

IS THE FEDERAL JUDICIAL CURE FOR PROTECTIONISM WORSE THAN THE DISEASE?

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I have three points that I will try to make as quickly as possible about whether or not the federal judiciary should become involved in the effort to end state and local protectionism.

First, certainly the best view of the doctrine is that protectionism is not a legitimate state interest as an end in itself. But it is a legitimate state mechanism by which it can accomplish other ends. So you have to distinguish between protectionism as a means and protectionism as an ends. That is the first point—the definitional point.

Second, and less certainly, having federal courts try to figure out whether protectionist means are actually protectionist ends is a fool's game. It probably is a game not worth the candle because the costs of the inquiry are probably greater than the benefits. And such federal judicial efforts could conceivably lead to even worse regulation.

And third, the solution, therefore, is federalism and separation of powers. I will give a few examples of why I think Professor Todd Zywicki is absolutely wrong to say that the political process is so hopelessly infected with special interest capture that you cannot trust institutions like the Federal Trade Commission, like Governor John Kasich of Ohio, or like the SEC to deregulate and to get rid of protectionist legislation. I will give you a few examples of deregulatory innovations that have been far more effective than anything that can likely be delivered by the federal courts.

First, why do I say that protectionism is a legitimate means but not a legitimate end? This assertion requires a definition of "protectionism," which I will stipulate is the providing of a subsidy to a private party by means of limiting competition

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against that party.¹ Is that sort of subsidy legitimate as a means? Of course it is. Protecting businesses with legally conferred monopolies as a way of subsidizing those businesses to serve the public interest has been used since the founding of the republic. Alexander Hamilton created the First Bank of the United States, giving it an exclusive right to serve as the federal government's fiscal agent.² Nicholas Biddle was president of the Second Bank of the United States.³ Both had legally protected monopolies. Every bridge company, every grist mill company, every corporation before 1838—when New York enacted the free corporation law and the free banking law—had some sort of monopoly.⁴ The bar association of this state and New York State and every other state enjoys a legally protected monopoly. Every zoning regulation creates noncumulative zones in which industrial users do not have to bid against residential users for the purpose of subsidizing the former with cheaper rents.⁵ The medallion system in New York City is a legally protected monopoly,⁶ and every union's collective bargaining agreement is a legally protected monopoly.

If you are going to strike those things down, you are going to be very busy, indeed. And you will not have troops behind you, because the people you offend will greatly outnumber the people who you please, depriving you of political support. And so the notion that a federal court is going to go around striking down those protectionist devices is ludicrous. Those

1. I think that my definition is superior to the more general definition of protectionism as any effort to limit competition, even if the limits do not provide the competitors so protected with any benefit. See, e.g., *Protectionism*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (desk ed. 2012) ("Protectionism is the use of tariffs, import controls, or other import regulations, or the use of subsidies in some forms, to limit foreign competition in a domestic market for goods or services."). Implicit in the idea of protectionism, after all, is that someone is protected.

2. BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 114 (1957).

3. *Id.* at 291.

4. Bray Hammond, *Free Banks and Corporations: The New York Free Banking Act of 1838*, 44 J. POL. ECON. 184, 184–85 (1936) (explaining how the Act of 1838 signified a departure from the prevailing view of corporations and banks as monopolies).

5. Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 249 (2010) ("[A]reas that are zoned non-cumulatively allow only manufacturing uses and bar any residential (and sometimes even commercial uses) of property.").

6. See Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 128 (2013).

protectionist devices, of course, are always justified as a means to an end. What is the end? The end is something like “protecting workers from exploitation,” or “providing a reliable fiscal agent for the United States” as a justification for the Bank of the United States, or simply, “providing a subsidy for consumer welfare.” The medallion system in New York City is an abomination, but it is justified as a way of ensuring that taxi cab drivers have revenue sufficient to “hack up”—that is to say, to spend a lot of money to bring their cabs up to the Taxi and Limousine Commission standards. The official justification for the medallion system is that we give taxis a subsidy to serve the public, not by appropriating tax money for that purpose but simply by giving them a monopoly through which they can charge higher rates.⁷ If you do not like that idea, then you must strike down the copyright and patent laws, because they use exactly the same mechanism of exchanging an exclusive right for a public benefit.

Copyright and patent laws give somebody a monopoly, usually for a limited time, in order to put money in the pockets of the copyright or patent owners so that these owners have incentive to benefit the public. Is there a deadweight cost associated with it? Of course. And my colleague here, Yaron Brook, will explain what that deadweight cost is. But you know what taxes do? They also impose a deadweight cost. Property taxes deter sales of property. Sales taxes have inefficiently discouraged sales. Income taxes have discouraged people from working. There is no way you can avoid the deadweight cost of a public subsidy except through revenue measures that are almost never used—a lump-sum head tax charged to every person regardless of their actions or inaction. Is the deadweight cost of the “monopoly tax” bad? Sure. But it is an economic question about whether it is worse than the deadweight costs of the income tax—an economic question that no judge will feel comfortable answering. At a certain level, I much prefer the medallion system than, say, another layer of absurdly structured property of taxes in New York City.⁸ And you would

7. *See id.* (“By inflating fares and limiting the availability of taxis, expensive licenses likely harm taxi consumers . . .”).

8. Ethan Geringer-Sameth, *An Old, Unfair System: New York City’s Property Tax Conundrum—Part II—Deep and Complex Inequities*, GOTHAM GAZETTE (Aug. 2,

need to have a Ph.D. in economics to figure out which measure imposes more excess burden.

So as a means, protectionism is perfectly acceptable if what you mean by protectionism is a limit on competition to secure other ends. As an end in itself, however, it has always been forbidden. And this is where I disagree with Professor Paul Bender. Since long before *Griswold*⁹ and its protection of privacy, long before *Brown v. Board of Education*¹⁰ and its prohibition on race discrimination, the courts have always recognized that class legislation—laws that have the sole goal of taking from A to give to B—serve only a forbidden state interest.¹¹ Such an end is forbidden either under the Due Process Clause or the Equal Protection Clause or perhaps the Privileges and Immunities Clause (the particular textual hook being practically unimportant). So it hardly is a wild innovation, to say that taking from A merely for the purpose of giving to B is forbidden by the Constitution. To say otherwise is to essentially cast doubt on virtually every interpretation of the Equal Protection Clause and the Due Process Clause from the mid-nineteenth century forward. From 1868 until the turn of the twentieth century, all the major Classical Liberal constitutional treatise writers—John Dillon, Christopher Tiedeman, and Thomas Cooley—agreed that to take assets from A merely to subsidize B because you prefer B when you have no other reason in benefiting the public, is unconstitutional.¹² That ban on class legislation existed

2019), <https://www.gothamgazette.com/state/8713-old-unfair-system-new-york-city-property-tax-conundrum-part-ii-classes> [<https://perma.cc/AZ8C-EGZT>].

9. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

10. 347 U.S. 483 (1954).

11. See, e.g., *Calder v. Bull*, 3 (3 Dall.) 386, 388–89 (1798).

12. See 1 CHRISTOPHER G. TIEDEMAN, A TREATISE ON STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY IN THE UNITED STATES, at vii–viii (1900) (describing the purpose of the treatise as an “attempt to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers” who are proponents of the redistribution of private property); John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 173 (1895) (“But when taxes, so-called, are imposed, not as mere revenue measures, but . . . as a means of distributing the rich man’s property among the rest of the community—this is class legislation of the most pronounced and vicious type Such schemes of pillage are . . . violative of the constitutional rights of the property owner”); Robert Allan Olender, *From Commonwealth to Constitutional Limitations: Thomas Cooley’s Michigan, 1805–1886*, at 230, SJD DISSERTATIONS (2014), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1004&context=sjd> [<https://>]

eons (in constitutional terms) before anybody dreamed of privacy's being a fundamental right.

Furthermore, it is no good to say that this ban on class legislation cannot be found in the text of the Constitution. The same can be said for the prohibitions on regulation of speech and racial discrimination. Neither of these prohibitions are in the text of the Constitution as far as state governments are concerned. The First Amendment says *Congress* shall make no law.¹³ It is a purely non-textual inference, far younger than the inference against protectionism, that the First Amendment should be incorporated against the states.¹⁴ So I disagree with Professor Bender that protectionism is a legitimate state interest as an end. Protectionism has never been a legitimate state interest.

Which brings me to my second point. Can courts get rid of protectionism as an end in itself? Well, in theory, yes. But in practice, I think the game is just not worth the candle.

There are two difficulties that federal courts face in enforcing a prohibition on protectionism as an end in itself. First of all, you're going to have to make decisions about when protectionism is a means rather than an end. And that involves casting stones, in a way that is likely to be politically polarizing in an era where we can ill afford more polarization.

Let me give you an example from my own experience. A group of N.Y.U. law professors went to the New York State Court of Appeals and said the third year of law school is a protectionist waste of money.¹⁵ It serves no purpose whatsoever, except to protect New York lawyers from more competition. So let the students take the law school exam in the third year, before they finish their third year of law school classes.

perma.cc/ZJW7-52MP] ("Cooley then held to principles requiring limited government that did not have the power to redistribute wealth.").

13. U.S. CONST. amend. I.

14. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding for the first time that "[f]or present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

15. See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 599, 606–11 (2012) (explaining the Working Group's proposal to the New York Court of Appeals to allow students to sit for the bar after two years in law school).

Our effort was a dismal failure. We were roundly drowned out by the county bar associations, especially from upstate. Now, did our opponents say, well, we just cannot stand the influx of more competition? No. They said, “the third year is critical for law students’ education. How can they be confident lawyers? How can consumers be protected from poor legal counsel unless they take yet one more seminar from Professor Hills?” Now, I was flattered. But although insincere, such flattery is legally effective. The patently pretextual justification being offered in defense of the third year of law school would easily survive review in any federal court. There is zero chance that any federal court would ever strike down as unconstitutionally pretextual the third year of law school, even if we filed in a federal court a lawsuit citing Professor Zywicki’s scholarship and even got an amicus brief from him. And part of that likely response from federal judges is simply—I am going to say this in the nicest possible way, because Judge Jones is in the room—federal judges’ natural class interest. Federal judges are part of a scholarly profession the members of which expect to be swaddled in layers and layers of protective education. We require a four-year liberal arts degree in most states, in addition to three years of law school. Do you realize that by that American standard, every lawyer in Germany and, indeed, in continental Europe is unqualified to practice law, because most of them earn their law degree in an undergraduate college? If they do not need to go through four years of college unrelated to law before they earn a law degree, then why do we? Why cannot students just go right to law school as an undergraduate?

Judges are likely, in short, to tolerate obviously protectionist regulation to benefit the legal profession. How, then, can they with a straight face strike down occupational licensing for beauticians as protectionist? Of course, such licensing *is* obviously protectionist—but no more so than rules for bar admission. So are federal judges really entitled to draw such distinctions between different types of protectionist legislation on the ground that some such rules protect members of a scholarly profession? How could anybody not see that that drawing such distinctions is outrageous class bias? Why would we put federal judges in the position of picking and choosing among occupational licensing like that? They cannot do it and sustain their political legitimacy, and so they should not try.

Is it possible to strike down at least some very narrowly defined types of protectionist laws without engaging in such professional favoritism? Yes, but this brings me to another danger of judicial review aside from manifesting class bias: judges could actually make things worse.

It is possible for federal judges to strike down laws so underinclusive in their pursuit of non-protectionist ends that those ends are plainly pretextual. My favorite example is provided by the judge for whom I had the honor of clerking, Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit. He is a great judge, was a great lawyer, and wrote a great opinion in *St. Joseph's Abbey*.¹⁶ *St. Joseph's Abbey* held that no conceivable non-protectionist purpose could be attributed to a state law regulation that required casket sellers to be licensed funeral home directors.¹⁷ Why could not the state law be justified as a way to insure that casket sellers were properly trained to serve customers buying caskets? The funeral homes argued that people who purchase caskets need grievance counseling to make sure they do not make a rash decision in a very vulnerable moment of grief. The problem with this argument, however, was that the state licensing scheme for funeral home directors did not require them to be trained in grievance counseling. The underinclusive character of the law branded the law's non-protectionist purpose as obviously pretextual.

But, of course, striking down laws because their underinclusiveness indicates pretext gives lawmakers an incentive to make such laws less underinclusive. *St. Joseph's Abbey* incentivized state lawmakers seeking to benefit state funeral home directors to require funeral home directors to undergo grievance counseling, for instance. Eliminating underinclusiveness, however, simply makes such laws even more expansive and inefficient, by layering on extraneous educational or other licensing requirements. Let me give you an example from New York, my last example. And then of course, I will end with a moral of the story, which is blessedly brief.

16. *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

17. *Id.* at 226.

In New York City, we have noncumulative industrial zones.¹⁸ That is to say, you can only have manufacturing in these zones. You cannot have residential or commercial uses. You cannot have hotels. You cannot have all sorts of uses that don't impose any harm such as noise or excessive traffic or odors on anyone. Now, what justification is offered for these zones? Well, the usual justification in New York City is that such noncumulative zones provide cheap land for manufacturing, and manufacturing provides good union jobs.¹⁹ If you don't have residential real estate developers bidding on the lots in noncumulative zones, the elimination of bidders radically lowers the prices of the lots, allowing manufacturers to use the land.

One could imagine an argument that such laws are too underinclusive to be justified as bona fide means for protecting union jobs, because manufacturers do not have to provide good union jobs as a condition for enjoying the benefits of land exclusively zoned for manufacturing. Actually, many of these manufacturing jobs in New York City stink. Warehouses count as manufacturing uses in these zones, but warehouse workers need not be unionized.²⁰ Striking down noncumulative manufacturing zones because they are underinclusive, however, just encourages the City Council to amend the Zoning Resolution to permit only unionized industrial uses in these zones, an amendment that would make these zones even more obstructive to sensible land use. The dilapidated industrial zones that used to plague New York City's waterfront, before Mayor Bloomberg's Administration rezoned them, would be all over the place and there would not be anything in them, because permitted uses would have to be not only industrial but also unionized.

18. Hills & Schleicher, *supra* note 5, at 250 ("Since 1961, the city's zoning resolution has barred residential uses from manufacturing zones, and 30 percent of the city's shoreline is presently zoned for industrial use.").

19. *Id.* at 251.

20. Noam Scheiber, *Amazon and Union at Odds Over Firing of Staten Island Warehouse Worker*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/business/economy/amazon-warehouse-labor.html> [https://nyti.ms/2URWrNP]. For a survey of unionization rates in New York City, see RUTH MILKMAN & STEPHANIE LUCE, THE STATE OF THE UNIONS 2018: A PROFILE OF ORGANIZED LABOR IN NEW YORK CITY, NEW YORK STATE, AND THE UNITED STATES (2018), https://slu.cuny.edu/wp-content/uploads/2018/08/Union_Density-2018-FINAL1.pdf [https://perma.cc/EEN4-JP47].

So I really think there are grave dangers to federal judges getting involved in this area, because judicial review is likely affected by class bias and because review for underinclusiveness encourages even more burdensome regulation. But fortunately, the moral of the story—this is my third and final point—is that there are other institutions that can be involved. Rather than rely on federal judges, consider relying on federal agencies, state politicians, and even state courts.

Federal agencies play an important deregulatory role. *St. Joseph's Abbey* critically relied on Federal Trade Commission regulations. The FTC has already eliminated many of the most outrageous protectionist funeral home practices. Likewise, between 1975 and 1980 the federal government deregulated brokers, truckers, airlines, and telecommunications—all through initiatives from people who were chairing agencies allegedly captured by the industry.²¹ Apart from federal agencies, one can rely on state politicians. Governor John Kasich has, for instance, launched as one of his last initiatives a major effort to limit occupational licensing. Governor Kasich's reform requires that the state must check out the commissions that provide these monopolies every six years and decommission them.²²

Sometimes critics of agencies claim that they are inevitably captured by the industries that they regulate.²³ This is untrue. My father, in fact, was chair of the Securities and Exchange Commission at the time that the SEC undertook a major initiative to deregulate brokers' commissions. So the idea that, somehow, agencies cannot deregulate industries because they will be captured by those industries strikes me as false: Dad was never captured by the brokers.

Assume, however, that you think that my dad *was* captured by the brokerage industry: why do you think federal judges are

21. See Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1179 (2012); Alfred E. Kahn, *Deregulation: Looking Backward and Looking Forward*, 7 YALE J. ON REG. 325, 325 n.2 (1990).

22. Nick Sibilla, *New Ohio Law Takes Aim At Occupational Licenses, Which Cost State \$6 Billion*, FORBES (Jan. 9, 2019, 3:15 PM), <https://www.forbes.com/sites/nicksibilla/2019/01/09/new-ohio-law-takes-aim-at-occupational-licenses-which-cost-state-6-billion/#5f12b64e6e95> [<https://perma.cc/W9Q9-3RJY>] (describing the new licensing regime in Ohio).

23. See, e.g., Michael A. Livermore & Richard V. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L. J. 1337, 1340 (2013).

not going to be captured? If you distrust the political process because of the influence of regulated businesses on politicians, then it strikes me as ludicrous to rely on federal judges as our salvation, because judges are appointed by politicians.

So trust in politics. We have federalism and separation of powers for many reasons; one of which is that they can be used to solve many of these problems that centralized judicial review is not well suited to solving. I think, at the margin, the federal courts probably will not reduce protectionist laws very much and might make them a lot worse by making them more consistent. Because federal courts have to accept protectionism as a means and cannot practically distinguish between means and ends, their efforts to strike down underinclusive means may very likely induce lawmakers to amend the law to make them more inclusive—and that could make the regulations even worse than they already are.

Thanks.