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Flanders, Brannon: Repeal minimum markup law

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At a time when Wisconsin is considering hiking its gas tax, it's a good time to consider how Wisconsin law keeps gas prices (and the prices of other goods) artificially high. It's called the "minimum markup" law, or the Unfair Sales Act, and it ensures that prices for products such as gas, alcohol, tobacco and prescription drugs don't go too low. The findings of a new study we co-authored dispels the myths surrounding the law and argues that it should be repealed.

A Depression-era relic, the minimum markup law seeks to protect Wisconsinites from "cutthroat competition," whereby a gas station owner could crush his competitors by charging a price so low that the other stations go broke trying to match him. Once the competition has been dispatched, the theory goes, the remaining survivor can charge monopoly prices and gouge consumers indefinitely.

To prevent this, gas stations and other retailers are required to "markup" their merchandise beyond what they may wish to charge. In the case of gas stations and tobacco sellers, competitors are allowed to sue anyone violating the Unfair Sales Act for damages, increasing the likelihood of complaints.

Similar and equally archaic laws remain in place in a number of states throughout the country. Fifteen states, including Wisconsin, have minimum markup laws that apply to most retail goods, and an additional eight states have such laws applied specifically to gasoline.

But is there really any evidence that "cutthroat competition" in the states that do not have minimum markup laws is having the effect claimed? To answer this question, the Wisconsin Institute for Law & Liberty examined nationwide data on the number of small businesses and gas stations in each state. After including a number of control variables that could plausibly impact the number of retailers — such as the condition of the state's economy and the demand for gasoline in each state — we found no evidence that minimum markup laws increase the number of small businesses or gas stations. In other words, there do not appear to be fewer small businesses in states that do not have such laws, something one would expect to see if cutthroat competition resulting in the loss of small businesses was in fact a real world problem. What instead affects the number of retailers are common-sense factors such as the quality of a state's economy.

The reason why the "protection" of minimum markup laws doesn't result in an increased number of small businesses is that cutthroat competition doesn't really work. If a competitor succumbs to such competition, his gas station — and the pumps and infrastructure — remain intact. This allows another competitor to enter the market, meaning that the cutthroat competitor simply will be faced with new competition and will not be able to earn the extra profit that would have made the scheme worthwhile. Economists refer to this phenomenon as “contestable markets.” So unless the cutthroat competitor can keep new businesses from entering the market, he will not reap the benefits of monopoly pricing.

If the Unfair Sales Act does nothing to increase competition, then it is nothing but a mechanism to transfer money from Wisconsinites to businesses through artificially inflated prices. There is no empirical evidence that it serves to protect competition, and the fact that states without such an archaic law have as many small businesses as other states ought to confirm its irrelevancy.

Two proposals in the Legislature — the Assembly GOP tax plan and a bill by state Sen. Leah Vukmir (R-Brookfield) — feature partial repeal of the minimum markup law. This is a start. But the time is long past for a full repeal of this vestige of the Great Depression and allow a freer market in Wisconsin to flourish. Consumers would benefit through lower prices and, as our study shows, small businesses are unlikely to be hurt by predatory pricing.

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