and women and men (Blair & Chung 2017).[2]

3. THE EXISTING ANTITRUST PARADIGM CANNOT ACCURATELY OR FAIRLY EVALUATE OCCUPATIONAL AND PROFESSIONAL REGULATIONS

Although antitrust law has informed and inspired the intellectual and legal attacks on occupational licensing [*Goldfarb v. Virginia State Bar* (1975); Edlin & Haw 2014], the current intellectual frame of antitrust cannot account for the myriad objectives of occupational regulations. Antitrust law today seeks to promote a very particular and arcane form of efficiency: allocative efficiency (Stucke 2008). This goal seeks to minimize the so-called deadweight loss from noncompetitive pricing. The efficiency framework is untethered from the goals that Congress expressed when it enacted the antitrust laws. Unlike the vision expressed by the drafters of the Sherman, Clayton, and FTC Acts, antitrust's present efficiency paradigm disregards power dynamics in the economy and society (Orbach 2013). The neoclassical model omits the critical role of state institutions in enabling market activity in the first place and uses a perfectly competitive marketplace, which does not exist outside textbooks, as its default. Even from a strictly consumerist perspective, the efficiency model does not protect the full range of consumer interests and prizes short-term price competition over other considerations, such as quality and safety (Pasquale 2006, 2013c). Owing to their narrow focus, in particular on short-term consumer prices, the efficiency-minded antitrust agencies have launched misguided attacks on occupational licensing.

3.1. The Current Antitrust Framework Fails to Account for the Pluralistic Goals of Occupational and Professional Regulations

Notwithstanding some intellectual disagreements over whether short-term consumer interests should be accorded importance within the analytical framework, the extant antitrust regime prizes

[2] Of course, licenses do not always help licensed workers. Sometimes they require credentialization that is overpriced. Obtaining licenses may also require workers to finance costly education and training through student loans and create unsustainable debt burdens (Consum. Financ. Prot. Bur. 2017). However, the answer to these problems may just as readily come in the form of better regulation and public financing of professional or vocational education than in abolishing licenses altogether. The balance between these approaches should be a critical focus of future social scientific research in the area.

economic efficiency. This technical concept of economic efficiency is derived from the neoclassical model and built on a pyramid of deductive reasoning. It is centered on a person's willingness and ability to pay for something. It does not consider a person's needs apart from his or her ability to meet these needs. For example, an ill person's desire to obtain lifesaving health care is not recognized in this framework unless she has the means to purchase health care (Pasquale 2010a).

The principal or exclusive social harm under this framework is so-called deadweight loss, in which some mutually beneficial market transactions do not occur owing to some institutional impediment. Concerns about distribution and even longer-term economic efficiency are either treated as secondary or dismissed. So-called noneconomic desires, such as preserving a particular industrial structure, maintaining the viability of local businesses, and protecting the living standards of workers, are deemed outside the scope of antitrust law. The FTC has, on occasion, gone further and implied these goals are even illegitimate for democratic governments to pursue (Gavil et al. 2014).

The efficiency fixation does not reflect the congressional goals of the antitrust laws. The sponsors of the antitrust laws had a broad vision for the new laws and sought to curtail concentrated private power and its many ill effects. Economists had barely begun to specify the concept of economic efficiency when Congress passed the principal antitrust statutes in the late nineteenth and early twentieth centuries (Carstensen 1983).

Even leaving aside the legislative histories of the antitrust laws, the case for sacrificing popular social goals in the name of an arcane definition of efficiency is unpersuasive. Davies (2014) has acidly remarked on the extreme manipulability of the type of aggregative analysis characteristic of contemporary antitrust economics. The concept of allocative efficiency prioritizes wealth maximization, leaving redistribution to be pursued later, if at all, via taxes and transfers (Kaplow & Shavell 2000). This work largely ignores or discounts the possibility that unequal wealth attained under optimal substantive legal rules may be devoted to blocking political processes necessary to redistribute it (Kaplow & Shavell 1994). In a climate of nearly two decades of intensifying gridlock, it is a recipe for favoring those able to take advantage of extant antitrust exemptions (like the *Noerr–Pennington* doctrine and other broad conceptions of protected speech) to further entrench their own power relative to those less advantageously positioned [*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.* (1961); *United Mine Workers v. Pennington* (1965); see also *Citizens United v. Federal Election Commission* (2010)].

The goals of public policy are not cast in stone, nor can they be removed from the realm of politics. Rather, they are contestable and intertwined with moral and political judgments (Rahman 2016). Despite the claims of its proponents, efficiency is not a value-neutral concept. Efficiency maximization is laden with implicit political judgments on the role of the state, the existing distribution of wealth, and human behavior. Specifically, it demands that the state vigorously enforce rights of property and contracts and assumes that the existing distribution of wealth is somehow just or at least the result of neutral processes and that human behavior is motivated primarily or exclusively by self-interest (Flynn 1988). On the whole, the efficiency ideology tilts heavily in a conservative direction and is loath to upset the status quo (Hovenkamp 1985).

Antitrust law need not be entirely focused on consumer welfare, especially given changes in the balance of power between very large firms and workers. Over the past two generations, tens of millions of Americans have experienced stagnant wages and precarious employment (Gould 2016, Kalleberg 2009). In this context, concerns about jobs and income are entirely valid and have become central to political debates. In the absence of stable, well-paying jobs, Americans are increasingly facing lives of material deprivation and chronic uncertainty. These afflictions are bad enough on their own, but they also threaten dire macroeconomic consequences, as individuals subject to constant fear of losing a livelihood resist making rational investments in education or the types of consumption they would normally enjoy. For mainstream economists and antitrust lawyers to condemn occupational licensing on the grounds that it raises wages and generally helps workers is to elevate the preferences of one class of technocrats over democratic choices.

3.2. The Current Antitrust Framework Fails to Consider Power in the US Political Economy

The efficiency model at the heart of current antitrust law also ignores power dynamics in American society in two critical ways. First, it submerges and naturalizes the essential role of state institutions in establishing and maintaining a market economy. Second, it relies on a model of perfect competition that disregards the power disparities that characterize the US economy and have characterized it for centuries.

The neoclassical model at the heart of antitrust law fails to acknowledge the important role of the state and public institutions in allowing markets to emerge and flourish. Legislatures, administrative agencies, and courts establish and enforce, among other things, property, contracts, and corporate charters that undergird a modern economy. Neoclassical conceptions of the economy submerge this essential state action and imply that the state is an exogenous, rather than a constitutive, force in a market economy.

The dominant, technocratic approach to antitrust law uses perfect competition as its intellectual starting point. Under this stylized model, no party—consumer, firm, or worker—has power to influence prices or other quantities in the market. Everyone sells a commodified good or service at the competitive price, no higher and no lower. This conception of the market is the successor to Adam Smith's idealized view of a market in which all participants are equals and answer to no authority except the invisible hand of collective decisions by buyers and sellers. The model of perfect competition has been at the heart of many defenses of existing economic arrangements in the United States and of capitalism generally.

Even when monopoly or oligopoly cannot be denied, the defenders of efficiency have a ready-made response. They assume that market entry is easy and so all markets are contestable by firms waiting on the sidelines. In this view, monopoly and oligopoly are fleeting phenomena soon defeated by new firms pursuing profit opportunities (e.g., Easterbrook 1984).

Although this model is simple and appealing in imagining a system in which no single actor or even group of actors exercises power over others, it is detached from contemporary political economy. Perfect competition is an ideal that is, for all intents and purposes, not seen in the US economy. Power abounds, systematically elevating the bargaining position of some and reducing that of others (Hale 1952, McCluskey 2012). The example of perfect competition often cited in textbooks and by economists—agriculture—is far from competitive, let alone perfectly competitive. The highly concentrated agricultural processing sector (Hendrickson & Heffernan 2007) dictates the terms on which American farmers can sell their products. Free entry and contestable markets, so frequently assumed in theory, are rarely witnessed in practice.

Most sectors of the economy are monopolistic or oligopolistic, with product differentiation being a defining characteristic of modern commerce. Industries ranging from airlines to pharmaceuticals to telecom are dominated by a small number of corporations (Porter 2016). Moreover, despite claims of new competition and openness in the economy, the technology sector appears to be the antithesis of vigorous competition. Five large platforms dominate this new economy (Manjoo 2016), and two companies have a 70% share in the national broadband market (Farivar 2016).

In this world of monopoly and oligopoly power, some actors have great power, whereas others have very little. A monopoly provider of a service has great power over its consumers as well as entrants that could threaten its dominance. Given the declining labor share of output over decades, it is now clear that capital has a great deal of power in both its purchasing and selling decisions and that workers and consumers have comparatively little power. To gloss over the power disparity between monopolistic and oligopolistic corporations and individual workers and consumers is to elevate the barren formalism of microeconomics over social realities.

The power of concentrated capital extends beyond the confines of the market sphere. The microeconomic concept of market power captures only one aspect of the power exercised by concentrated capital. Large corporations have the ability to shape the long-term development of their industry by determining who gets to participate in their market and on what terms. Further, they wield disproportionate political power in the ostensibly democratic United States (Gilens & Page 2014). Large businesses can also manipulate the media and the ideology of society. For example, they can fund trade associations, think tanks, and academics to influence the terms of popular debate and foster ideologies supportive of their interests (Kocieniewski 2013, Lipton & Williams 2016). Corporate power, understood in its entirety, implicates political economy generally. Narrow focus on short-term prices will never manage to address this fundamental concern of the Sherman Act.

Occupational and professional licensing regimes are established against the backdrop of extensive market-enabling state action and power disparities. They are not imposed on an anarchic or egalitarian marketplace. Rather, they are a layer of state action that structures markets, much like property and tort law. As with these common law fields, occupational and professional regulations shift legal entitlements and shape marketplace outcomes. They have the capacity to redress disparities in power. They can confer and amplify organizational force to atomized groups of workers. Licensed workers, possessing greater organizational coherence and unity than their unlicensed peers, can exercise greater power in labor markets and also assert a collective voice in the political system. In doing so, they can create more equal—or at least less unequal—power relations between labor and capital.

3.3. Antitrust Law's Intellectual Foundation and Analytical Framework Fail to Protect Consumers

Although the efficiency model can be reconciled to an extent with the consumer protection aspect of occupational licensing, it does not consider the full range of consumer interests. Its horizon does not extend beyond the short term. The neoclassical paradigm, most familiarly expressed in supply-and-demand diagrams, is a static view of a market. Per this understanding, short-term market failures are valid grounds for state intervention. Yet, markets do not exist at a single point in time. The present efficiency model fails to account for dynamic changes that can have far greater impact on consumers—for better or for worse—than static changes. In practice, the efficiency model can capture the static cost of a regulation but not its dynamic benefit. Antitrust law does have an analytical framework, the rule of reason, for balancing the benefits and costs of a particular public policy. Yet, because of its emphasis on quantifiable effects, it is incapable of balancing the full range of benefits and costs.

The efficiency paradigm does recognize the possibility of market failures that warrant state action and thereby does acknowledge a limited role for occupation and professional regulations. In the textbook model, asymmetric information is a defining characteristic of some markets, especially those for complex services. Consumers lack the sufficient information to make fully informed decisions. For example, owing to information asymmetries, consumers may not be able to tell a reputable medical practitioner from a quack seeking to make easy money (Akerlof 1970). Beyond paying for worthless service, consumers may suffer grievous harm because they cannot distinguish capable from incapable practitioners. The efficiency frame of contemporary antitrust deems such asymmetric information between consumers and service providers to be a market failure that warrants public action.

Licensing can correct for this asymmetric information between consumers and providers. It can establish and impose educational and other training requirements for individuals seeking to offer a particular service. Occupational regulations screen market participants and ensure that only qualified professionals can legally serve the public. Such regulations establish an entry barrier against incompetent and unqualified practitioners. Under such a licensing system, consumers are relieved of the burden of trying to distinguish competent practitioners from those who are not. Much like product standards, licensing rules can serve as a "market-stabilizing device. . .in industries characterized by complex or highly technical products, where product quality is otherwise difficult to ascertain" (Fed. Trade Comm. 1983, p. 43).

Although it supposedly protects consumer interests, the current antitrust framework protects consumers in a limited way. The efficiency model does not account for dynamic benefits from regulations, occupational or otherwise. For example, occupational regulations can raise wages and draw more skilled and diligent individuals into a field over a longer time horizon (Shapiro 1986). This can translate to superior quality and enhanced public safety. In other words, occupational licensing can reduce price competition today in exchange for higher levels of quality and safety in the future. Because of its static orientation, however, the efficiency frame does not capture these dynamic benefits. Instead, the efficiency lens sees only the short-term loss of price competition.

Antitrust law's rule of reason, superficially sophisticated, is not capable of evaluating the benefits and costs of occupational regulation. As with other prevailing forms of cost-benefit analysis, the rule of reason is comparatively good at measuring short-term and quantifiable costs and benefits and deficient in, or even incapable of, measuring longer-term and more qualitative benefits and costs (Allensworth 2016). In antitrust cases against mergers or monopolies, the rule of reason means that the plaintiff loses unless it can show actual or likely short-term price effects from the defendant's conduct (Stucke 2009). Dynamic and other more qualitative harms from, for example, a merger or monopoly are either discounted or disregarded.

The defects of the rule of reason become apparent in the context of public interest regulation. The costs of public interest regulation, including those governing occupational and professional licensing, tend to be quantifiable and incurred in the short run, whereas the benefits are more qualitative and more likely to accrue over a longer time horizon.[3] Applying a rule of reason framework often means emphasizing the costs and discounting or ignoring the benefits. In the context of occupational regulations, a restriction on entry into a particular profession can raise prices in the short term but also improve the quality of service in the longer term. Given its bias in favor of quantifiable items, the rule of reason is likely to identify and condemn the short-term loss of price competition and overlook any offsetting improvements to service quality over the long term. In practice, the rule of reason is biased against policies that have static, short-run costs and dynamic, long-run benefits. When forced to choose between a benefit that is not quantifiable and a cost that is, the rule of reason champions the quantifiable and slights the unquantifiable.

3.4. The Existing Antitrust Paradigm's Narrow Lens Leads to Misguided Attacks on Occupational Licensing and Worker Collective Action

The shift in antitrust philosophy from political economy to narrow microeconomics has brought occupational and professional regulations, as well as collective action by workers, into the

[3]For example, cost-benefit analysis in the environmental context generally discounts longer-term benefits (Driesen 2006, Kysar 2010).

enforcers' crosshairs. The efficiency paradigm has led to collusion becoming the primary focus of antitrust enforcement, especially public enforcement. Without drawing distinctions between labor and capital, the antitrust agencies have made policing collective action by workers a focus of their enforcement and competition advocacy efforts. In doing so, they have insisted on viewing occupational and professional licensing within the narrow lens of their efficiency framework rather than considering larger public policies.

Under the efficiency framework, collusion has become the "supreme evil of antitrust" [*Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko* (2004)]. Conduct such as horizontal price fixing between rivals is seen as almost always generating deadweight losses and no offsetting efficiency benefits. Today, collusion is subject to aggressive prosecution, with the DOJ's Antitrust Division focusing many of its resources on the criminal prosecution of individuals and companies involved in price fixing and bid rigging (First & Waller 2013). As collusion has moved to the center of the enforcement agenda, other forms of anticompetitive behavior have receded in importance. In elevating collusion to the rank of most serious antitrust offense, the antitrust agencies have neglected historical concerns about the concentration of private power. Over the past several decades, they have made merger and monopoly cases a lower priority. For example, the DOJ filed just one monopolization suit between 2007 and 2016 (US Dep. Justice Antitrust Div. 2018).

With their collusion-centric enforcement philosophy and focus on eliminating restraints on horizontal price competition, the enforcement agencies, in particular the FTC, have made occupational and professional regulations a major priority (Fed. Trade Comm. 2016, United States 2016). Regulation of the occupations and professions often involves restrictions on entry and the establishment of price floors and supervision requirements. Because these regulations are often instigated at the behest of practitioners and impede full price competition, the antitrust agencies have been active participants in the campaign against them. They have called for a retrenchment of occupational regulations and argued that they should be limited to measures that protect consumers.

In addition to public advocacy against occupational regulations, the agencies have targeted private trade restraints among workers. They have brought enforcement actions against professional associations that adopted ethical codes and other rules that limited price competition among their members. In recent years, for instance, the FTC brought enforcement actions against professional associations representing music teachers and ice skating teachers for prohibiting their members from soliciting each other's clients [*In re Music Teachers National. Ass'n.* (2014), *In re Professional Skaters Ass'n.* (2015)]. For the antitrust agencies, collusion is collusion and should be subject to similar punishments, whether practiced by middle-class workers seeking to establish some features of a market shelter or by the world's largest tech companies striving to suppress wages (Green 2015). Even collective action by workers to challenge powerful employers over low wages and unsafe working conditions is suspect [*FTC v. Superior Court Trial Lawyers Ass'n.* (1990); Paul 2016].

These advocacy and enforcement efforts are misguided because they insist on viewing professional and occupational licensing through the framework of allocative efficiency. This technocratic concept is the proper goal of neither the antitrust laws in particular nor public policy in general. Occupational and professional regulations advance myriad goals. They can protect consumers in the short and long run and promote stable employment with livable wages. Antitrust enforcers, in joining the chorus against occupational and professional regulations, disregard these other public policy aims and demand that legislators and regulators conform to their efficiency ideology.

4. HOW ANTITRUST AGENCIES AND COURTS SHOULD RESPECT THE OBJECTIVES OF OCCUPATIONAL AND PROFESSIONAL REGULATIONS IN THE NEAR TERM

Notwithstanding the narrow and inadequate efficiency paradigm of contemporary antitrust law, the federal antitrust agencies and the courts can still respect the objectives for occupational and professional regulations and preserve sufficient policy space for them. They can take two steps to ensure that occupational regulations are less likely to be subject to antitrust interference. First, the DOJ and FTC, in exercising prosecutorial discretion, should recognize that labor is not just another commodity. Second, the agencies and the courts should maintain a state action immunity that gives states and municipalities freedom to enact and preserve occupational licensing without fear of antitrust liability.

4.1. The Spirit of the Clayton Act's Labor Exemption Should, at a Minimum, Inform the Exercise of Prosecutorial Discretion

The federal antitrust agencies should accord much lower priority to policing occupational regulation than they currently do. The current efficiency framework is not up to the task of evaluating occupational licensing regimes, even from a strict consumerist perspective. The efficiency ideology can offer only a partial understanding of the purposes and effects of occupational regulations. At best, it can provide some protection for consumers. At worst, this paradigm simplistically condemns occupational regulations as "publicly-approved cartels" (Boswell 2013, p. 132) and ignores their social benefits.

This exercise of prosecutorial discretion makes sense from a resource perspective. The agencies recognize that they cannot bring every case or opine on every matter that implicates competition policy. These capacity limitations are most acute during times of fiscal austerity, such as the present (Lipman 2013). In light of these constraints, the DOJ and FTC should place a much lower priority on policing occupational regulations and collective action by workers. These freed up resources can be devoted to areas that have been neglected in recent years and decades, such as merger and monopolization matters. Even from a purely consumerist perspective, challenging an anticompetitive merger in food retailing or health insurance is sure to produce greater consumer savings than bringing a case against ice skating coaches for not soliciting each other's students.

A reduced focus on occupational regulation would promote the congressional spirit behind the Sherman and Clayton Acts. When the Sherman Act was being debated in 1890, a recurring concern was that courts would apply it to labor unions and other worker collectives on the basis that this joint action represented a "restraint of trade" (Greenslade 1988, p. 166). The principal sponsors of the bill were intent on controlling the power of capital, not policing the activities of labor (Greenslade 1988, Paul 2016). Notwithstanding this understanding in Congress, the courts applied the Sherman Act to labor activities in subsequent years [*Loewe v. Lawlor* (1908)]. Congress responded with the Clayton Act in 1914 (15 U.S.C. § 12) and the Norris–La Guardia Act in 1932 (29 U.S.C. § 101) to create space for collective labor activities. The Clayton Act's labor exemption used expansive language, stating that "the labor of a human being is not a commodity or article of commerce."

A reduced focus on occupational regulation would further the original vision of the Sherman and Clayton Acts. Occupational regulations can, in part, protect the interests of workers and promote higher wages and stable employment. Over the past century, the courts have construed the labor exemption narrowly and, in large measure, limited it to workers deemed employees under federal law, thereby excluding workers classified as independent contractors. This narrow understanding is antiquated, a holdover from a different era when stable, centralized workplaces were the norm. Such work is in secular decline, replaced by a "fissured workplace," with independent contractor status becoming a new norm (Weil 2014). A broad understanding of the labor exemption would acknowledge changes in the labor market and recognize that those who depend on their labor for a living are workers entitled to antitrust immunity, notwithstanding legal formalities and labels (Paul 2018).

4.2. The State Action Immunity Should Not Be Made More Restrictive

The courts should not make the test for the state action immunity more restrictive. This immunity provides states with the flexibility to advance important public policies without running afoul of the antitrust laws. In the context of occupational licensing, the state action doctrine gives states and municipalities the freedom to establish regulations to protect consumers, improve wages and employment, and advance other public objectives.

The state action immunity reconciles the federal antitrust laws with state and local political authority. The Supreme Court has held that state action is immune from the antitrust laws. For instance, a state cannot be held liable for passing a law that restricts competition in a market [*Parker v. Brown* (1943)]. Private actors are entitled to the state action immunity if they can show that they are (*a*) acting pursuant to clearly articulated and affirmatively expressed state policy and (*b*) subject to active supervision by the state [*California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* (1980)]. This doctrine represents a sensible balance between upholding the federal antitrust laws, respecting state and local policy-making powers, and protecting against the capture of these governmental units by private interests.

The Supreme Court in *North Carolina State Board of Dental Examiners v. FTC* (2015) clarified the application of the state action doctrine to regulatory bodies composed of private actors. The Court held that if a state agency is "controlled by active market participants," such as the dentists in the case, it would have to be actively supervised by a state entity. The Court noted that an agency controlled by active market participants is similar to a private trade association, except that the former acts under the color of state authority. According to the Court, in the absence of the active supervision requirement, powerful private actors could use state power to advance their own interests, rather than a broader public interest or state policy.

For state bodies controlled by active market participants, an important outstanding issue that the Court did not resolve was what qualifies as active supervision. It stated that "day-to-day involvement in an agency's operations or micromanagement of its every decision" is not required. It offered some guidance and stated that a supervising state actor "must review the substance of the anticompetitive decision...and have the power to veto or modify a particular decision." Unrealized potential for review is not sufficient.

In several areas across the United States, occupational licensing bodies are controlled by active market participants. This choice is logical because active market participants are likely to have the expertise to serve as competent regulators of their field. As the Supreme Court noted, though, these arrangements raise the risk of private interests being elevated over public goals. The Supreme Court's formulation of the active supervision requirement serves as a reasonable check against this threat, without imposing onerous burdens on states. To preserve occupational regulations, the active supervision requirement should not be made more restrictive. The Court's current guidance on this requirement should be preserved rather than made more prescriptive.

To insist on more robust state oversight would create risks for occupational licensing regimes and may even undermine the stated purposes of the Court. States could be compelled to establish "day-to-day supervision" of agencies controlled by active market participants or to replace active market participants with full-time officials. Retaining full-time government employees to oversee or staff these agencies may open entities like medical boards to even more political interference. If the state action doctrine is interpreted to demand such changes in the context of agencies controlled by active market participants, states may be forced to curtail or eliminate occupational licensure programs that advance important state policies.

5. CONCLUSION

Encouraged by the Trump administration's general anti-intellectualism and antilabor tendencies, FTC technocrats have recently stepped up their attacks on occupational licensing regimes with a so-called Economic Liberty Task Force. The resonance of "economic liberty" with Lochner-era conceptions of economic substantive due process is not accidental. The technocrats have criticized regulation for raising consumer prices and supposedly failing to generate sufficient compensating health, safety, and other consumer benefits. But they have done little to quantify, or even study, such benefits. Thus, their criticisms reflect an unduly narrow view of both consumer interests and the public interest.

From a labor market perspective, future research should focus on two large classes of occupational licensing rules. Where there are clear safety and quality rationales for licensure, as in health care and education, any agenda to relax those licensing restrictions should research exactly how quality and safety can be maintained without licensure. In other areas, where quality and safety are not so salient, the wage effects of removing licensing restrictions should be a key concern of policy makers. If the end result of relaxing licensing restrictions in, say, hair styling would simply be to reduce the median wage in the occupation while slightly raising the number of hours worked in it, this would do little to ensure inclusive prosperity among hairdressers.

From a consumer protection perspective, the research agenda in occupational licensing needs to become more balanced. The academic and advocacy work here is almost exclusively focused on excess licensing, and excess enforcement of extant licensing. However, many occupational licensing rules are too permissive and underenforced. Consumers may suffer serious harm, including grievous injury and death, because existing occupational licensing regimes are too weak. Moreover, occupational licensing is not intended to benefit consumers alone. By restricting entry, occupational and professional regulations establish market shelters that enhance the bargaining power of workers, raising wages and improving worker welfare. They function much as federal labor and minimum wage laws do and help establish floors on labor market standards.

Although many critics of occupational licensing have applied its framework, antitrust law, as presently interpreted, is not capable of fairly or fully evaluating occupational regulations. Under the efficiency objective of contemporary antitrust, goals aside from short-term wealth maximization are trivialized. For example, distributional fairness, protection of workers, and preservation of a democratic political economy are either neglected or dismissed. But efficiency is neither apolitical nor value free. Furthermore, the efficiency model assumes away power, disregarding the role of market-enabling state action and the supremacy of capital in modern society.

Even from a consumerist view, the efficiency paradigm protects only a subset of consumer interests, principally short-term price competition, and fails to fully consider other measures, such as quality and safety. Rather than promoting a broad understanding of the public good, efficiency-oriented antitrust authorities have launched misguided attacks on occupational licensing and worker collective action. Antitrust authorities in both the Clinton and Obama administrations continued the Bush (*père et fils*) trend to shirk their responsibility to monitor and contain the monopolizing impulses of massive firms (Khan & Vaheesan 2017)—especially in the technology and finance sectors. This trend has been particularly troubling given the mounting evidence that information markets are being systematically distorted by large firms (Ezrachi & Stucke 2016, Patterson 2016, Stucke & Grunes 2016).

Top economic officials in both the Obama and Trump administrations have said that they want to assure workers good jobs at good wages. But the assertion rings hollow when they set out to undermine one of the key institutions offering some kind of stability in labor markets racked by precarity and disruption. Unions, professional associations, and licensure requirements are mutually supportive in reinforcing policies designed to give workers some autonomy and self-determination in defining the terms of their employment. Undermining one tends to undermine the other.

Occupational licensing is just as much a matter of politics as it is of economics. Especially given persistent bias and opacity in the economic analysis of mergers, antitrust loses little if any scientific validity once it concedes the dually politico-economic nature of competition policy (Eisinger & Elliott 2016). In properly politico-economic questions, both the ends and the means are open to debate, not dictated by a technocratic quest for a perfected labor market (McCluskey et al. 2016).

Admittedly, existing occupational regulations can and should be improved. For example, they sometimes impede the full participation of former prisoners and immigrants in American economic life. The critical point is that occupational licensing implicates multiple, and sometimes competing, public policy goals, including protecting consumers and enhancing the bargaining power of workers. Licensure—part consumer protection, part labor law—calls for legislative-type determinations that reflect a broad and multifaceted conception of the public interest, not limited by esoteric formulations of efficiency that have by now lost whatever patina of legitimacy they once had. Antitrust practitioners who insist on reducing every public policy decision to efficiency enhancing or efficiency reducing cannot account for the pluralistic objectives of occupational licensing in particular and public policy in general. Given its intellectual narrowness, the framework of contemporary antitrust law provides a warped view of occupational and professional licensing regimes.

DISCLOSURE STATEMENT

This work reflects the views of the authors alone and not necessarily those of the Consumer Financial Protection Bureau or the United States. The authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

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