

Antitrust and Federalism: A Response to Professor Wiley

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Which values are so compelling that, in their defense, we should enlist the federal judiciary to overturn political decisions made in the states? The question is at the core of our constitutional law, but rarely raises its head in antitrust. As I briefly argue here, however, a disagreement over this question is what divides Professor Wiley's¹ preferred test for preemption of state regulation by the Sherman Act from my own.² Professor Wiley's test assumes that the maintenance of economic competition is a value sufficiently compelling to justify judicial intervention in political decision-making. While I do not dispute the importance of competition, the premise of my test is that it does not warrant such intervention. To avoid further waterlogging our readers, I will forego discussing other points raised in Professor Wiley's piece and focus on why I believe it is this disagreement over the ordering of values that ultimately divides us.³

One clue can be found in Professor Wiley's defense of his preemption test from First Amendment attack. Professor Wiley proposes that federal courts should invalidate state regulations that (1) are economically inefficient and (2) originate from the lobbying efforts of "producers." To my contention that the latter criterion—by imposing an absolute penalty upon

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1. See Wiley, *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277 (1987) [hereinafter Wiley, *Revision and Apology*]; Wiley, *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713 (1986) [hereinafter Wiley, *Capture Theory*].

2. See Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486 (1987).

3. As a consequence, this reply will deal principally with the prescriptive elements of Professor Wiley's capture theory. I continue, however, to regard his theory as descriptively inaccurate because it accounts for few if any of the antitrust state action cases. Moreover, the trend of recent cases is the opposite of that which the theory would predict. See Garland, *supra* note 2, at 490–98. Indeed, as Professor Wiley concedes, the Supreme Court's most recent opinion, *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987), provides no evidence to support his theory that the state action doctrine has been shaped by a growing suspicion of regulation on the part of the Justices. See Wiley, *Revision and Apology*, *supra* note 1, at 1280–82. On the contrary, as Justice Powell noted, *see* 107 S. Ct. at 724, the analysis in *324 Liquor* is a straightforward application of the test previously announced in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the very test Professor Wiley criticizes most sharply as an inappropriate response to his capture theory. See Wiley, *Revision and Apology*, *supra* note 1, at 1278, 1280–82; Wiley, *Capture Theory*, *supra* note 1, at 729–39.

producers' political activities—is inconsistent with the First Amendment,⁴ he responds by pointing to such cases as *Hunt v. Washington State Apple Advertising Commission*⁵ and *Washington v. Davis*.⁶

In those cases, Professor Wiley suggests, the Supreme Court looked to the intentions of those who supported regulations in order to determine their validity—and did so without reference to First Amendment concerns. But the difference between cases like *Washington Apple* and *Davis*, and antitrust cases, is an important part of the difference between Professor Wiley's argument and my own. In those cases, the Court examined intent in order to vindicate compelling constitutional values—specifically the protection of out-of-staters and racial minorities from local governmental discrimination. Professor Wiley, by contrast, would overturn state legislation to vindicate a statutory interest in economic competition—an interest the Court has found not to be constitutionally compelling.⁷ One may, of course, dispute whether such an interest should be deemed as compelling as the interest in barring discrimination. But one certainly need not reverse *Washington Apple*, as Professor Wiley implies, in order to criticize his capture criterion on First Amendment grounds.⁸

An underlying disagreement over the ordering of values can also be

4. My contention does not "expand[] to assert that a court violates the First Amendment whenever its historical investigation 'penalizes' political actors by supporting a judicial conclusion distasteful to them." Wiley, *Revision and Apology*, *supra* note 1, at 1288. There is nothing wrong with a court looking at legislative history in order to interpret the meaning of a statute. Professor Wiley's proposal, however, runs afoul of the First Amendment because it makes the *validity* of legislation turn on the identity of the person who lobbied for it. See Garland, *supra* note 2, at 512-18 (discussing *Noerr* and *Hartlage* cases). Indeed, because a substantial percentage of state regulations will necessarily fail Professor Wiley's efficiency criterion, see Garland, *supra* note 2, at 510, under his test their validity is likely to depend solely on whose lobbying resulted in their enactment.

5. 432 U.S. 333 (1977).

6. 426 U.S. 229 (1976). Professor Wiley's further citation of *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), is considered in detail in Garland, *supra* note 2, at 513 n.161.

7. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913-14 (1982) ("[T]he right of the people to petition their representatives in government 'cannot properly be made to depend on their intent in doing so' . . . This conclusion [is] not changed by the fact that the [defendants'] anticompetitive *purpose* produced an anticompetitive *effect* . . .") (quoting *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 139 (1961)).

8. See Wiley, *Revision and Apology*, *supra* note 1, at 1288.

There are also other significant First Amendment differences between Professor Wiley's analysis and that employed in the cited cases. First, in large part, Wiley's test turns not on the *intent* but on the *identity* of the sponsors of legislation, and is expressly aimed at deterring a specified class of lobbyists ("producers") from seeking benefits through the political system. See Wiley, *Capture Theory*, *supra* note 1, at 743, 772-73. The Court has repeatedly condemned such efforts to discriminate on the basis of a speaker's identity. See, e.g., *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 106 S. Ct. 903, 912 (1986); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 784-85 (1978).

In addition, to the extent Professor Wiley's test does turn on intent, it focuses on the intent of the lobbyists who sought adoption of the regulations in question. See Wiley, *Capture Theory*, *supra* note 1, at 743. *Washington Apple* and *Davis*, by contrast, focus on the intent of the local governments that enacted the regulations, entities whose speech is not protected by the First Amendment. See *Washington Apple*, 432 U.S. at 352; *Davis*, 426 U.S. at 238-39. Where these cases examine lobbyists' remarks, they do so only as one kind of evidence of the intent of the government. See *Washington Apple*, 432 U.S. at 352.

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discerned by examining Professor Wiley's defense of his proposed efficiency criterion, which would direct federal courts to determine which state regulations are economically inefficient. To my suggestion that this criterion would replicate many of the evils of *Lochner v. New York*,⁹ he responds that judicial condemnation of *Lochner* did not result in the demise of all forms of substantive due process. The survival of substantive due process in some form, he argues, demonstrates that there is nothing inherently objectionable about his own proposal for substantive judicial scrutiny of state legislation.¹⁰

But, once again, the difference between the case law to which Professor Wiley refers and the antitrust cases to which his test would apply is of critical significance. Where the Court has continued to employ substantive due process analysis in the post-*Lochner* era, it has done so to vindicate interests such as the protection of free speech or minority rights. It has not done so to vindicate a particular economic theory, whether it be the economic efficiency of the Chicagoans or the just economic distribution that Wiley suggests as an alternative.¹¹

This is not the place to moot what was "wrong" with *Lochner*. The question here is whether the economic efficiency or distribution notions that Professor Wiley has sketched are sufficiently compelling to justify the overriding of inconsistent political choices by state governments. The modern substantive due process cases provide no support for the proposition that they are. Nor can I accept that the Sherman Act has made them so—at least not without a substantially more explicit statement to that effect than Congress has ever made.¹²

Finally, the disagreement that divides us is also implicit in Professor Wiley's challenge to the test I prefer over his own for distinguishing between state action that should be vulnerable to, and state action that should be immune from, Sherman Act attack. The better test, I suggest, protects states' efforts to regulate their economies, while exposing to scrutiny state laws that do no more than delegate to business competitors the power to restrain competition. The two-pronged requirement for immunity enunciated in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*,¹³ which insists that the challenged restraint be

9. 198 U.S. 45 (1905).

10. See Wiley, *Revision and Apology*, *supra* note 1, at 1289.

11. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 518, 540-44 (10th ed. 1980).

12. Far from "direct[ing] the judiciary to exercise federal supervision over local policy" as Professor Wiley contends, Wiley, *Revision and Apology*, *supra* note 1, at 1289, the Local Government Antitrust Act of 1984 constituted a stiff congressional rebuke to judicial intrusion upon local policymaking. See Garland, *supra* note 2, at 495 & nn.54, 55.

13. 445 U.S. 97, 105 (1980).

"clearly articulated" as state policy and "actively supervised" by the state itself is, in my view, a tolerable proxy for such a result.¹⁴

The problem with this test, according to Professor Wiley, is that it assertedly makes use of a "public/private distinction." Scholars, he contends, have demonstrated that such a distinction is not "natural," but rather must express the pursuit of some underlying value. But the scholarship to which Professor Wiley refers¹⁵—which questions the use of such a distinction in Fourteenth Amendment "state action" analysis—does not cast doubt upon the antitrust preemption test I argue for here.

First, despite the Court's unfortunate use of the phrase "state action" in its antitrust opinions, cases like *Midcal* do not seek to separate state from private action. On the contrary, they assume that both kinds of "action" under consideration (state regulation and state delegation) are actions of the state, and instead seek to separate that state action which is preempted by the Sherman Act from that which is not.

Second, I agree that this line is not a "natural" one, and that it does reflect a set of underlying values. Those values do not encompass a belief in the inherent benefit of economic regulation, but rather a respect for the political process that chooses it. Application of antitrust concepts to state law would drastically reduce the scope of state regulation, even as compared to Senator Sherman's time.¹⁶ It is a respect for the decisions of elected local governments that counsels hesitation in adopting such a dramatic restructuring of American federalism in the absence of any mention of the possibility in the legislative history of the antitrust laws.¹⁷

Even this respect must be tempered by federal concerns, however, when the state seeks to do little more than delegate to business competitors the right to violate the Sherman Act. This is not because state laws that simply permit businesses to do as they please are necessarily any less close "to the 'true' hearts and minds of state citizens" than state-administered regulations.¹⁸ Rather, it is because such laws—for example, a law that says "you may act as you please in fixing prices"—offend the Sherman Act in the most direct possible way. Their preemption seems the minimum necessary to prevent evisceration of the federal antitrust laws, without at the same time threatening the entire structure of federalism—as would the preemption of all "inefficient," "producer-initiated" state regulations.

14. See Garland, *supra* note 2, at 499–501.

15. See, e.g., Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982).

16. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 634–35 (1976) (Stewart, J., dissenting).

17. See *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("In a dual system of government in which . . . the states are sovereign, . . . an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

18. Wiley, *Revision and Apology*, *supra* note 1, at 1279.

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Professor Wiley is right in saying that the antidelegation rule just described is not the product of a “simple regard for federal antitrust policy” alone.¹⁹ He errs, however, in looking only to policies internal to the Sherman Act—be they economic efficiency or the just distribution of consumer surplus—to determine how Congress would have wanted that Act applied to legislation passed by the states. Application of the Sherman Act to such legislation has implications for values far more fundamental to our society than those contained within the four corners of antitrust law alone, values which Congress shares and which therefore must be taken into account in any effort to divine congressional intentions. It is to those more fundamental values—particularly a respect for the political processes of American federalism—that the antidelegation rule responds.

19. *Id.* at 1279.

