

# Monopoly, Mercantilism, and Intellectual Property

Thomas B. Nachbar\*

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The politics of intellectual property are a one-way street. That is the message of modern intellectual property scholarship. Assiduously applying the lessons of public choice theory to the political process that has produced recent (and not-so-recent) expansions in intellectual property protection, many intellectual property scholars have argued that the politics of intellectual property are heavily tilted in favor of those with large holdings of intellectual property, resulting in illegitimate expansions in intellectual property protection. Examples are many: the extension of copyright in both its term and coverage,<sup>1</sup> the awarding of intellectual property protection for subject matter already in the public domain,<sup>2</sup> and the extension of intellectual property protection to articles that do not meet the traditional tests of originality or novelty<sup>3</sup> top the list. Some have even argued that the political process is no longer a valid limit on intellectual property rights and that it is necessary for courts to intervene by enforcing the limits of the Intellectual Property Clause of the Constitution against congressional overreaching.<sup>4</sup>

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<sup>1</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827–28 (1998) (codified at 17 U.S.C. §§ 301–304) (extending the term of copyright by 20 years); Copyright Act of 1976 (removing formalities and thereby increasing the number of works subject to copyright protection).

<sup>2</sup> Uruguay Round Agreements Act § 514, 17 U.S.C. § 104A (restoring copyright in some foreign-authored works).

<sup>3</sup> Vessel Hull Design Protection Act, Pub. L. No. 105-304, 112 Stat. 2905 (1998) (codified at 17 U.S.C. §§ 1301–1332 (2000)) (unpatentable boat hull designs); Federal Trademark Dilution Act, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. §§ 1125(c), 1127) (protection for unoriginal trademarks without the requirement of confusion); Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901–914) (unpatentable semiconductor designs).

<sup>4</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (challenging Copyright Term Extension Act), *Kahle v. Ashcroft* (N.D. Cal. filed Mar. 30, 2004) (No. C-04-1127) (challenging constitutionality of the 1976 Copyright Act's elimination of formalities); *Golan v. Ashcroft* (D. Colo. filed Sept. 19, 2001) (No. 01-B-1854) (challenging URAA), Benkler at 571; Michael H. Davis, *Extending Copyright and the Constitution: "Have I Stayed Too Long?,"* 52 Fla. L. Rev. 989, 993 (2000); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 *Cardozo Arts & Ent. L.J.* 655, 659 (1996); Paul J. Heald & Suzanna Sherry, *Implied Limits on Legislative Power: The Intellectual Property Clause as an Absolute Restraint on the Commerce Clause*, 2000 U. Ill. L. Rev. 1119, 1197 (2000); Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 *Loy. L.A. L. Rev.* 199, 245–46 (2002); Merges & Reynolds at 52–56.

Evidence for the illegitimacy of the policies inherent in these expansions is frequently offered by reference to two events that occurred approximately 400 years ago: the common-law rejection of trade monopolies in the 1603 case of *Darcy v. Allen*, and the passage of the Statute of Monopolies, with its exception for invention patents, in 1624.<sup>5</sup> Many, including the Court itself,<sup>6</sup> have pointed out the relationship between *Darcy* and the Statute of Monopolies on the one hand and the constitutional authority to grant exclusive rights on the other,<sup>7</sup> and some have even

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<sup>5</sup> Just a sample of references from *the last 18 months*: Lawrence Lessig, *Free Culture* 88 (2004) (“Even that limited right [of copyright] was viewed with skepticism by the British. They had had a long and ugly experience with ‘exclusive rights,’ especially ‘exclusive rights’ granted by the Crown. The English had fought a civil war in part about the Crown’s practice of handing out monopolies – especially monopolies for works that already existed. King Henry VIII granted a patent to print the Bible and a monopoly to Darcy to print playing cards. The English Parliament began to fight back against this power of the Crown. In 1656, it passed the Statute of Monopolies, limiting monopolies to patents for new inventions.”); Yvonne Cripps, *The Art and Science of Genetic Modification: Re-engineering Patent Law and Constitutional Orthodoxies*, 11 *Ind. J. Global Legal Stud.* 1, 29 (2004) (“We have strayed disadvantageously far from the anti-monopolistic warnings contained in the decision in the Case of Monopolies, with its emphasis on the need to keep sight of the overarching public interest.”) (footnote omitted); Jay Dratler, Jr., *Does Lord Darcy Yet Live? The Case Against Software and Business-Method Patents*, 43 *Santa Clara L. Rev.* 823, 831-32 (2003) (“This brief historical background suggests that the task of balancing competition ... against the legal protection of intellectual property is of vital importance in economic law. The Statute of Monopolies phrased these two values neatly as rule and exception.”); Mark Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 *U. Chi. L. Rev.* 129, 134-35 (2004) (“And the D.C. Circuit offered as one justification for upholding the CTEA the idea that more works would be available if copyright terms were extended than if the works entered the public domain. ... It harkens back to the English Crown’s grant of patents on existing products, a practice abolished by the Statute of Monopolies in 1624.”); Joshua D. Sarnoff, *Abolishing the Doctrine of Equivalents and Claiming the Future After Festo*, 19 *Berkeley Tech. L.J.* 1157, 1187-88 (2004) (Patent “claims may not apply to prior art and thereby withdraw subject matter from the public domain and place it under an exclusive monopoly. Such monopoly rights are justly condemned as ‘odious,’ having a long history in abusive issuance of royal privileges by British monarchs.”) (citing *Darcy* and through other sources, the Statute of Monopolies).

<sup>6</sup> E.g., *Graham v. John Deere*, 383 U.S. 1, 5 (1966) (“The [Intellectual Property] clause ... was written against the backdrop of the practices – eventually curtailed by the Statute of Monopolies – of the Crown in granting monopolies to court favorites in goods or business which had long before been enjoyed by the public.”).

<sup>7</sup> E.g., Dratler at 836 (“On its face, each of these developments appears to have shifted the delicate balance between free competition for business in general and temporary monopoly for

argued that the English economic policy against trade monopolies exemplified by Darcy and the Statute of Monopolies is so fundamental that any attempt to grant broader exclusive trade privileges (by either Congress or the courts) is unconstitutional.<sup>8</sup> In intellectual property law

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genuine innovation, which the Statute of Monopolies decreed and the Patent and Copyright Clause continued.”); Heald & Sherry, 2000 U. Ill. L. Rev. at 1160 (“Fully consistent with English legal history, the [Intellectual Property] Clause seems drafted to embody the same narrow exceptions to the bans on exclusive rights found in the Statute of Monopolies and in the Statute of Anne.”); Hugh Latimer & Karyn K. Ablin, *Stealth Patents: The Unconstitutionality of Protecting Product Designs Under the Federal Trademark Dilution Act*, 90 Trademark Rep. 489, 432 (2000) (“The Patent Clause’s explicit limitations on Congress’ ability to award monopolistic protection arose out of an historical context in which awarding exclusive rights was not a favored practice.”); Edward Lee, *The Public’s Domain: The Evolution of Legal Restraints on the Government’s Power to Control Public Access through Secrecy or Intellectual Property*, 55 Hastings L.J. 91, 112 (2003) (“The Statute of Monopolies provided a model for the Framers in the United States, as it was enacted to curb the excesses of the British monarchy in granting monopolies over common goods.”); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. Dayton L. Rev. 215, 215 (2002) (the holding of *Darcy* was “codified” in 1624 in the Statute of Monopolies, which “first recognized [the public domain and] placed time limits on patents and copyrights, after which the invention or work could be copied freely by anyone. The concept was enshrined in the U.S. Constitution and reflected in American patent and copyright laws.”); Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA 1 (2002) (the Framers drafted the Intellectual Property Clause to focus on the promotion of progress “because they wanted to adopt the same general approach set forth in the English Statute of Monopolies, i.e., refusing authority to create monopolies in general, but nonetheless providing a specific exception in the case of the limited-term monopolies that came to be known as patents and copyrights.”). See also Richard Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique*, 55 Sup. Ct. Rev. 143 (2003) (describing as “simple but powerful” the argument that “[t]he historic Anglo-American hostility to government grants of monopolies caused the framers of the Constitution to authorize the granting of copyrights only for limited periods and only for the purpose of promoting intellectual and cultural progress by inducing the creation of expressive works. This is apparent from the wording of the Copyright Clause itself and has been repeated in numerous decisions of the Supreme Court.”).

<sup>8</sup> See, e.g., Dan T. Coenen & Paul Heald, Means/Ends Analysis in Copyright Law: *Eldred v. Ashcroft* in One Act, 36 Loyola L.A. L. Rev. 99, 111 (2002) (“The Framers knew their English history and were well aware of the abusive granting of exclusive rights perpetrated on the public by Queen Elizabeth I and King James I. ... Eventually, the common law courts held crown-sponsored monopolies illegal, and Parliament passed anti-monopoly legislation shortly thereafter.”); Heald & Sherry.

Others have advanced the constitutional significance of either or both of *Darcy* and the Statute of Monopolies in litigation. See, e.g., Brief of Petitioners, *Eldred v. Ashcroft*, at 24 (citing

and scholarship, it is practically impossible to escape the pervasive sense that these two events, or rather the rejection of state-sanctioned monopolies that they embody, define the legitimate scope of the governmentally sanctioned exclusive trading rights.<sup>9</sup>

This optimistic view of seventeenth-century English monopoly policy is not universal, particularly in fields outside of intellectual property.<sup>10</sup> The less-sanguine view (of the Statute of

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the statement in *Graham v. John Deere* in the context of arguing for enforcement of the constitutional limitations to strike a federal statute); Brief Amicus Curiae of the Free Software Foundation in Support of Petitioners, *Eldred v. Ashcroft* (“The words ‘for limited Times’ appear in the Copyright Clause, Article I, §8, cl. 8 as the result of long and bitter experience with the constitutional evil of stateawarded monopolies. From the seventeenth century, the requirement of limitation in time was a basic constitutional mechanism for dealing with the potential for abuse of power inherent in the royal or statutory monopoly.”); Brief Amici Curiae of Tyler T. Ochoa, Mark Rose, Edward C. Walterscheid, The Organization of American Historians, and H-Law: Humanities And Social Sciences Online in Support of Petitioners, *Eldred v. Ashcroft*, at 17 (“The stipulation that patent and copyright protection be granted only ‘for limited Times,’ only to ‘authors’ and ‘inventors,’ and only ‘To promote the Progress of Science and useful Arts,’ appears to have been aimed at preventing the kinds of abuses that had prompted the Statute of Monopolies 150 years earlier.”).

<sup>9</sup> See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (“The grant of a patent is the grant of a statutory monopoly; indeed, the grant of patents in England was an explicit exception to the statute of James I prohibiting monopolies. Patents are not given as favors, as was the case of monopolies given by the Tudor monarchs, see [*Darcy*], but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention.”)(footnotes omitted); *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948) (antitrust case) (“Public policy has condemned monopolies for centuries.”) (citing *Darcy*); *Pennock v. Dialogue*, 27 U.S. 1, 19 (citing the Statute of Monopolies as instructive in interpreting the federal patent statute); Bugbee at 38-40 (Statute of Monopolies); Donald S. Chisum, *Chisum on Patents* § 1.01 at 1-6 – 1-7 (2000) (“The statutory classes can be traced far back into legal history. The English Statute of Monopolies of 1623 referred to patents for “new manufactures.” The statute generally prohibited monopolies but provided as an exception for a 14 year privilege [for inventions.]”); Robert P. Merges, Peter S. Menell, & Mark A. Lemley, *Intellectual Property in the New Technological Age* 126 (2d ed. 2000) (citing the exception for invention patents in the Statute of Monopolies); Laurence H. Pretty, *Patent Law* 6 (1997) (claiming that the Statute of Monopolies “is regarded as the origin of the present British and U.S. patent statutes”); Peter D. Rosenberg, *Patent Law Fundamentals* (2d ed. 2001) (“What [] has been a recurring theme in the United States, no doubt based at least in part on the English experience with abusive grants of monopolies prior to enactment of the Statute of Monopolies, is the pains to which American jurists and commentators sympathetic to the intended purpose of the patent system have gone to distinguish patents for useful inventions from monopolies in general.”).

Monopolies in particular) is that the events of the period were not so much the product of economic policymaking as they were the incidents of a conflict over financial (and therefore political) control over the English government,<sup>11</sup> and some have applied public choice theory to highlight the political and financial ambitions of those who opposed the royal monopolies.<sup>12</sup>

Both views stem from two distinct yet similarly narrow understandings of not only the historical context for, but also the literal content of, *Darcy* and the Statute of Monopolies. I will concentrate on the consequences for intellectual property. Failure to recognize the mercantilist economic backdrop for both *Darcy* and the Statute of Monopolies has led courts and commentators to read *Darcy* and the Statute of Monopolies as bills of economic rights – one judicial and one legislative. But the freedom suggested by both was itself strictly confined within the mercantilist economic and political order dominating at the time. Neither event, understood in context, can plausibly be offered as supporting any particular restriction on modern intellectual property laws. Nor does the problem end with economics. Modern intellectual property scholarship has largely ignored the political context in which both events occurred; appreciation of that context highlights the novelty of recent efforts to place disputes over intellectual property in judicial (rather than political) hands. Modern intellectual property scholars (and activists) who ignore the role of politics in *Darcy* and the Statute of Monopolies risk not only embarrassment but missed opportunities. When considered in their proper political light, *Darcy* serves not as a standard for the common law’s commitment to economic freedom but rather as the product of political maneuvering and settlement; the Statute of Monopolies not as a popular uprising in the name of economic freedom but as the reassertion of the centuries-old practice of economic control. Persistent failure to appreciate the economic and political context – and content – of *Darcy* and the Statute of Monopolies will doom intellectual property theorists to repeat the mistakes of history; the long-since-rejected economic principles underlying both events are already seeing a resurgence in the proposals advanced by many of today’s leading commentators in the field. At the same time, the period’s history offers hope for

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<sup>10</sup> E.g. William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 366 (1953).

<sup>11</sup> E.g. Letwin; Tanner.

those seeking political solutions to modern concerns over seemingly ever-expanding intellectual property rights.

My principal enterprise is to give broader meaning to both *Darcy* and the Statute by placing them in their proper historical context and identifying their political and economic content. I proceed first by laying out the mercantilist regulatory order that serves as the backdrop for *Darcy* and the Statute of Monopolies. I then describe the political developments in Parliament that led to the decision in *Darcy* and compare those political interests with the seventeenth-century English common-law regarding exclusive trade privileges. I next examine both the adoption of the Statute of Monopolies and parliamentary practice that followed it to provide a new, more comprehensive understanding of the statute's meaning. Having presented a reinterpretation of both *Darcy* and the Statute of Monopolies, I consider the ramifications of this new interpretation for today's disputes over the proper reach of intellectual property rights.

### **Monopoly and Mercantilism in Pre-Industrial England**

It is impossible to understand any set of historical events without at least some appreciation for the economic and political system in which they took place. Key to understanding the events of the early 17th century are two concepts that are treated quite loosely by modern legal scholars: "mercantilism" and "monopoly".

#### ***Mercantilism: Trade Regulation for National Wealth***

At base, mercantilism was control of the economy in order to further national interests. What most clearly separates mercantilism from the capitalist economic systems that followed is its emphasis on collective, rather than individual, wealth. Mercantilist trade regulation quite openly sacrificed the welfare of the individual in furtherance of the "common weal."<sup>13</sup> The primary microeconomic objective was to assure that everyone would have enough to get by, but mercantilist preoccupation with scarcity meant that no one should receive much more than they needed to survive. The result was not only profit but also free competition was discouraged, for while competition would maximize supply, it would result in prices too low for craftsmen to live on. Mercantilists sought a balance that would lead to full employment for the maximum

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<sup>12</sup> Ekelund & Tollison; Baker (on Coke and his relationship to James).

<sup>13</sup> 2 Cunningham at 16-18.

number of people who could be reasonably well-sustained.<sup>14</sup> In order to prevent the race to the bottom represented by free competition, mercantilists – like their medieval predecessors – openly accepted interference with the free operation of markets.

With their emphasis on a reasonable reward, English mercantilists eschewed the seemingly arbitrary prices dictated by supply and demand and favored pricing based on the costs of production, a policy that required price controls in order to be effective. Thus, a key element of English mercantilist policy was extensive price fixing over the most basic goods, particularly food, based on the prices of inputs.<sup>15</sup> Indeed, many have characterized the central tenet of the mercantilist system as the continuing quest to find and set “just” or “fair” prices:

In the attempt to do the fair thing between man and man, many regulations were framed on matters which we now allow to take their own course. At the same time there is an obvious advantage in thinking out the fair price and settling it, where this can be done [as in the case of setting taxi cab fares]. ... In the circumstances of medieval commerce, when there were comparatively slight fluctuations in the conditions for the supply of manufactured goods, and labour was such a very important element in the cost of production, it was almost as easy to frame similar regulations for reasonable transactions in trades of all sorts, as it is to fix rates for cab-hire in the present day.<sup>16</sup>

Along with the price of consumer goods, the price of labor was heavily regulated following the rise in wages that accompanied the Black Death in the thirteenth century,<sup>17</sup> leading eventually in England to the 1564 Statute of Artificers.<sup>18</sup>

Very little of this was new. Control over prices and the factors of production was the rule of the day under the medieval order pre-dating mercantilism, as was the focus on collective rather than individual well-being.<sup>19</sup> The innovation of mercantilism was to shift the locus of control from the local to the national level, leading to the policies we most frequently think of

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<sup>14</sup> 2 Cunningham at 285; 1 Heckscher at 271.

<sup>15</sup> The Assize of Bread, for instance, set the price of bread based on the price of wheat. See 1 Cunningham at 250-51.

<sup>16</sup> 1 Cunningham at 249-50.

<sup>17</sup> 1 Cunningham at 333-35;

<sup>18</sup> 5 Eliz. c. 4.

<sup>19</sup> 1 Cunningham at 211-13; Fox at 30-31; 1 Heckscher at 374-76.

when we think of mercantilism: trade regulation favoring local manufacture, the accumulation of bullion, and protectionist shipping policies designed to encourage strong navies.<sup>20</sup> But, while trade policy could be made at the national level to further national interests, the institutions of national enforcement had not yet developed. Instead, mercantilist trade regulation was originally carried out at the local level by the traditional institutions of trade regulation: the guilds. Guilds – and their direct control over the means of production – were an important instrument in the administration of the English regulatory state for over five centuries.

The involvement of guilds in the administration of a national English economy began with their role in tax collection. An early innovation in the administration of the English monarchy was to shift the responsibility for domestic revenue collection from royal officers to select town residents. The development throughout the thirteenth and fourteenth centuries of a middle class of tradesmen and merchants (the burgesses) provided a group of individuals with reputations sufficient to assure the crown that taxes would get paid. The crown chartered municipal corporations made up of those leading citizens, who became jointly and individually liable to pay the town's share of the royal taxes. Those charters exempted citizens of the towns from the normal mechanism for royal taxation (such as the paying of tolls or domestic customs) and consequently from royal commercial regulation. The members of the corporation would fulfilled their pledge to pay the town's taxes by collecting shares of the assessment from the other citizens of the town.<sup>21</sup>

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<sup>20</sup> See 1 Cunningham at 470 (describing the “three main points” of mercantilism: “[t]he encouragement of natives and discouragement of foreigners, the development of shipping, and the amassing of treasure”); *id.* at 265 (describing the beginnings of nationalization under Edward I in the fourteenth century); 2 Cunningham at 5-8 (describing the culmination of the transformation in the sixteenth century).

<sup>21</sup> 1 Cunningham at 212-20.

Under the feudal system, particularly following the Norman conquest, crown revenues were generated largely in the form of taxes collected by royal officers, the sheriffs, who were the crown's representative in matters of not only tax collection but also served as judges and as the crown's agents in the satisfaction of royal duties. The agency problems inherent in this system were legend.<sup>1</sup> Cunningham at 215-16. Enlisting the municipal corporations in the collection of the tax allowed removal of the socially costly sheriff, which was beneficial to both crown and local commercial interests. 1 Cunningham at 216, 218-19.

These municipal corporations became the merchant guilds (either by extension of previously existing medieval guilds or explicitly by their charters).<sup>22</sup> As formed, the merchant guilds were not identical with local government – they did not have general civil jurisdiction, but they had regulatory authority over commercial practices and practitioners, and could fine those whose activities ran afoul of guild rules.<sup>23</sup> Eventually the structure of the merchant guilds evolved into networks of specialized trade guilds, each exercising regulatory authority over its particular trade.<sup>24</sup>

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The move to a corporate (and thus collective) tax mechanism from the older system of individual taxation in-turn gave rise to the need for commercial exclusivity within the towns. Chartered towns enjoyed freedom from many kinds of royal taxation and regulation, but they enjoyed that freedom only because their citizens (who were thus “free of the town,” the “town” in this case being the municipal corporation, not the physical location) paid their taxes through the local municipal corporation. 1 Cunningham at 219. If non-citizens conducted business in the town, they would receive the benefit of the town’s freedom without having paid their share of the town’s collective tax obligation. In order for the system to work, towns had to erect prohibitions against trade carried out by “foreigners” (a term encompassing anyone not resident in the town) and others who did not pay taxes, and this they did. 1 Cunningham at 218-19.

<sup>22</sup> 1 Cunningham at 219.

The corporate charters varied widely; different towns received different exemptions from taxation and different powers. Similarly, the potential for interference by other power-holders (such as local nobility) varied from place to place and consequently resulted in wide variations in the degree of independence enjoyed by different towns. See 1 Cunningham at 212-13.

<sup>23</sup> 1 Cunningham at 219-22. Nevertheless, the members of the guilds were likely to be leading local citizens, and there was considerable identity between the membership of the guilds and the composition of the town government, so much so that “it appears that in most English towns in the fourteenth and fifteenth century, the gild merchant had come to be almost entirely merged in the municipality and the Gild Hall was used as the Town Hall.” 1 Cunningham at 225. See also *id.* at 344; Fox at 33 (the guilds were identical with municipal government, if not in theory then in fact).

<sup>24</sup> Again, the story of this evolution varied from place to place; there is no single agreed-upon explanation for how the system of town-centric merchant guilds evolved into a system in which multiple trade guilds existed in each town. One likely theory is that the trade guilds developed as branches of the merchant guilds, Fox at 35-37, and that the merchant guild itself eventually became synonymous with the local government. In any event, the trade guilds were themselves coordinated and largely cooperated with each other within each town. The theory that the trade guilds existed within a larger collective is supported by the fact that the original merchant guilds had tradesmen as members and by the existence of practices such as the custom of

The Statute of Artificers – a national labor regulation setting the terms for employment for both skilled and unskilled workers<sup>25</sup> – cemented the local guilds’ position in the national regulatory machinery, and in doing so the Statute also dramatically opened up the potential for guild rent seeking. First, the effect of the Statute was to place in the guilds control over the means of industrial production in England. While the Statute did establish the guilds (through the requirement of apprenticeship) as the only way to become a tradesman, it did not establish any rules over the means of manufacture.<sup>26</sup> The power to set the terms of entry into the trade combined with a lack of any outside standards for performing the trade left the guilds, collectively, largely in control of setting the terms of each particular trade. Second, and perhaps more importantly, the Statute placed responsibility for setting wages and inspecting businesses for compliance with the statute in the hands of justices of the peace, who were selected from among prominent citizens by the crown and were unpaid.<sup>27</sup> The justices of the peace were directed to consult with “discreet and grave persons” in order to determine the appropriate local wage rates.<sup>28</sup> This should not have been difficult, because the justices of the peace frequently had extensive financial interests in the industries they were supposed to be regulating<sup>29</sup> – they were among the leaders of the guilds themselves. The charitable characterization of the JPs’ role in mercantile industrial regulation is that they were inefficient and subject to bribery.<sup>30</sup> The more realistic view is that they acted in their self-interest by limiting competition and favoring their own interests in matters of dispute, such as in the setting of wage rates.<sup>31</sup>

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London, which allowed anyone free of one trade guild to practice in any of the trades. On the evolution of merchant guilds into affiliated trade guilds see generally 1 Cunningham at 344-46.

<sup>25</sup> 5 Eliz., c. 4 (1563).

<sup>26</sup> 1 Heckscher at 235-37.

<sup>27</sup> On the Statute of Artificers and its general regulatory effect on the guilds, see 1 Cunningham at 250-51; 1 Heckscher at 235, 246-47.

<sup>28</sup> 5 Eliz., c. 4, § 11; see 1 Heckscher at 235.

<sup>29</sup> 1 Heckscher at 248.

<sup>30</sup> See, e.g., 1 Heckscher at 246-47 (potential for bribery); *id.* at 252 (inefficiency).

<sup>31</sup> Ekelund & Tollison, *Politicized Economies* at 53-58 (criticizing as naïve Heckscher’s assessment of the justices of the peace as merely inefficient). Ekelund and Tollison’s criticism is not entirely fair. Although he emphasizes inefficiency, Heckscher himself points to self-

The guilds were used as the instruments of mercantilist regulation, and they had a major stake in maintaining that authority and the benefits accruing to them from its exercise.<sup>32</sup> But they were inherently local in nature. Commerce eventually moved out of the towns and into the countryside, which were not subject to guild control, largely in response to the onerous burdens of guild taxation and regulation.<sup>33</sup> When that happened, a substantial amount of England's economic activity was not longer controllable (or taxable) through the guilds. Instead, the government needed a source of regulation (and revenue generation) that was truly national, and it came in the form of national trade monopolies.<sup>34</sup>

***Monopoly: Exclusive Trade Privileges by Letters Patent***

And so the path to monopoly. One major hurdle to understanding the seventeenth-century treatment of monopolies is defining the subject: What is – or rather was – a “monopoly”? As it is today, the term “monopoly” was used throughout the period to describe several different things. One problem is that the period encompasses the fifty years during which “monopolies” were outlawed. Thus, Coke could confidently write in 1644 that “all Grants of Monopolies are against the ancient and Fundamentall laws of this kingdome” if for no other reason than that the combination of *Darcy* and Statute of Monopolies had made them so.<sup>35</sup> As Coke himself recognized (if somewhat late),<sup>36</sup> outlawing “monopolies” does little to establish the word's definition.<sup>37</sup>

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interested acts and rulings on the part of landed and industrialist justices of the peace. See 1 Heckscher at 246.

<sup>32</sup> On the use of guilds to effect national regulation, see 1 Cunningham at 441; on their self-interest in maintaining this power, see 1 Heckscher at 236.

<sup>33</sup> 1 Cunningham at 517-24. Of course, once a few residents fled a town, the town's fixed tax burden fell even more heavily on the remaining guild members, leading to an increasing flight. See 1 Cunningham at 455-56.

<sup>34</sup> Fox at 125-26; 1 Heckscher at 253-54; Price at 5-7.

<sup>35</sup> 3 Co. Inst. 181.

<sup>36</sup> That the Statute of Monopolies does not define the term, a deficiency that one can lay soundly at Coke's feet. During the debate on the Statute of Monopolies, the House of Lords had requested that the term be defined in the statute. The negotiator from the House of Commons – Coke – refused, arguing that the definition should be left up to judges and that the statute described adequately what was to be outlawed. See 1 JHC \_\_\_ (Apr. 19, 1624).

<sup>37</sup> 3 Co. Inst. 181.

The term was commonly used in its economic sense: the condition of having a single seller in a particular market.<sup>38</sup> That condition was not itself necessarily illegal under either common or statute law, although it was believed to lead unavoidably to the sharp practices that were. About the only use of the term that one can easily exclude is the analogy to modern antitrust liability. There was no common-law tort of “monopolization”. Instead, the common law actions against monopolists were “engrossing,” “regrating,” and “forestalling,” each a different flavor of the same offense: buying commodities other than at open market in an attempt to affect their price,<sup>39</sup> although they could also describe any illegitimate attempt to affect market prices.<sup>40</sup>

As the exercise of royal authority to bestow exclusive rights on individuals became the subject of debate, the term came to be used not only in its economic sense but also to describe the exclusive rights being granted by the crown. While the Statute of Monopolies does not define the term, Coke defined it twenty years later as:

an Institution, or allowance by the King by his Grant, Commission, or otherwise to any person or persons, bodies politique, or corporate, of or for the sole buying, selling, making, working, or using of any thing, whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any

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<sup>38</sup> See, e.g., Thomas More, *Utopia* (1516).

<sup>39</sup> Engrossing was to purchase goods and resell them “in gross” rather than at retail, the theory being that, the more hands the commodity passed through, the higher its price would eventually become. Forestalling was any attempt to purchase goods before they reached a market and re-sell them at the same or a nearby market. Regrating was to purchase commodities at a market in an attempt to corner the market and thereby raise prices before re-selling them in the same market. See generally Letwin, *Contracts in restraint of trade were also unenforceable*. Cf. *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711).

<sup>40</sup> As explained in nineteenth-century treatise:

Forestalling, commonly speaking, means, to market before the public, or, to anticipate or prevent the public market; but, legally understood, it has a greater signification, for it comprehends all unlawful endeavours to enhance the price of any commodity, and all practices which have an apparent tendency thereto, such as, spreading false rumors; buying commodities in the market before the accustomed hour; buying and selling again the same articles in the same market; and other such criminal devices.

See William Illingworth, *An Inquiry into the Laws, Ancient and Modern, Reflecting Forestalling, Regrating, and Ingrossing* 14 (1800).

freedome, or liberty they had before, or hindred in their lawfull trade.<sup>41</sup>

Of course, this definition describes only the grants made illegal under the Statute of Monopolies and common law – Coke’s rendition is in the context of describing the coverage of the law itself. Not all royal exclusive privileges were illegal; foreign trade monopolies were upheld by common-law courts throughout the period and beyond, their eventual deaths being of political, not legal, causes. It is little surprise, therefore, that the term came to carry a pejorative and even tautological meaning, “monopolies” being those restrictions and privileges that the speaker considered to be illegal. Grants agreed to be valid would not have been called “monopolies” at all.<sup>42</sup> The rhetorical attempt to equate all royal grants to invalid “monopolies” was frequent,<sup>43</sup> but far from universal. As a matter of contemporary usage, the term “monopolies” was most commonly used to describe a set of royal privileges granted to individuals that offered them certain advantages in trade,<sup>44</sup> although other terms (e.g. “licenses”<sup>45</sup>) were also used.

Even so limited, the contemporary practice of referring to the royal grants at issue as “monopolies” was a misleading oversimplification, albeit – as it happens – a rather sophisticated one. In actuality, the grants at issue took four distinct forms, only one of which resembles anything that one would commonly call a “monopoly”. In order to avoid misleading, I shall refer to the grants at issue collectively as “exclusive trade privileges” since they were all

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<sup>41</sup> 3 Co. Inst. 181.

<sup>42</sup> *Corré*.

<sup>43</sup> And remains so. See Giles S. Rich, *Are Letters Patent Grants of Monopoly*, 15 *Western New England L.R.* 239, 253 (1993) (describing incidents in which “monopoly” has been used by litigants in attempts to besmirch the reputation of modern patent-holders).

<sup>44</sup> See Fox at 24-25 (“By the turn of the century [‘monopoly’] had come into common use and was widely employed in Parliament to describe the system of patents used by Elizabeth for the granting of exclusive rights.”).

It would have been more accurate to refer to the troublesome grants as “letters patent,” since they all actually took that form. But all royal grants of authority, including commissions to officers, took the form of letters patent, making that term (or the shortened form “patent”) unhelpful as a name for the grants at issue.

<sup>45</sup> Bell in Parliament.

exclusive and all pertained to trade. Dealing with the oversimplification requires explanation of the four forms that royal exclusive trade privileges took.<sup>46</sup>

The first was the analog to today's invention patents: grants to inventors for the exclusive right to use their invention. During the period, this category would have included patents given for the exclusive use of a technology or industry that the recipient either invented (or merely imported) into England.<sup>47</sup> They were given as an inducement to undertake the investment of either invention or importation, a practice not politically contested and sanctioned by both the Statute of Monopolies<sup>48</sup> and the common law.<sup>49</sup> The second kind of privilege – which I refer to as “non obstante grants” or “exemptions from regulation” – were just that: exceptions from the force of other laws.<sup>50</sup> Thus, while the Navigation Laws<sup>51</sup> required the use of English shipping, Henry VIII granted exemptions as a source of revenue “so frequently that the law became a dead letter.”<sup>52</sup> Similarly, the export of certain commodities (most notably wool) was prohibited, but exemptions to the restriction were regularly granted as a means of royal favoritism.<sup>53</sup> The third kind – which I call “delegations of regulatory authority” – were patents granting the right to *supervise* rather than practice a particular trade. Sir Walter Raleigh, for instance, was given the sole authority to license taverns and the retailing of wines.<sup>54</sup> Finally, the fourth kind were common trade monopolies: exclusive rights to practice a trade

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<sup>46</sup> For the four categories generally, see 3 Lipson, *The Economic History of England* 352-56 (1929) and Davies at 397-98 (adding patents of importation to Lipson's categories).

<sup>47</sup> Davies; Fox at 42, 50, ch. V; Hulme at 52; Price at 8.

<sup>48</sup> Statute of Monopolies § 6.

<sup>49</sup> See generally *Mitchel v. Reynolds*, 24 Eng. Rep. 347 (1711).

<sup>50</sup> See Fox at 64-65.

<sup>51</sup> 1 H. VII c.8 (1486); 4 H. VII c.10 (1489).

<sup>52</sup> 1 Cunningham at 490

<sup>53</sup> See Price at 9-12. See also *id.* at 12-14 (exemptions from regulations requiring a particular method or practice for manufacturing goods, such as an exemption from the prohibition on the use of gig mills).

<sup>54</sup> See Lipson on Raleigh. See also 2 Cunningham at 301-03 on the patents for licensing alehouses generally.

whose justification depended either on grounds unrelated to the trade's novelty to England<sup>55</sup> or on the naked assertion of royal prerogative.

Of course, the lines separating the various forms of exclusive trade privileges blurred. Non obstante grants, for instance, frequently included the right to grant the exemption to others, converting them essentially into delegations of regulatory authority.<sup>56</sup> A slightly different but closely related form was the patent for the right to collect fines for violations of trade regulations. Those patents were in practice not used to punish (and stop) violations but simply to extract fees from proprietors in exchange for continuing the prohibited practice. They consequently worked exactly like transferable non obstante grants.<sup>57</sup> Under the guild system, there was no affirmative right for any non-member to practice a trade without permission from the guild, making invention and importation patents not only a negative right to prevent others from practicing the invention or imported practice but also an affirmative right to practice the trade in question outside of the relevant guild's regulatory authority – thus serving effectively as non obstante grants.<sup>58</sup> A non obstante grant of exemption to a universal prohibition of some trade practice, such as the import or export of a particular commodity,<sup>59</sup> created in its bearer an effective trade monopoly in the otherwise prohibited article. Combinations were also possible. The playing-card patent at issue in *Darcy v. Allen* gave Darcy the exclusive right to make his own playing cards or authorize others to make playing cards by applying his seal to them,<sup>60</sup> but it also contained a non obstante clause allowing Darcy to avoid the longstanding statutory prohibition against their import.<sup>61</sup>

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<sup>55</sup> The playing-card monopoly at issue in *Darcy v. Allen*, for instance, was justified by the need to limit (ostensibly through monopoly pricing) the venal practice of card playing. See *Darcy*, 77 Eng. Rep. at 1261-62.

<sup>56</sup> See, e.g., Price at 13-14 (patent for the power to grant exemptions to the statutorily dictated means of tanning leather).

<sup>57</sup> See, e.g., Price at 12-13 (patent for the right to collect fines for use of prohibited gig-mills).

<sup>58</sup> Fox at 42. The protection was not only against regulation by trade guilds; patents frequently allowed their recipients to avoid enforcement by the holder of an earlier yet still extant patent. *Id.*

<sup>59</sup> E.g. the exception on the importation of sweet wine.

<sup>60</sup> *Darcy*, 77 Eng. Rep. at 1261.

<sup>61</sup> See *Corré* at 1305-06.

The one operative similarity shared by all exclusive trade privileges is that all four types would have conferred upon patentees a claim to all the economic rents generated by a particular trade, industry, or article of commerce.<sup>62</sup> The sole holder of a non obstante grant, for instance, can extract the same monopoly rents as the holder of a trade monopoly. Nor is there, for the purposes of rent extraction, any difference between someone who holds a trade monopoly and someone who holds a delegation of regulatory authority over others engaged in the trade. In either case, the holder of the exclusive right has a strong claim to all the economic rents – the monopolist by charging monopoly prices to consumers and the regulator by charging the actual producers the difference between their cost and the monopoly price in exchange for the right to engage in production.<sup>63</sup> In this sense, the single label “monopoly” for all four types of exclusive trade privileges was accurate, if only because all four types of exclusive trade privileges had the potential to generate economic outcomes (in terms of both rents and prices) identical to those under a trade monopoly.

With these working understandings of mercantilism and the word “monopoly” as it was used at the time, I turn next to the ways in which the two concepts figure into our appreciation of *Darcy v. Allen* and the Statute of Monopolies.

### **Darcy v. Allen and the Compromise of 1601**

In 1602, Edward Darcy sued Thomas Allen in King’s Bench for infringement of a royal patent awarded to Darcy granting him the exclusive right to make, import, and sell playing cards in England. The court held in *Darcy v. Allen* that the royal grant to Darcy was void at common law. According to Coke’s report of the case, the court held that the monopoly granted for making and selling playing cards (which had formerly been widely available in England) was void under the common law as an abrogation of the right of all subjects to engage in a trade and as a harm to the public in the form of reduced employment and higher prices for playing cards. The royal prerogative did not extend to the making of such grants.<sup>64</sup> *Darcy* is a landmark

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<sup>62</sup> Assuming, of course, that others in the chain of production and distribution held no exclusive trade privileges of their own, else all the holders of exclusive trade privileges would divide the economic rents between them.

<sup>63</sup> Demsetz; McChesney, *Money for Nothing*.

<sup>64</sup> 77 Eng. Rep. 1260, 1262-64 (K.B. 1603).

case, although not for its impact on the common law. The case broke no new legal ground; the rule it applied had been widely established for some time. Nor did the *Darcy* signal the death of exclusive trade privileges or trade monopolies; common-law courts upheld those institutions for decades to follow. Rather, *Darcy's* significance is as evidence of an important political compromise between crown and parliament over the exercise of royal authority.

### *From Parliament to the Common Law Courts*

The story of *Darcy* begins not in 1602, with *Darcy's* commencement of the action against Allen, nor even in 1576, with Elizabeth's grant of the playing-card monopoly.<sup>65</sup> Rather, the course of events leading directly to *Darcy* begins in 1571 – in the House of Commons.

It was on Saturday, April 7, 1571 that the subject of royal trade privileges was first raised in a way likely to gain notice by the Queen. During a debate on the subsidy, Bell offered that, while

a Subsidy was by every good Subject to be yielded unto; but for that the People were galled by two means, it would hardly be levied, namely, by Licences and the abuse of Promoters; for which, if remedy were provided, then the would the Subsidy be paid willingly; which he proved, for that by Licences a few only were enriched, and the multitude impoverished; and added, that if a burden should be laid on the back of the commons, and no redress of the common evils, then there might happily ensue, that they would lay down the burden in the midst of the way and turn to the contrary of their Duty.<sup>66</sup>

Others quickly jumped on board the reform bandwagon, suggesting a host of abuses (ranging from misuse of Crown funds by the treasurers to the practice of purveyance to the fees charged by the Exchequer)<sup>67</sup> that required redress, and a committee was formed to consider items of reform. This is the first time in recorded memory that the subject of royal trade

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<sup>65</sup> The monopoly was originally granted to Ralph Bowes and Thomas Bedinfield. After Bowes died, it was re-issued to *Darcy*. Davies at 399.

<sup>66</sup> D'Ewes, Elizabeth at 158 (April 7, 1571). The monopolies question had also been raised in 1567, but it was mentioned only briefly during the Speaker's speech and it occasioned neither debate in Parliament nor any real response from the Queen. See D'Ewes, Elizabeth at 115-16 (House of Lords, Jan. 2, 1567); Hulme at 53.

<sup>67</sup> D'Ewes, Elizabeth at 158 (April 7, 1571). Bell's questioning of the prerogative was, unlike the other complaints raised that day, omitted from the Journal of the House of Commons.

privileges was expressly tied to that of the subsidy. Just how sensitive a topic Bell had raised became clear just three days later, when Elizabeth responded to his suggestion by admonishing the Commons to “spend little time in Motions, and to avoid long Speeches.”<sup>68</sup>

And so the matter rested for a quarter century. It was not until 1597 that monopolies per se were raised again in Parliament. Depending on the source, monopolies were the subject either of a draft bill that went nowhere or a committee that produced none,<sup>69</sup> but they were at the very least discussed in committee, with the result that the Commons voted to present a “Note” to the Queen seeking “her Highness most gracious care and favour, in the repressing of sundry inconveniences and abuses practiced by Monopolies and Patents of priviledge.”<sup>70</sup> At the close of Elizabeth’s ninth Parliament, the Speaker “shewed a Commandment imposed on him by the House of Commons, which was touching Monopolies or Patents of Privilege, the which

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<sup>68</sup> 1 JHC 83; D’Ewes, Elizabeth at 159; (April 10,1571). See generally Fox at 74; 4 Holdsworth at 34; Price at 20. Although the rebuke was made generally, D’Ewes explains that it “grew out of somewhat spoken by Mr. Bell the 7th day of this instant April, concerning Licences granted by her Majesty, to do certain matters contrary to the Statutes, wherein he seemed to (as was said) to speak against her Prerogative ... .” D’Ewes, Elizabeth at 159; see also 4 Parl. Hist at 154.

It’s not entirely clear what the basis of Bell’s objection was. D’Ewes’ record of his speech mentions only “Licences,” and the record of his admonishment explains that Bell’s speech had been “concerning Licences granted by her Majesty, to do certain matters contrary to the Statutes,” D’Ewes, Elizabeth at 159, a suggesting that Bell’s objection was to non obstante grants. But the Parliamentary History reports that the Queen’s admonishment “was occasioned by one Mr. Bell, speaking against Monopolies or granting of Licences, which, he thought, was contrary to certain Statutes,” 4 Parl. Hist. 154, a complaint suggesting that the monopolies and licenses themselves were in violation of statute, a condemnation of the royal preferences in their own right. That would have been a much bolder argument; it would have been an argument that the Queen’s prerogative was being exercised not merely to the harm of her subjects but actually contrary to law, and it would have been one difficult to defend at the time (at least with regard to the statute as opposed to the common law). The Journal of the House of Commons notes the admonishment, but does not tie it to Bell at all. See 1 JHC 83 (April 10, 1571).

<sup>69</sup> Compare Price at 20; 4 Parl. Hist. 416 (Nov. 8, 1597) (draft bill) and D’Ewes, Elizabeth at 554 (Nov. 9, 1597) (a motion “delivered yesterday” by Francis Moore) with Townshend at 103 (Nov. 9, 1597) (committee being chosen was postponed on Bacon’s request and no further mention of the committee during that parliament).

<sup>70</sup> D’Ewes, Elizabeth at 572 (Dec. 14, 1597) (report by Francis Moore of the committee’s product with a vote to present it to the Queen).

was a set and penned Speech, made at a Committee.”<sup>71</sup> This was a bold move, made doubly so by its touching upon the Queen’s prerogative. It was unusual for substance to be included in the speaker’s closing speech to the Queen (which customarily included the presentation of the “gift” of the subsidy, thanks for the Queen’s pardon of free speech for the members, and a request for personal pardon for anything he had done or failed to do), much less a suggestion that the Commons had any business meddling in the Queen’s prerogative. But even more remarkable (and likely indicative of what was going on outside of Parliament<sup>72</sup>) was Elizabeth’s response, which was considerably more solicitous than it had been in 1571:

Touching the Monopolies, her Majesty hoped that her dutiful and loving Subjects would not take away her Prerogative, which is the chiefest Flower in her Garden, and the principal and head Pearl in her Crown and Diadem; but that they will rather leave that to her Disposition. And as her Majesty hath proceeded to Trial of them already, so she promiseth to continue, that they shall all be examined, to abide the Trial and true Touchstone of the Law.<sup>73</sup>

Elizabeth’s response – a suggestion that Parliament might have authority to restrain her prerogative combined with a request that they indulge her – was typical of her approach to parliamentary relations. Both she and her father had pursued a policy of co-opting Parliament, a policy that, by virtue of the unique circumstances facing the Tudor monarchs, heightened *de jure* the Crown’s dependence on Parliament while at the same time producing *de facto* Crown autocracy.<sup>74</sup>

Three years elapsed before the next parliament met, but that was long enough for the Commons to figure out that Elizabeth’s 1598 promise was not being carried out. The Privy Council and the Star Chamber continued to exercise jurisdiction over patent cases, even to the point of staying common-law proceedings involving them.<sup>75</sup> Monopolies were brought up early

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<sup>71</sup> 4 Parl. Hist. 419 (Feb. 9, 1598).

<sup>72</sup> On the depressed industrial conditions of the time, which placed pressure on the monopolies, see 4 Holdsworth 347.

<sup>73</sup> 4 Parl. Hist. 420 (Feb. 9, 1598)

<sup>74</sup> Tanner at 5-6.

<sup>75</sup> 4 Holdsworth at 348. During the debates in 1601, both Flemming, the Solicitor General, and Francis Bacon argued that many monopolies had been reformed in the time since the 1598 promise was made, “since which Time at least fifteen or sixteen, to my Knowledge, have been

in the 1601 parliament and, unlike in the previous parliaments, they became the subject of extensive debate in the Commons. A draft bill outlawing the royal monopolies was put up for debate on November 20,<sup>76</sup> and the topic dominated the house for the next five days. There were a litany of speeches against monopolies (frequently specific ones that members thought particularly egregious or harmful to their seats), and no one seriously defended the monopolies on their merits.<sup>77</sup> There was, however, real concern over whether the Commons should be considering legislation touching on the prerogative; the main point of debate was whether the Commons should pass a bill or let their protest take the milder form of petition.<sup>78</sup> There was reason to be careful. Elizabeth had, albeit politely, admonished her last parliament to avoid questions of prerogative, a remonstrance that some members of the 1601 parliament still remembered.<sup>79</sup> In addition to principled arguments against interference with royal discretionary powers, there was the very real possibility that, if they passed an act outlawing monopolies, Elizabeth would simply grant exemptions from its enforcement,<sup>80</sup> thereby undercutting Parliament's credibility.

As it happens, they never decided whether to proceed by bill or petition, because on November 25 Elizabeth cut short their debate on monopoly reform by undertaking her own. Thanking the Commons for bringing the facts of the matter to her attention<sup>81</sup> and expressing her

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repealed, some by her Majesty's own express Commandment, upon complaint made unto her by Petition, and some by *Quo Warranto* in the Exchequer." 4 Parl. Hist. 455 (Nov. 20, 1601) (statement of Bacon); id. at 462 (Nov. 21, 1601) (statement of Flemming). The argument gained no traction. As Robert Wroth pointed out in response to Flemming, it was easy to effect re-delivery of cancelled patents and, perhaps more tellingly, the practice of granting patents had not abated. Id. (statement of Wroth).

<sup>76</sup> 4 Parl. Hist. 452 (Nov. 20, 1601). The bill was first mentioned on November 18, but the Speaker had cut-off the discussion. Townshend at 224.

<sup>77</sup> The only exception was Sir Walter Raleigh, who held several of them, and even his participation was limited to defending his own conduct in operating the tin monopoly. In the end, he agreed to cancellation of his monopolies should the house vote it. 4 Parl. Hist. 459-60 (Nov. 20, 1601).

<sup>78</sup> 4 Parl. Hist. 455-68.

<sup>79</sup> 4 Parl. Hist. 452 (Nov. 20, 1601) (statement of Hide).

<sup>80</sup> 4 Parl. Hist. 457 (Nov. 20, 1601) (statement of Francis Moore); id. at 458 (statement of George Moore); 4 Parl. Hist. 464 (Nov. 23, 1601) (statement of Spicer).

<sup>81</sup> 4 Parl. Hist. 480 (Nov. 30, 1601) (speech of Elizabeth).

astonishment “[t]hat my Grants should be grievous to my People, and Oppressions to be privileged under Colour of our Patents,”<sup>82</sup> she terminated outright a few of the most unpopular monopolies and reiterated her 1598 promise to have patent cases tried in the common-law courts. But this time that promise was made in the more tangible form of a royal proclamation, and it was backed-up by a concomitant promise to issue no more writs of assistance staying cases in common-law courts.<sup>83</sup>

Elizabeth’s decision to cancel some of the most widely detested monopolies and subject the rest to the common-law courts was, by all accounts, a brilliant political move.<sup>84</sup> By bending in this way, Elizabeth not only avoided (at least for a time) a direct confrontation over the monopolies problem, she was able to placate Parliament without even conceding that the prerogative was subject to parliamentary authority.<sup>85</sup> The members of the House of Commons, for their part, were gratified to see the Queen respond to their as yet unspoken entreaties.<sup>86</sup>

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<sup>82</sup> *Id.* at 481.

<sup>83</sup> The substance of the proclamation was communicated to the Commons through the speaker and promised “that some should presently be repealed, some suspended, and none put in Execution, but such as should first have a Tryal according to the Law for the good of the People.” D’Ewes, *Elizabeth* at 652 (Nov. 25, 1601); 4 *Parl. Hist.* 469. The proclamation itself declared several patents void and permitted anyone injured by operation of a patent “at his or their liberty to take their ordinary remedy by her Highness’s laws of this realm, any matter or think in any of the said grants to the contrary notwithstanding,” that “it is now resolved that no letters from henceforth shall be written from [the Privy Council] to assist these grants,” and that “no letters of assistance that have been granted by her Council for execution of these grants, shall at any time hereafter be put in execution.” See “A proclamation for the reformation of many abuses and misdemeanors committed by patentees of certain privileges and licenses, to the general good of all her Majesty’s loving subjects,” Nov. 28, 1601, reprinted in Price Appendix J. at 156-59 (“Proclamation of 1601”). There is no specific mention in the proclamation of suspending the grants themselves, only their enforcement outside of the common-law courts. Elizabeth followed the proclamation up her own speech to the Commons. See 4 *Parl. Hist.* 479-82 (Nov. 30, 1601).

<sup>84</sup> Fox at 79.

<sup>85</sup> Indeed, unlike her 1598 promise, which was toothless but also suggested Parliament might challenge the prerogative, the 1601 proclamation also contained a stern warning for anyone who might view it as conceding the supremacy of the prerogative. See Proclamation of 1601, para. 6.

<sup>86</sup> Price at 22.

They voted a record subsidy five days later.<sup>87</sup> At the same time, Elizabeth's decision shifted the attention of the public away from her own role in granting the patents and toward the actions of the monopolists. According to the proclamation, the monopolies cancelled were done so on the ground that "it doth appear that some of the said grants were not only made upon false and untrue suggestions contained in her letters patents, but have been also notoriously abused, to the great loss and grievance of her loving subjects (whose public good she tendereth more than any worldly riches)."<sup>88</sup> The offending writs of assistance had similarly been obtained "upon like false suggestions."<sup>89</sup> Given the circumstance and Elizabeth's popularity, no one was tempted to argue the obvious point: Elizabeth could have done much more. She could have cancelled *all* the monopolies and promised never to grant another.

Publication of the proclamation prompted a London haberdasher to test the validity one of the minor patents Elizabeth had not cancelled – the one for playing cards – by making his own,<sup>90</sup> which in-turn prompted the holder of that patent to sue him for infringement in King's Bench. But for the compromise that Elizabeth found with a Parliament that wasn't looking for one, *Darcy v. Allen* might never have been.

#### *Exclusive Trade Privileges in the Common Law*

Although *Darcy* is by any account a landmark case, it's not clear how much of its status should be attributed to its reasoning. Coke's report of the case, by far the dominant one,<sup>91</sup> has been largely discredited. The judges hearing *Darcy* did not give any reasons when they delivered their decision, although Coke's report reads as though they adopted wholesale the most extreme arguments advanced against monopolies.<sup>92</sup> Indeed, it appears that, in his zeal,

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<sup>87</sup> 4 Parl. Hist. 483-84 (Nov. 30 and Dec. 5, 1601).

<sup>88</sup> Proclamation of 1601, para. 1.

<sup>89</sup> Proclamation of 1601, para. 2.

<sup>90</sup> See Price at 22-23.

<sup>91</sup> The case was reported by three reporters: Coke, Moore, and Noy. Noy's report included only the arguments by Fuller, whose arguments on monopolies and the reach of the king's prerogative were by far the most radical made during the case. Corr . Moore's report, which was originally issued in Law French, has yet to appear in an authoritative English translation. Fox or Price.

<sup>92</sup> Corr  (no reasoning given by the judges when the case was decided). After reciting the allegations of the complaint (which were in all material aspects admitted), Coke's report spends

Coke likely raised and resolved against the crown an issue – whether the crown can grant exemptions to statutory import restrictions – that never came up in the case.<sup>93</sup> That is not to say that Coke’s report of *Darcy* is affirmatively wrong. The case did conclude that royal letters patent could not be used to create trade monopolies.

But the common law was quite amenable to exclusive trade privileges that did not emanate from the crown. In 1610, seven years after *Darcy*, the King’s Bench upheld the ability of London to fine a tallow-chandler who practiced his trade without being free of the city. In *Wagoner’s Case*, the court laid out what would be the best heuristic for predicting whether any particular exclusive trade privilege would be upheld or struck in common-law courts:

It was resolved that there is a difference between such a custom within a city, &c. and a charter granted to a city, &c. to such effect; for it is good by way of custom but not by grant; and, therefore, no corporation made within time of memory can have such privilege, unless it be by Act of Parliament.<sup>94</sup>

For the 200 years following *Darcy*, exclusive trade privileges based in custom or confirmed by statute were routinely upheld by common-law courts.<sup>95</sup> *Darcy* and the cases that followed were an assault on the monarchy, not on exclusive trade privileges.<sup>96</sup>

But royal privileges did not always lose. After the Restoration (and over seventy years after *Darcy*), the East India Company’s royal trading monopoly was upheld as a valid exercise

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two paragraphs outlining the arguments advanced by plaintiff’s counsel on two questions: whether the patent was “good,” which is to say enforceable, and whether the exemption in the patent to the statutory prohibition against importing playing cards was also valid. The next paragraph, which begins a two-and-a-half page tirade against monopolies begins, “As to the first [question], it was argued ... by the defendant’s counsel, and resolved by Popham, Chief Justice, *et per totam Curium* ... .” See *Darcy*, 77 Eng. Rep. at 1262. Coke made no distinction between the arguments of the defendants and the (undisclosed) reasoning of the court.

<sup>93</sup> Corr . Coke was criticized for the report at the time and, with regard to this second question, he actually retracted it at the insistence of James I. Corr .

<sup>94</sup> 77 Eng. Rep. at 663 (footnote omitted).

<sup>95</sup> 1 Heckscher at 284-86.

<sup>96</sup> Letwin.

of the prerogative to regulate foreign trade.<sup>97</sup> Nor was the presence of a royal patent the death-knell for any domestic trade privilege. Rather, patents, when present, were largely ignored in the courts' consideration of whether a particular trade privilege was valid. But the generalization largely holds: Courts upheld privileges supported by patents if the privilege was also supported by custom or Act of Parliament,<sup>98</sup> and I have yet to find a case striking a trade privilege supported by statute.<sup>99</sup> Nevertheless, some outcomes in this area of law addressing the intersection between industrial organization and political organization were likely the result of political exigencies and the circumstances of particular privileges,<sup>100</sup> and so rather than count case outcomes, it might be more informative to consider the persistent lines of argument in English trade privilege law.

Some points were common ground among common-law judges and advocates during the seventeenth and eighteenth centuries. Everyone seemed to agree that patents awarded for a newly invented or imported article were valid and that monopolies presented the likelihood of economic harm, although some of the theories supporting those conclusions were quite different than anything that would be argued today. Following the mercantilist economic thought of the time, the primary harm from monopolies, for instance, was largely identified as

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<sup>97</sup> See *The East India Co. v. Sandys*, 10 St. Tr. 371 (1685). See also *Company of Merchant Adventurers v. Rebow*, 3 Mod. 126, \_\_\_ Eng. Rep. 81 (1686) (upholding the Merchant Adventurers' exclusive foreign trade privileges).

<sup>98</sup> E.g. *Wagoner's case*, in which London's charter was supported by both custom and statute. That is not to say that patents were irrelevant in the actions. The patent was often the legal instrument granting the right to bring the suit in the first place. See *Mayor of Winton v. Wilks*, in which the court dismissed the case because the action was brought by the corporate town, not the guild whose charter contained the restricting in question.

<sup>99</sup> The closest I've found is *Dr. Bonham's Case*, in which Coke (as both judge and reporter) suggests that Parliament cannot grant the London College of Physicians the power to imprison those who practice medicine in London without the College's approval, but Coke did uphold a fine imposed by the statutorily approved College.

<sup>100</sup> For instance, in *The Case of the King's Prerogative in Saltpetre*, 12 Co. Rep. 12, \_\_\_ Eng. Rep. 1294, 1295-96 (1607), the role of the crown in defending the nation served as adequate justification (in an advisory opinion) for royal purveyance of saltpetre, although the opinion suggests that the personal nature of the right requires that it be exercised by the officers of the crown rather than a patentee (as was frequently the case).

the loss of jobs for craftsmen resulting from having a single employer for any particular industry. The harm to consumers was clearly a secondary consideration.<sup>101</sup>

Perhaps the most sweeping concept appearing in the cases, and certainly the most relevant to the American experience, is the steady reference to the “liberty of the subject” (in somewhat varying language) to carry on his or her trade as a countervailing force against exclusive trade privileges. Thus, Coke’s report describes the playing-card monopoly at issue in *Darcy* as “against the common law, and the benefit and liberty of the subject.”<sup>102</sup> Reference to the same concept – as enshrined in the common law – is one of the most consistent features of litigation of the period<sup>103</sup>. But, while the concept’s rhetorical appeal made it popular among lawyers, it doesn’t appear to have done any work at all in the trade-privilege cases. The “liberty of the subject” guaranteed by the common law held fast in cases addressing privileges already doubtful for their reliance on royal prerogative alone, but it gave way to all privileges satisfying the criterion of origin in custom or statute. Thus, in *Wagoner’s Case* as the court trumpeted the superiority of custom or statutory privileges to royal ones, it also acknowledged identical limits on the reach of common-law rights:

There are divers customs in London which are against common right, and the rule of the common law, and yet they are allowed in our books ... because they have not only the force of a custom, but are also supported and fortified by authority of Parliament.<sup>104</sup>

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<sup>101</sup> See, e.g., *Darcy* at 1262-63; *Davenant* at 312 (argument of Moore).

<sup>102</sup> *Darcy* at 1262.

<sup>103</sup> See, e.g. *Raynard v. Chase*, 1 Burr. 2, 97 Eng. Rep. 155, 157 (K.B. 1756) (the Statute of Artificers should be read restrictively because, among other reasons it is “in *Restraint of natural Right*; ... It is *contrary to the general Right* given by the Common Law of this Kingdom”) (opinion of Mansfield, C.J.); *Sandys* at 523 (the right to manufacture “remain[s] within the most liberty by the common law” compared to the right to conduct, inland or foreign trade, which are protected to declining degrees) (opinion of Jeffries, C.J.); *Wilks* at 248 (“every man at common law might use what trade he would without restraint”) (argument for defendant); *The Case of the Tailors & Co. of Ipswich* at 1220 (“without an Act of Parliament, none can be in any manner restrained from working a lawful trade”); *Chamberlain of London’s Case*, \_\_\_ Eng. Rep. at 150 (argument of defendant).

<sup>104</sup> See *Wagoner’s Case*, 77 Eng. Rep. at 66.

The common-law right was not to be free from trade restrictions, even exclusive trade privileges, it was only to be free from ones of illegitimate pedigree – not a concern in a republic like the United States.

Even if the liberty of the subject had had traction in the seventeenth- and eighteenth-century English cases, there are reasons why so general a preference for free trade does not translate well to the twenty-first-century American debates over the optimal reach of patent and copyright. Liberty-of-the-subject arguments were, like the primary concern over monopolies themselves, producer-centric. The “liberty” at issue was not the freedom to consume; it was the freedom to practice a trade. The importance of that liberty has to be considered in context – in an industrial system in which employment mobility was extremely limited. The apprentice and guild system perpetuated by the Statute of Artificers made it extremely difficult to switch between different trades. It was nearly impossible for a tallow-chandler to become a haberdasher if the entire candle industry were handed over to a monopolist who didn’t plan on doing any outside hiring. Even in the face of a local (rather than a national) monopoly, moving to another city was not for most workers a practical response to the granting of a new exclusive trade privilege.<sup>105</sup> Those concerns do not translate to the present-day debates over intellectual property rights. Potentially displaced employees are much more mobile, not only geographically, but among the various trades. There is no longer identity between a particular “trade” and an entire industry as there was in pre-industrial England. If the entire automobile industry were handed over to a monopoly, the potentially displaced machinists can turn to other industries requiring machinists. But, of course, modern intellectual property rights rarely pose a threat of handing entire industries over to monopolists;<sup>106</sup> not only do industrial markets work to alleviate concerns over the freedom to work, it’s unlikely to be jeopardized by any exclusive trade privilege that any modern representative government would realistically award.

If liberty-of-the-subject arguments could be sensibly made in modern intellectual property debates, it’s not clear that anyone opposing the expansion of intellectual property

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<sup>105</sup> The lone exception was London, the custom of which was to allow someone free of any of the companies to practice any of the trades controlled by the other companies. Cite.

would want to make them. Even in its most extreme form, the argument was keyed to reliance rather than some abstract sense of liberty; when Fuller advanced this argument in *Darcy*, his focus was entirely on whether the crown could “prohibit a man not to live by the labour of his own trade, wherein he was brought up as an apprentice.”<sup>107</sup> There was no concern for the right for anyone to *become* a playing-card maker; it was the rights of the *current* playing-card makers that were at stake. Even Coke’s definition of “monopoly” (a term he used for trade privileges that were necessarily illegal) was limited to grants from the king “whereby any person or persons, bodies politique, or corporate, are sought to be restrained of any freedome, or liberty that they had before, or hindered in their lawful trade.”<sup>108</sup> The right to move into new fields – or to seek self-actualization through work – was simply not an issue.

The emphasis of the liberty of the subject on one’s current trade might explain why courts were so willing to accept custom as a sufficient basis for upholding an exclusive trade privilege. Right or wrong, the one thing that custom has going for it is its ability to meet settled expectations.

The ill fit of the “liberty of the subject” to modern intellectual property debates becomes apparent when understood in this light. While mercantilist conceptions of the liberty of the subject support arguments against any form of exclusive rights that take subject matter out of the public domain,<sup>109</sup> they are equally amenable to being advanced in support of granting exclusive rights inconsistent with the American intellectual property tradition. Invention patents fit nicely within the liberty-of-the-subject ideal, since “no body can be said to have a right to that which was not in being before.”<sup>110</sup> But the same argument was used to uphold not

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<sup>106</sup> Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 Vand. L. Rev. 1727 (2000).

<sup>107</sup> *Darcy*, Noy at 180, 74 Eng. Rep. at 1137 (argument of Fuller).

Coke appears to have overreached in this portion of his report of *Darcy* as well, for not even Fuller was willing to make the argument appearing in Coke’s report that one of the liberties at issue is the liberty of consumers to choose from whom they will buy their products. See *Darcy*, 11 Co. Rep. at 86a-86b, 77 Eng. Rep. at 1263 (citing *Davenant v. Hurdis*). That interest, unlike the one identified by Fuller, does not appear to have been taken up in later cases.

<sup>108</sup> 3 Co. Inst. 181.

<sup>109</sup> E.g. Lee, 55 Hastings L.J. at 112.

<sup>110</sup> *Mitchel v. Reynolds*, 24 Eng. Rep. 347, 350 (Ch. 1711).

only importation patents – which were not treated any differently under the common or statute law from invention patents<sup>111</sup> but are treated differently as a matter of American constitutional law<sup>112</sup> – but also foreign trade monopolies: Because there was no recognized common-law right to travel beyond the kingdom, a monopoly in foreign trade did not deprive anyone of a pre-existing right.<sup>113</sup> While the absence of any right to engage in foreign trade might be a harder sell under the American constitutional scheme, it's not hard to come up with more likely examples. There is no established right to manufacture or sell pharmaceuticals in the United States, for instance.<sup>114</sup> The award of perpetual exclusive trade privileges in pharmaceuticals – covering both existing and future drugs – to current FDA licensees would be perfectly consistent with the liberty of the subject as rehearsed in the cases of the era. Arguments premised on the liberty of the subject as it was then understood could be used to justify any trade restriction that did not interfere with settled expectations, such as the awarding of copyrights and patents to someone other than authors and inventors, which few commentators or courts would accept as legitimate under current conceptions of intellectual property.

The concept that appears to have done the most analytical work was the requirement that, in order to be valid, trade privileges must benefit the public. In the 1592 *Chamberlain of London's Case*, the plaintiff distinguished between trade regulations that benefited the public and those for the gain of individuals: Guild ordinances in furtherance of the public good could stand without support of a custom; those for “private profit” were valid only to the extent they were supported by custom.<sup>115</sup> In 1599 in *Davenant v. Hurdis*, Coke argued successfully that, in

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<sup>111</sup> See supra text accompanying notes 47-49.

<sup>112</sup> Cite Intellectual Property Clause and the question that arose over importation patents in Hamilton's Report on Manufactures.

<sup>113</sup> Sandys, St. Tr. at 542.

<sup>114</sup> Cite FDCA.

<sup>115</sup> The plaintiff argued:

[I]nhabitants of a town without any custom may make ordinances or by-laws for the reparation of the church, or a highway, or of any such thing which s for the general good of the public; and in such case the greater parrrt shall bind the whole without any custom. ... But if it be for their own private profit, as for the well ordering of their common of pasture, or the like, there, without a custom they cannot make by-laws: and if there be a custom, then the greater part shall

order to be valid, corporate by-laws must be “made in furtherance of the public good and the better execution of the laws, and not in utter prejudice of the subjects or for private gain.”<sup>116</sup> During the period, the most commonly deployed justification for guild or company privileges was the public benefit flowing from their regulation of commerce.<sup>117</sup> Even though *Darcy* was something of a test case regarding royal power, the primary argument advanced in favor of the monopoly was not raw prerogative, it was that the reduction in the supply of cards was a public necessity in order to prevent laborers from wasting time playing cards instead of working.<sup>118</sup> By 1685, after the Revolution and the Restoration had seemingly resolved the conflict over the reach of royal authority, the public benefit justification subsumed all others. When it came time to defend the East India Company’s trading monopoly, the attorney for the company laid the entire argument “upon a question of fact, which will, or will not make this company and their grant a monopoly: Viz. Whether this company and their grant be a public good and advantage to the trade of England.”<sup>119</sup> The discretionary exercise of royal prerogative was a necessary component of the monopoly, but there was no pretence that it was sufficient in the absence of a separate public benefit. The court agreed, defining grants that are beneficial to the public out of the legal meaning of the term “monopoly”.<sup>120</sup>

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not bind the less, if it be not warranted by the custom. For as the custom creates them, so they ought to be warranted (directed) by the custom.

\_\_\_ Eng. Rep. at 151 (footnotes omitted).

<sup>116</sup> Davenant at 312.

<sup>117</sup> See *Hayes v. Hardring*, Hardres 53 (1656) (collecting cases). So strong was the recognition of this particular line of argument that there was some suggested that in the presence of a public benefit, a by-law would be valid even in the absence of a charter. *Chamberlain of London's Case*, \_\_\_ Eng. Rep. at 151 (argument of defendant). In the absence of a charter, however, it’s not clear how anyone would be able to sue for enforcement of the by-law. See *Mayor of Winton v. Wilks*, 92 Eng. Rep. 247, 250-51 (1705) (holding that a corporate town cannot bring suit to enforce a privilege held by a separately chartered guild).

<sup>118</sup> See *Darcy*, 77 Eng. Rep. at 1261-62. According to this line of argument, the reduction of card playing a public benefit in its own right, but the recreational nature of card playing also subjected it to the prerogative. *Id.*

<sup>119</sup> *Sandys, St. Tr.* at 513 (argument of Williams for plaintiff).

<sup>120</sup> *Sandys, St. Tr.* at 518 (“if it happen to be of advantage to the public, as this trade is; then it ceases to be against the prohibiting part of the [Statute] of Monopolies.”) (opinion of Withins, J.); *id.* at 538:

### *Darcy and the Calculus of Compromise*

The “public benefit” rule – the most potent common-law limit to exclusive trade privileges – pre-dated *Darcy* by at least a decade, and Elizabeth’s advisors were well-aware of it when she agreed in 1601 to subject letters patent to common-law review. The common-law standard was mentioned in the proclamation itself,<sup>121</sup> and, when arguing the monopolies question on the floor of the House of Commons, her ministers articulated the rule in almost exactly the same form that would be applied to monopolies throughout the seventeenth century: “if the Judges do find the Privilege good, and beneficial to the Common-Wealth, then they will allow it, otherwise disallow it.”<sup>122</sup> When Elizabeth agreed to subject the monopolies to the common law, she was hardly taking a legal gamble; she knew full well that the rent-conferring monopolies would be struck.<sup>123</sup> The public benefit rule was solidly in place by 1601,

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Now though monopolies are forbidden, yet that cannot be understood to be so universally true ... that it should in no respect, and upon no occasion or emergency whatsoever, admit of any exceptions or limitation.

The exceptions thereof may be such as these:

1. Though no private persons can have the sole trade to themselves, by their own private authority, yet this may be granted to a public society, by the prerogative of the prince; *if,*

2. It be upon good cause, and for the public advantage of the kingdom.

(opinion of Jeffries, L.C.J.) (emphasis added). The court also allowed that foreign trade (the monopoly at issue in the case) warrants its own category of exception to prevent free-riding on investments in overseas trade facilities. *Id.* at 538-39.

<sup>121</sup> The proclamation declared with regard to the monopolies “that some should presently be repealed, some suspended, and none put in Execution, but such as should first have a Tryal according to the Law *for the good of the People.*” D’Ewes, Elizabeth at 652 (Nov. 25, 1601); 4 Parl. Hist. 469 (emphasis mine).

<sup>122</sup> 4 Parl. Hist. 454-55 (statement of Francis Bacon). Indeed, Elizabeth herself had used legal proceedings, in the more closely controlled Exchequer, to call in several monopolies since the 1597 protest in Parliament. *Id.* at 455. Similarly, Cecil, Elizabeth’s principal minister, attacked monopolies “which taketh from the Subject his Birthright,” a reference to the liberty of the subject. *Id.* at 466.

<sup>123</sup> That is, she wasn’t gambling in the aggregate. She might have harbored hope that individual monopolies might be justified. Thus, in his own explication of the law of monopolies during the 1601 debates, Cecil classified the playing-card monopoly as “both good and bad” (4 Parl. Hist. at 465-66), probably because he believed that the queen’s interest in controlling access to articles of venality balanced against the private rents being conferred made the playing-card monopoly a close case.

and the divergence between the queen's interest and that of the public was well-developed enough that she could not argue that that lucre for the crown qualified as a public benefit.<sup>124</sup> *Darcy* did not break any new legal ground; the legal rule was already in place and well-understood. The reality, though, was that the established legal rules on trade privileges had been inapplicable to royal trade privileges because the crown had refused to allow wholesale review of them by common-law courts. The rule of law and free trade coincidentally advanced in the early 17th century, but their mutual advance was not a product of *Darcy*; *Darcy* was a product of the advance. Courts rarely lead societies into major political and social change, even in a system with as robust a tradition of judicial review as the United States;<sup>125</sup> it is virtually inconceivable the English common-law courts, whose political position has never been as strong as that occupied by courts in the United States, could have intervened to deny the crown access to monopolies as a source of rents. The advance evidenced by *Darcy* is not in the decision and is not attributable to the courts at all. The advance of *Darcy* took place almost three years before the case was decided, and it took place in Parliament.

As it happens, the common-law courts had very little impact on monopolies, even after *Darcy*. *Darcy* itself remained something of a hidden treasure; Coke's report containing his strong version of the rule in *Darcy* did not appear until 1614.<sup>126</sup> During the parliamentary debates over monopolies in 1614, for example, Moore cited several cases to demonstrate the limits on the prerogative to grant monopolies, and while he mentioned *John the Dyer* and *Dr. Bonham's Case*, he did not mention *Darcy*.<sup>127</sup> Elizabeth died less than two years after she issued the Proclamation of 1601, and a new monarch ascended, a monarch who was not willing to give up

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<sup>124</sup> See *The Case of the King's Prerogative in Saltpetre*, \_\_\_ Eng. Rep. 1294, 1295 (1607):

And as to the case of gravel, for reparation of the houses of the King, it is not to be compared to [the prerogative to dig for and take saltpetre]; for the case of saltpetre extends to the defence of the whole realm, in which every subject hath benefit; but so it is not in the case of the reparation of the King's houses.

<sup>125</sup> See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1 (1996) (questioning whether courts actually perform a "heroic countermajoritarian function").

<sup>126</sup> *Corré* at 1262.

<sup>127</sup> 1 JHC 472 (May 4, 1614).

on the monopolies question so easily. In the 80 years following *Darcy*, only a handful of cases actually reached the common-law courts, restricting the impact of the rule they'd applied in that case. James I's attempt to re-take the ground that Elizabeth had ceded would eventually lead to the seventeenth century's next great innovation in trade regulation: the Statute of Monopolies.

## **The Statute of Monopolies and the Politics of Economic Regulation**

### *The Assertion of Parliamentary Control over Economic Regulation*

When one considers the convergence of forces from which the Statute of Monopolies sprang, James I appears as an almost hapless victim of a tragedy in which the fate of his dynasty was determined before he came to power, or even before he was born. When James took the throne, what awaited him was a country that was rapidly becoming a cash economy. Soldiers were obtained with money rather than through feudal service, and the centralization of the government made the previous practice of purveyance (moving the court around the kingdom in order to obtain provisions at low or no cost) impractical.<sup>128</sup> The crown's income woes were further exacerbated by the rising importance of bullionism within mercantilist economic doctrine,<sup>129</sup> a development that coincided with the Tudor strategy (originating with Henry VII) of protecting against insurgency by amassing a large treasury.<sup>130</sup> While the shift to a cash economy and the perceived need for a large royal treasury increased the crown's need for cash, inflation from the increased availability of silver combined with the fixed nature of the primary sources of royal revenue (the tenths and fifteenths and the rents from royal lands) to reduce in real money the crown's income.<sup>131</sup> The Tudors' pursuit of a large treasury, through such means as recoinage, redemption of city charters, Empson and Dudley's mills, seizing lands of declared traitors and the Catholic church and – of course – the granting of monopolies, had left the kingdom weary of these hidden taxes and cast into doubt the legitimacy and rationality of the crown's regulation of the economy.<sup>132</sup> Where Elizabeth had been able to secure the production of important goods through regulation, James would have to buy them with bullion, which in

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<sup>128</sup> 2 Cunningham at 1-5.

<sup>129</sup> 2 Cunningham at 176-77.

<sup>130</sup> See 1 Cunningham at 486-87.

<sup>131</sup> 2 Cunningham at 170; Tanner at 7-8.

<sup>132</sup> See 1 Cunningham at 487-88; Kishlansky at 83.

turn he would have to obtain from somewhere.<sup>133</sup> The result was a recipe for economic tension: Non-cash sources of income such as feudal service and purveyance were declining, the value of the crown's established sources of cash were themselves declining through inflation, and the country was in no mood for further royal ingenuity in finding ways to raise the needed funds. The crown's relationship with Parliament would have been strained, largely for reasons not of James's own making, for even the most popular of monarchs.

But James was not particularly popular, a deficiency exacerbated by contrast to the universal adoration of his predecessor. James brought to the table a number of attitudes and characteristics that would have led him into conflict even under the best of circumstances. Foremost among them was an absolutist theory of monarchy,<sup>134</sup> which could not have been more poorly timed or executed following Elizabeth's political management of Commons, which had both increased the Commons' power and left it used to a tone of mutual solicitude in its dealings with the crown.<sup>135</sup> James's views on the appropriate locus of power exacerbated every conflict, partly because it caused him to mis-handle his relationship with Parliament and partly because of the threat (real or perceived) it represented in particular circumstances. Thus, where Elizabeth had capitalized on England's geographical isolation through a strategy of militarized noninvolvement in continental disputes (essentially by maintaining a decades-long quasi-war against Spain), James pursued a policy of engagement, hoping that a lasting peace with the continental powers would make a disinterested England a powerbroker among them.<sup>136</sup> But doing so led to entanglements with the Spanish, including an ill-fated plan to marry his son Charles to Maria Anna, daughter of the Catholic king of Spain.<sup>137</sup> The possibility of a succession tied to Spain was bound to be unpopular in a country so suspicious of papist influences, but it was made doubly so by James's aspirations to enhance the power of the monarchy. When

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<sup>133</sup> 2 Cunningham at 33.

<sup>134</sup> See generally Tanner at 19-22. James said: "Monarchy is the greatest thing on earth. Kings are rightly called gods since just like God they have power of life and death over all their subjects in all things. They are accountable to God only ... so it is a crime for anyone to argue about what a king can do"

<sup>135</sup> Tanner at 5-6.

<sup>136</sup> Kishlansky at 93; Tanner at 49-50.

<sup>137</sup> Tanner at 47-48

Parliament responded to the plan with petition, James's attempts to squelch the debate eventually led to the Protestation of December 18, 1621, which asserted Parliament's right to debate the issue.<sup>138</sup> When James learned of it, he called for the *Journal of the House of Commons*, personally ripped out the page containing the offending passage, and dissolved the parliament<sup>139</sup> – a somewhat less diplomatic approach than Elizabeth might have taken. Religion played an important role as well. Elizabeth had securely established a national church independent of Rome, but she had done so in large part by putting off important questions of religious doctrine and practice, and as the church matured, these questions came to the fore.<sup>140</sup> The popular movement was clearly toward a less-formal and Calvinist tradition. Although unimpeachably a protestant, James's conservative religious leanings aroused ire in the growing reformist faction in Parliament. Thus, whenever Parliament was called, there would be divisive religious issues to be resolved before they were willing to grant a subsidy.<sup>141</sup> Further, James was either unable or unwilling to follow Elizabeth's model of controlled spending.<sup>142</sup> The increased financial pressure drove him to raise funds through whatever device available, while political tensions over foreign policy and religion (traditionally two areas of near-absolute royal prerogative) made him loathe to call parliaments. The result was as particularly destructive cycle of avoidance, distrust, and conflict in which James, in order to avoid summoning Parliament, would institute measures that would arouse suspicion and anger in the parliament that he was eventually forced by financial necessity to summon. Parliament, in turn, insisted on redress of religious and (by virtue of James's own overreaching) increasingly central economic

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<sup>138</sup> Reprinted in 1 Prothero at 314; see Tanner at 48-49

<sup>139</sup> Fox at 107; Tanner at 48-49. A photo of the journal with the pages torn out is reprinted in David Menhennet, *The Journal of the House of Commons: A Bibliographical and Historical Guide* 16-17 (1971).

<sup>140</sup> Tanner at 11-12.

<sup>141</sup> Tanner at 12-13, 29-32. Although a source of strife between him and Parliament, James was largely successful in managing the competing parties, which postponed the full consequences of the rift until Charles I's reign. See Kishlansky.

<sup>142</sup> See Tanner at 8. In 1607, James's court spent more than double (over £500,000) what Elizabeth had spent in a normal year. *Id.*

grievances before voting a subsidy, which would prompt James to take even more extreme measures in order to put off calling the next parliament.<sup>143</sup>

The result was a reckless and unsustainable policy of extra-parliamentary revenue generation through any means available. James resorted to dramatically increased impositions on exports and imports,<sup>144</sup> forced loans, and a vast expansion of the system of royal monopolies. In 1611, James even created the title of Baronet, charging £1,080 for admission to the rank.<sup>145</sup>

Monopolies were not the only, nor even the primary, source of fiscal dispute between the crown and Parliament. In 1608, James increased impositions<sup>146</sup> on imports on the order of £70,000 per year. The increase, and the absolutist rhetoric James used to accompany it, sparked fierce debate in Parliament, and James was eventually forced to enter into a compromise in which he agreed to cancel the worst of the increases while Parliament agreed to make up the difference. In exchange, James had to agree to submit to parliamentary consent for future increases. Before the deal was finalized, James dissolved the parliament.<sup>147</sup> The question of impositions wound up dominating the next parliament, too, leading James to dissolve it in two months without obtaining a subsidy.

There is reason, though, why debate focused on James's use of monopolies. Royal monopolies were objectionable as a constitutional matter because they provided the crown a source of income without recourse to Parliament,<sup>148</sup> and to the extent that Parliament felt less secure with an independent Stuart monarchy than they had under an independent Tudor one, they would have chafed more under the James's monopolies than under Elizabeth's. Although

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<sup>143</sup> See Tanner at 8-9. See also Price at 26-28 (recounting the various petitions in James's early parliaments and his responses to them); *id.* at 30-31 (noting the aggressive moves James made following the failure of Parliament to grant a subsidy in 1614).

<sup>144</sup> Tanner at 42-44.

<sup>145</sup> See <http://www.britannia.com/history/titles.html>.

<sup>146</sup> Impositions were duties, over and above tonnage and poundage, that were protectionist measures. Because of their regulatory nature, they had always been considered a matter of prerogative. Tanner at 43. Their use as revenue sources had been recognized by statute, but their use as such was customarily voted to the king for life shortly after ascending to the throne. Fox at 99. The question came up again during the Addled Parliament of 1614, Fox at 100, and the issue was finally resolved by the Tonnage and Poundage Act, 16 Car. 1, ch. 8 (1641).

<sup>147</sup> Fox at 98-100; Tanner at 42-44.

fiscal control an obvious and intuitive focal point for dispute, there was very little mention of fiscal control or royal independence in the debates over monopolies. But monopolies can be used for purposes other than generating revenue, and it is likely that these other incidents of monopoly caused as much concern as their market and fiscal consequences.

The first session of James's first parliament went largely without mention of monopolies. James had appointed a commission, the Commissioners for Suits, to review patent applications<sup>149</sup> and suspended the operation of patents issued by Elizabeth, subject to review by the king-in-council.<sup>150</sup> The monopolies question was not raised until the second session in 1606, when a general petition was presented by the Commons at the close of the session (in May) pertaining to a number of matters, including patents.<sup>151</sup> James appears to have done nothing until the opening of the third session that November, when he answered that he had examined the items in the petition with the assistance of "Two Chief Justices, the Lord Chief Baron, and his Majesty's Counsel at Law." His answer was largely a reassertion of his right to issue delegations of regulatory authority, notwithstanding grants, and trade monopolies. James retained the most important trade monopolies outright, but promised to punish any abuses committed in the patents' execution, to subject some monopolies to the common-law courts, and to revoke several patents (among them one trade monopoly).<sup>152</sup> He apparently did none of this, for

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<sup>148</sup> Fox at 100.

<sup>149</sup> Price at 25-26.

<sup>150</sup> A Proclamation inhibiting the use and execution of any Charter or Graunt made by the late Queene Elizabeth, of any kind of Monopolies &c. (May 7, 1603), reprinted in 1 Stuart Royal Proclamations 11 (James F. Larkin & Paul L. Hughes, eds., 1973); Fox.

<sup>151</sup> See Fox at 95; Price at 26; The petition is reprinted in Fox, appendix VI, at 329. Of the patents listed, three of them are patents for collecting fines and duties, one is an exemption from price regulation, one is a delegation of regulatory authority (to search and seal draperies), and five of them regard trade monopolies.

One of those five concerned the "the abuses Committed by the Salt Petermen," which was not so much a trade monopoly as a delegated purveyance. See *The Case of the King's Prerogative in Saltpetre*. The saltpetre industry would receive much mention for the abuses of its executors, but the right of the king to take saltpetre was never seriously challenged in Parliament.

<sup>152</sup> 1 JHC at 316-18. See Fox at 95; Price at 26-27. The monopoly was for "Use of a Stuff for dying, made of a Mixture of Logwood, or Blockwood, with other Things, which, in that Manner used,

toward the close of the fourth session of his first parliament, in July 1610, the Commons issued another petition seeking redress of the same grievances and complaining that the promises had not been kept.<sup>153</sup> James's response was to engage in what can only be described as a long-running campaign of misinformation. In addition to reiterating his empty promise to subject the patents to common-law courts, he published the bold but toothless *Book of Bounty*, in which he proclaimed that royal exclusive trade privileges were contrary to both his own policies and the common law, declared his intent to issue no more of them, and warned potential suitors against even approaching him in pursuit of the grants that he was freely giving.<sup>154</sup> By the time of James's second parliament in 1614, it had become clear that he was doing nothing to limit royal trade privileges. Another committee on grievances was formed to consider all the old monopolies and some new.<sup>155</sup> But the debate over impositions was a much more important topic, and the Commons refused to proceed with an act of subsidy until they reached an accommodation on that matter. Debate with the Lords broke down over what they considered to be an incursion into the royal prerogative to regulate foreign trade, leading James to dissolve his second parliament in just two months without having obtained a subsidy.<sup>156</sup>

The dissolution of the so-called Addled Parliament signified a complete breakdown in what had become, under the Tudors, the "normal" fiscal operation of the English government. James had failed to obtain a subsidy from Parliament, and had done so because of the Commons' insistence on encroaching on prerogative. Having no reason to turn to Parliament, James turned to other sources, including patents. The resulting situation was regulatory chaos. Any pretence of restraint fell away, James dismissing Ellesmere, who was chary of patents, and

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is alleged to be good and profitable for dying," while he upheld the trade monopolies in such articles as tin and starch and the price exemption for wines. *Id.*

<sup>153</sup> See Fox at 95; Price at 27.

<sup>154</sup> See Fox at 96-97; Price at 27-28. The *Book of Bounty* is reprinted in J.W. Gordon, *Monopolies by Patents* 161-92 (1897).

<sup>155</sup> The crown's failure to live up to its words was lost on no one. As the chair of the Committee on Grievances commented, "That this Committee have perused the old Grievances, and his Majesty's Answer; which, in many Parts, very gracious and full: Yet, as in a Garden, clean weeded, Weeds next Year ; so here, by new Patents, Proclamations, &c." 1 JHC 491 (May 20, 1614) (statement of Sir Edwyn Sands).

<sup>156</sup> See 5 Parl. Hist. 286-303; 1 JHC 505-06 (June 3, 1614); Fox at 98; Tanner at 46-47.

replacing him as Lord Keeper of the Seal with the more liberal (and compliant) Bacon.<sup>157</sup> Patents were granted, routinely revoked (frequently on the grounds that they had become overly burdensome), and re-issued to someone else. Eventually, revocation became so common that patents being issued included language permitting revocation by vote of the Council.<sup>158</sup> More and more desperate for revenue, James granted broad supervisory control over whole industries and with it broad powers of search and arrest of infringers. The powers were predictably subject to frequent and profound abuse by the patentees, who were commonly unpopular favorites of James and allies of Buckingham, further fomenting public scorn for both the monopolies and the monopolists. The administrative mechanism for controlling the patents having broken down, their use was completely unmanaged. The patents were economically burdensome and politically unpopular, but their use was so poorly managed that James received very little of the economic rents they generated. James was forced to call Parliament in 1621.<sup>159</sup>

When James's third Parliament met in 1621, monopolies came up almost immediately and featured prominently in the first session, which was held in the Spring. The Commons appointed a Committee of Grievances that, under Coke's chairmanship, pursued the monopolies question with particular vigor and reported a bill against monopolies later that Spring.<sup>160</sup> James's response to early news of the bill's consideration was typical of his cagey approach to monopolies: he encouraged the attack on monopolies in warmest terms while in the same breath he suggested that Parliament should "put that bill to an end so soon as ye can; and at your next meeting to make it one of your first works."<sup>161</sup> The exact scope of the bill (for

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<sup>157</sup> Price at 30; .4 Gardiner at 3, 11.

<sup>158</sup> Price at 29 & n.4.

<sup>159</sup> Fox at 101; Price at 31. Both Fox and Price lay blame (both historical and presently perceived) for what happened at the feet of Buckingham, who was James's closest advisor. Thus, it is possible that, while the people despised the patents and the administration behind them, their approbation did not necessarily extend to the king himself.

<sup>160</sup> 1 JHC 575 (Mar. 25, 1621).

<sup>161</sup> The King's Speech to the Lords, 1 Cobbetts at 1226 (Mar. 26, 1621). Parliament (and Commons in particular) took half the advice, continuing work on the bill through the rest of the third parliament and, when it did not pass, raising it as one of the first legislative priorities in the fourth.

which there is limited legislative history) is unclear. Fox hypothesizes that it outlawed trade monopolies, subjected their trial to common-law courts, and prohibited using letters patent to excuse violation of the laws. It does not appear to have had an exception for invention patents until it reached the conference stage.<sup>162</sup> The bill passed Commons on May 12,<sup>163</sup> but it did not pass the Lords, although their objections were not to the core of the bill.<sup>164</sup>

Although several patents were attacked or called in for review during the session (with about three dozen “removed” by Commons),<sup>165</sup> attention focused on three: the patents for inns, alehouses, and gold and silver thread. Parliament went so far as to impeach and convict two members – Giles Mompesson and Francis Mitchell – for their abuses in the execution of the three patents.<sup>166</sup> Perhaps recognizing that the impeachments did not attack the validity of the patents themselves but rather the manner in which they were carried out, James gave Mompesson and Mitchell up to punishment without a fight and canceled the three patents.<sup>167</sup> The resurrection of impeachment (unused for almost 200 years) was an important development in crown-parliamentary relations. Although “[t]he impeachment of a monopolist was without political importance,” Parliament also impeached Bacon (who was Lord Chancellor) for bribery,

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<sup>162</sup> Fox at 106.

<sup>163</sup> 1 JHC 619 (May 12, 1621).

<sup>164</sup> Fox at 106-07; Price at 33. While there was concern that the bill might overly constrain the royal prerogative, the Lords seemed to think it salvageable in principle. But the objection was raised after the third reading of the bill in the Lords, and procedure prevented it from being recommitted after a third reading. It was consequently voted down and a committee appointed to draft a new bill. 3 JHL 177 (Dec. 1, 1621); *id.* at 178-79 (Dec. 3, 1621). The draft the Lords came up with focused blame on informers and projectors rather than the actions of the crown, declaring existing and future patents to be void (while preserving for conference between the houses exactly what types of patents were covered by the prohibition) and fining holders of illegal monopolies “Ten Times so much as he shall receive, one Moiety to the King, and the other to the informer.” 3 JHL 188 (Dec. 10, 1621). The Commons and Lords had no problem working out the details of the bill in 1624; there is reason to think that, had they had more time in 1621, they would have done so then.

<sup>165</sup> Fox at 105-06.

<sup>166</sup> See Fox at 107-110; Price at 31-33. Mompesson and Mitchell were essentially proxies for anger toward Buckingham and others who were unreachable for political reasons. Price at 32.

<sup>167</sup> See The King’s Speech to the Lords, 1 Cobbett’s at 1224 (Mar. 26, 1621) (confirming the punishment of Mompesson and banishing him from the kingdom); *id.* at 1226 (canceling the patents); 1 JHC 576-77.

moving another step closer to open challenge of royal supremacy.<sup>168</sup> After the session, James issued yet another proclamation, canceling eighteen patents and submitting seventeen to the common law.<sup>169</sup>

The second session of James's third parliament (in the fall of 1621) was dominated by debate over James's plan to marry Charles to Maria of Spain.<sup>170</sup> When James dissolved Parliament upon hearing of the Petition of December 18, 1621, whatever monopolies bill had been under consideration died with the dissolution of parliament. There is some evidence that, even between parliaments, there was resistance to the patents; James issued yet another royal proclamation, this time creating a committee to receive complaints about "monopolies, excessive fees, and other matters, and the Proclamation 10 July [1621]" in February of 1623.<sup>171</sup>

The plan to marry Charles to the Infanta having failed, James's fourth parliament was called in anticipation of war with Spain, and its proceedings are consumed largely with matters of supply (which was given readily), diligence against the potential for insurgency by popish "recusants," and yet another impeachment of a high officer for bribery, that of Lionel Cranfield (Earl of Middlesex), the Lord Treasurer. But there was also a substantial amount of time given over to matters of "free trade"; a committee chaired by Edwin Sandys was active in its investigations, and many patents were called in by the Commons and examined, with special attention given to the practices of the Merchant Adventurers.<sup>172</sup> The bill that became the Statute of Monopolies was introduced early in the session and sailed through the Commons with very

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<sup>168</sup> Tanner at 50.

<sup>169</sup> A Proclamation declaring His Magesties grace to his Subjects, touching matters complained of, as publique grievances, July 10, 1621, reprinted in 1 Stuart Royal Proclamations at 511; see generally Fox at 112; Price at 32.

<sup>170</sup> See notes 137-139.

<sup>171</sup> A Proclamation declaring His Majesties grace to His Subjectes for their reliefe against publique Grievances (Feb. 14, 1623), reprinted in 1 Stuart Royal Proclamations at 568.

<sup>172</sup> See, e.g., 1 JHC 672 (Feb. 24 (1624) (listing of a number of concerns over the decline of trade; several patents called in to be examined by "the Committee to be appointed for Trade); id. at 673 (Feb. 25, 1624) (patents called in for the Committee of Grievances); Fox at 114 (listing many of the patents called in and examined).

little debate.<sup>173</sup> Ostensibly the same bill had passed the Commons in 1621, but had failed the Lords, and so the bill's sponsors (with Coke as their leader)<sup>174</sup> were anxious to get the bill to the Lords quickly so they could finish the intercameral negotiations they had begun three years earlier.<sup>175</sup>

The Lords agreed to the bill in principle, as they had in 1621, but they did have a number of concerns about its operation. For instance, they objected that the bill did not define "monopoly" and that it was unclear under the bill whether actions against monopolies were to be brought at common law or pursuant to the statute itself.<sup>176</sup> Coke seems to have allayed such concerns quickly. But the Lords were also concerned that the statute might prevent the King from chartering corporations, and they wanted a series of patents to be exempt from the operation of the statute, prompting protracted negotiations between the two houses over the exceptions.<sup>177</sup> There is no available draft of the bill, but the content of the Lords' objections suggests that as originally sent up from the Commons, the statute ended at section 8; section 9 is the exception for corporations and sections 10 through 14 list a series of exceptions for various patents and privileges. Coke did not like the miscellaneous exceptions but was prepared to accept them as part of the political deal necessary to pass the bill.<sup>178</sup> The exception for

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<sup>173</sup> See 1 JHC \_\_\_ (Feb. 23, 1624) (first reading in Commons); 1 JHC \_\_\_ (Mar. 9, 1624) (report of committee of changes); 1 JHC \_\_\_ (Mar. 13, 1624) (act passed the Commons).

<sup>174</sup> On Coke's enthusiasm for the program underlying the Statute of Monopolies, see generally Baker at 451.

<sup>175</sup> When the act passed the Commons, it was carried up alone (bills usually being sent in batches) "with a special Recommendation for this House, of the good Affection thereof unto it". 1 JHC \_\_\_ (Mar. 13, 1624).

<sup>176</sup> See 1 JHC \_\_\_ (Apr. 19, 1624).

<sup>177</sup> See 1 JHC \_\_\_ (Apr. 19, 1624) (report of eight exceptions sought by the Lords; appointment of a sub-committee to negotiate the various exceptions without altering the body of the statute); id at \_\_\_ (May 1, 1624) (report of the sub-committee on exceptions); id at \_\_\_ (May 13, 1624) (same, with appointment of a committee of eight to meet with the Lords).

<sup>178</sup> On May 1, Coke reported on the committee's conclusion regarding the exceptions, "[t]hat they have affirmed none of them to be good, nor condemned any of them to be ill." The Commons "[r]esolved, if the Lords shall add a Provisos, to except them out of the Act, and leave them as they be, the committee thinketh it fit to consent, not in Love to these Patents, but to the Passage of the Bill." 1 JHC \_\_\_ (May 1, 1624).

corporations, though, he likely thought was redundant.<sup>179</sup> His original response to the Lords' objection was not to insert the clause – it was that the statute did not reach the guilds and corporations, no doubt based on his own definition of “monopoly”: “If a Corporation, for the better Government of the Town, not contrary to the Law; but, if any sole Restraint, then gone.”<sup>180</sup> Coke didn't object to guild control; he didn't associate it with the incidents of monopoly at all. Nor was he alone in his cramped understanding of free trade. When the Commons debated during the same term whether the Merchant Adventurers Company's exclusive trade privileges should be opened up, they considered opening them only to members of the merchant guilds;<sup>181</sup> the same parliament that passed the Statute of Monopolies also confirmed by statute that only free members of the Cheesemongers and the Tallow-chandlers guilds could purchase butter and cheese in the outlying counties for resale in London and then only if the Justices of the Peace in the outlying counties did not issue an order against such purchases by retailers.<sup>182</sup> Indeed, while the Commons considered some elements of the Merchant Adventurers' monopoly problematic, their chosen means of reform was through the issuance of a *new royal patent* for the Company.<sup>183</sup> The points of contention between Commons and Lords were eventually resolved by adding a laundry list of exceptions (some general for entire classes of patents, some specific to particular patents) to the statute: The Lords voted the amended bill on May 22,<sup>184</sup> the Commons on May 25.<sup>185</sup>

The statute is worded strongly and broadly. After a long preamble reciting the contents of the *Book of Bounty* in detail, the statute declares “altogether contrary to the Laws of this Realm” and void not only “all monopolies” but also “all commissions, grants, licences, charters, and letters patents heretofore made or granted, or hereafter to be made or granted ... for the

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<sup>179</sup> The draft bill written by the Lords in December of 1621 had contained a very express exception for corporations, further underscoring Coke's decision not to include an explicit exception in his first 1624 draft. See 3 JHL 188 (Dec. 10, 1621). Section 9 as written is even broader.

<sup>180</sup> 1 JHC \_\_\_ (Apr. 19, 1624).

<sup>181</sup> See 1 JHC \_\_\_ (May 22, 1624).

<sup>182</sup> See 21 Jam. c. 22, §§ 5-6 (1624).

<sup>183</sup> 1 JHC \_\_\_ (May 22, 1624). See *infra* text accompanying notes \_\_\_-\_\_\_.

<sup>184</sup> 3 JHL \_\_\_ (May 22, 1624).

sole buying, selling, making, working, or using of anything” or for dispensing with the application of any statute or law or the granting of such dispensations to others or for farming out collections of fines before specifically voiding any legal measures furtherance of them.<sup>186</sup> Section 2 subjects monopolies and the like to trial “accordinge to the common lawes of this Realme & not otherwise.” Section 3 prevents anyone from exercising any of the rights granted, and section 4 not only provides a right of action for those aggrieved by their operation (at treble damages) but also subjects to praemunire (the severity of which was a point of concern among the Lords<sup>187</sup>) anyone who attempts to have an action at law “stayed or delayed by coulor or meanes of any order warrant power or authoritie, save onelie by writt of error or attainit.”<sup>188</sup> In a sense, this last portion of section 4 was the only real work done by the prohibitive part of the statute, because the substance of the first four sections largely described what a common-law

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<sup>185</sup> 1 JHC \_\_\_ (May 25, 1624).

<sup>186</sup> The statute renders “utterly void and of none Effect, and in no wise to be put in [Use] or Execution”:

[1] all Monopolies

all Commissions, Grants, Licences, Charters and Letters Patents heretofore made or granted, or hereafter to me bade or granted, to any Person or Persons, Bodies Politick or Corporate whatsoever, of or for

[2] the sole Buying, Selling, Making, Working or Using of any Thing within this Realm, or the Dominion of Wales, or of any other Monopolies,

[3] or of Power, Liberty or Faculty, to dispense with any others, or to give Licence or Toleration to do, use or exercise any Thing against the Tenor or Purport of any Law or Statute;

[4] or to give or make any Warrant for any such Dispensation, Licence or Toleration to be had or made;

[5] or to agree or compound with any others for any Penalty or Forfeitures limited be any Statute;

[6] or of any Grant or Promise of the Benefit, Profit or Commodity of any Forfeiture, Penalty or Sum of Money, that is or shall be due by any Statute, before Judgment thereupon had;

[7] and all Proclamations, Inhibitions, Restraints, Warrants of Assistance, and all other Matters and Things whatsoever, any way tending to the Instituting, Erecting, Strengthening, Furthering or countenancing of the same or any of them

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21 Jam., c. 3 (1624).

<sup>187</sup> See 1 JHC \_\_\_ (Apr. 19, 1624).

<sup>188</sup> 21 Jam. c. 3, s. 4.

court would do when confronted with a patent.<sup>189</sup> Thus Coke's reply at the Lords' objection that the statute did not define "monopoly": This was all a matter for the common-law judges.<sup>190</sup> Sections 5 and 6 contain the exceptions for current and future invention patents. Section 7 excepts grants by Parliament; section 8 clarifies that the act does not apply to the ability of judges to collect fines in cases they hear, and sections 9 through 14 provide the previously mentioned exceptions for corporations and some specific patents.

Given the bill's relatively easy progress through the Lords and the lack of royal commentary against it, James either welcomed the bill (which seems extremely unlikely, the rhetoric of the *Book of Bounty* notwithstanding)<sup>191</sup> or he recognized that it was a *fait accompli* given his financial circumstances and the Commons' enthusiasm for the bill. James was in great debt with war on the horizon, but anticipation of a popular war with Spain also made Parliament more generous with supply than it had been two years earlier when James's policy toward Spain had been marriage rather than war. In the patriotic atmosphere of 1624, a patent system that had been the source of much resistance and little real revenue might have seemed to James much like Mompesson and Mitchel had in 1621: a good candidate for sacrifice. In 1624, there were to be no lectures from the throne on the unassailability of royal prerogative.

As it happens, James had little to fear: Very little changed after 1624. Following James's death in 1625, Charles I pursued an avid policy of royal trade privileges, which continued to be enforced by conciliar courts.<sup>192</sup> Charles, who ruled for eleven years without calling Parliament,

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<sup>189</sup> Fox at 118-19 (arguing that the statute restated the common law except with regard to the prohibition of stays and the limitation of the term for invention patents).

<sup>190</sup> See 1 JHC \_\_\_ (Apr. 19, 1624) (The Lords "would have had a Description of a Monopoly in the Bill. Ans. Definitions, in Law, dangerous; yet well described in the Bill.").

<sup>191</sup> But see Fox at 114-16 (arguing that the *Book of Bounty* "exercised considerable weight in the enactment of the statute of monopolies" and that the book and James's proclamations against monopolies suggest that he favored their eradication but wanted to do it without parliamentary interference). While it is easy to imagine Coke's grin of ironic satisfaction when he included reference to the *Book of Bounty* in the preamble of the Statute of Monopolies and cited it in the debates in the Commons (1 JHC \_\_\_ (Apr. 19, 1624)), James's actions were so inconsistent with his words that accepting them at face value would have taken considerable charity, and Coke was an unlikely source of such charity toward James.

<sup>192</sup> See Fox at 118-19 ("[I]t was not until the end of the *eighteenth* century that patent cases began to come frequently before the common law courts.")(emphasis mine); *id.* at 119-24; Hulme at 55

was more effective than James at using patents to raise revenue, in part by using per-piece rents to convert them into virtual excise taxes.<sup>193</sup> He also saw the value of royal trade privileges in securing economic regulatory authority over industry.<sup>194</sup> With the royal trade privileges came the powers of search and seizure, and abuses once again became common.<sup>195</sup>

Protests continued in Parliament and out. Charles's second parliament raised objections in 1626 to a long list of patents, including those for soap, starch, and even playing cards.<sup>196</sup> When both the Short and Long Parliaments met fourteen years later, similar complaints were made against the explosion of patents under Charles.<sup>197</sup> As one parliamentarian complained in 1641:

Better laws could not have been made than the Statute of Monopolies against Projectors, and the Petition of Right against the infringers of liberties; and yet, as if the law had been the author of them, there hath been within these few years, more monopolies and infringement of liberties, than have been in any age since the Conquest.<sup>198</sup>

That year, Parliament abolished the Star Chamber, the most infamous of the conciliar courts and the focal point for judicial enforcement of royal trade privileges,<sup>199</sup> called in and cancelled a number of monopolies,<sup>200</sup> and declaimed monopolies in the Grand Remonstrance. The conflict of which the royal privileges were just a small part eventually led to the Civil War. After the Restoration, when the battle for control had been firmly decided in Parliament's favor, royal

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n.1 ("[N]otwithstanding the statute, the Stuart dynasty continued to uphold the jurisdiction of the Privy Council, both in practice and by direct reference in the patent grant.").

<sup>193</sup> Price at 41-42.

<sup>194</sup> Fox at 127, 135-36.

<sup>195</sup> Fox at 131-32.

<sup>196</sup> See Fox at 128 (citing complaints against patents for soap, starch, saltpeter, gunpowder, alum, iron, glass, whale oil or whale fins, latten wire, books and printing, lighthouses, playing cards, dice).

<sup>197</sup> See Fox at 127-28 (citing patents for soap, salt, wine, dressing meat, coal, cards and dice, beavers, felts, bone-lace, and pins).

<sup>198</sup> 2 Cobbetts at 650 (statement of Bagshaw). See generally Fox at 129-34 (discussing the use of and protest to royal trade privileges from 1625 to 1640).

<sup>199</sup> 16 Char., c. 10 (1641); see generally Fox at 140-45.

<sup>200</sup> Fox at 151-54. Charles himself had cancelled a number of patents in 1639 anticipation of calling Parliament. Fox at 133; Price at 44-45.

trade privileges were no longer a useful means for crown evasion of what had become the vastly dominant power of Parliament, and the Bill of Rights settled the matter permanently in 1689 by ending the power of the crown to alter or “dispense” with the statute law.<sup>201</sup> The Statute of Monopolies did not kill the royal trade privileges – the English Revolution did. But modern intellectual property theorists do not cite the Statute of Monopolies for its practical import; they cite it for its underlying ideology and the long-standing tradition of free trade that it represents. While the Statute of Monopolies does represent a strong and important tradition, it is not one of free trade; it is one of political action.

### *Politics and Free Trade in Seventeenth-Century England*

That the Statute of Monopolies is about power rather than free trade cannot be proven more definitely than by reference to Section 7, which makes explicit the self-evident point that, while the statute declares “all grants of monopolies ... are contrary to your Majesty’s lawe,”<sup>202</sup> parliamentary ones are perfectly legal, without appeal to the common law.<sup>203</sup> But to say that the statute was merely an exercise of political power is overly dismissive. The statute does not represent anything approaching what we would call free trade, nor could it possibly have given the times, but it did move England in the direction of free trade. That it did so as a by-product of special-interest politics hardly detracts from its moment. In the early seventeenth century, there was no sizable political constituency for free trade, but there were two groups that opposed the royal trade privileges nevertheless. Parliament had many reasons to want to end the era of the royal trade privileges, and I discuss parliamentary political motivations in more detail below. But there were also well-organized *economic* interests that made attack on the royal privileges possible, although their interest was not in free trade: They were the guilds.

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<sup>201</sup> 2 Cunningham at 201, 205; Fox at 156-57.

<sup>202</sup> Statute of Monopolies, preamble.

<sup>203</sup> “Provided also, that this act or anything therein contained shall not in any wise extend or be prejudicial to any grant or privilege, power, or authority whatsoever heretofore made, granted, allowed, or confirmed by any act of parliament now in force, so long as the same shall so continue in force.” Statute of Monopolies, § 7.

Having lost their stranglehold on trade regulation as the result of competition from rural tradesmen,<sup>204</sup> the guilds nevertheless remained a potent force in sixteenth- and seventeenth-century English politics. As the English economy became more commercial (and the government consequently more dependent on commercial interests for support), commercial interests used their influence to obtain preferential trade regulation from both the crown and Parliament.<sup>205</sup> Petitions to the Commons for investigation of the practices of the foreign trading companies did not come from seventeenth-century consumer advocates, they came from the guilds (largely the London livery companies).<sup>206</sup> Similarly, the legal attacks on royal trade privileges were not consumer action; they were producer action. *Darcy* itself was not the result of a wildcat undertaking by an aggrieved playing-card maker who couldn't contain his need to manufacture playing cards; it was financed as a test case by the Mayor and Alderman of City of London in order to vindicate the livery companies' trading rights.<sup>207</sup> Of course, the guilds had been more than happy to obtain and exercise their own exclusive trade privileges; their concern was not motivated by a desire for free trade.<sup>208</sup> But the guilds had a two-fold objection to royal trade privileges, specifically ones granted in the form of trade monopolies.

Obviously, the guilds had a direct economic interest in avoiding competition, much less displacement, from royal monopolists. But the guilds also had a regulatory interest to vindicate against royal patents. Guilds had a decided stake in the status quo. The economy depended not only on organization within a guild but also on agreement between guilds regarding

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<sup>204</sup> See *supra* text accompanying notes 33-34.

<sup>205</sup> 1 Cunningham at 392.

<sup>206</sup> E.g. Sandys' 1624 investigation of the Merchant Adventurers that opened up elements of the cloth trade to the Merchants.

<sup>207</sup> Davies.

<sup>208</sup> See Fox at 42 (“[I]n many towns throughout England there were chartered guilds of merchants and craftsmen whose privileges at the date of the Statute of Monopolies were effective and jealously guarded.”). The history of the guilds is a history of practiced exclusion. As early as the mid-fourteenth-century, the guilds successfully opposed attempts to open up markets to aliens, 1 Cunningham at 292-93, and even after the passage of the Statute of Monopolies, the companies of London were still petitioning for *royal* charters granting them the to control trade within three miles of the city. 2 Cunningham at 320. The exclusion of “foreigners” was finally eliminated in 1835 by the Municipal Corporations Act. 1 Heckscher at 310.

jurisdiction over particular industries. Technological or organizational change could alter the underlying assumptions behind those agreements and created discord within the entire system.<sup>209</sup> In this way, monopolies were used to defeat guild control as a means of introducing change. That is why the pre-industrial English did not distinguish between patents for inventions and those for technology that was well-established elsewhere and merely imported.<sup>210</sup> Many of the technologies introduced from overseas were introduced by foreigners,<sup>211</sup> and in order for a foreigner to practice in a particular industry, they needed exemption from the requirement of guild membership, which was not granted to foreigners.<sup>212</sup> The same was true for an inventor who was not free of the particular guild, and even if he was free of the guild, without a patent for his invention, there was no way to prevent the guild from redistributing the rents generated from its use. Because guilds controlled entire industries, they had control over whether and how any single technology would be applied to that industry.<sup>213</sup>

While the guilds were unhappy about the many individual patents handed out during Elizabeth's years, two developments made the Stuart patents even more objectionable: First, the demographics of the merchant trades (which were the most heavily affected by the patents) changed in the last half of the sixteenth century from being dominated by aliens to being more heavily populated by citizens. While aliens were subject to absolute regulation by the crown, citizens were unaccustomed to such direct royal control. The shift from alien to citizen merchants resulted in an industry more prepared to resist than had been the case in earlier times.<sup>214</sup>

Second, and much more importantly, James's attempt to use monopolies as a vehicle for bringing about change through uniform national regulation of entire industries threatened the guilds to their core. Although James did use patents in an effort to raise revenue, he also used them extensively to introduce innovation and, consistent with his autocratic view of the

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<sup>209</sup> 2 Cunningham at 294.

<sup>210</sup> Hulme at 52.

<sup>211</sup> See Hulme at 52 (table showing that twenty-one out of fifty-five patents granted between 1561 and 1603 were granted to foreigners).

<sup>212</sup> 2 Cunningham at 79-84.

<sup>213</sup> Fox at 42.

monarchy, national industrial control. James used monopolies in an attempt to either grow<sup>215</sup> or control<sup>216</sup> industries that were identified as strategically important. One of feudalism's lasting influences on mercantilism, though, was a belief in stable employment, and there was no way the Stuarts could effect industrial change while at the same time maintaining economic security.<sup>217</sup> Of course, national regulation meant regulation that reached not only the towns but also the countryside, with the result that many who had been free of internal restrictions on their trade were simultaneously enrolled in and aggrieved by the Stuart regulatory agenda.<sup>218</sup> Many of the Stuart trade privileges were motivated by rent-seeking,<sup>219</sup> and they were likely to arouse ire in both competitors and consumers, but even the principled use of monopolies was widely resisted by the entrenched regulatory interests of the guilds. Of course, even the delegations of regulatory authority were held and controlled by individuals rather than government agents, leading to the union of interests between guilds and Parliament that served as the foundation of the Statute of Monopolies.

#### ***Parliamentary Mercantilism in Practice***

That Parliament did not respond to the royal-privileges threat by legislating Great Britain a free-trade zone is hardly a surprise. Dudley North would not even be born until almost twenty years after the Statute of Monopolies (and would not publish *Discourses Upon Trade* until 1691); it would be almost 150 years until Adam Smith would publish *The Wealth of*

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<sup>214</sup> Hulme at 54.

<sup>215</sup> The salt monopoly is a notable example; salt had been almost entirely imported, and the decision to create a domestic supply had strategic importance for an island nation. 2 Cunningham at 309; Fox at 168-69, 171-72.

<sup>216</sup> Instead of relying on government officials to procure saltpetre and sulfur (necessary ingredients for gunpowder), both Elizabeth and James relied on patents to private parties allowing them to dig for both saltpeter and sulfur on private property. Fox at 169-71; see generally the Case of the King's Monopoly in Saltpetre.

<sup>217</sup> Fox at 173-74.

<sup>218</sup> 2 Cunningham at 286-87.

<sup>219</sup> Fox maintains that industrial development was the Stuarts' sole motivation and that "[i]f any pecuniary profit from the monopolies flowed into the royal revenues in addition, that should merely have entitled the Crown and its ministers to greater credit as being astute men of business." *Id.* at 172-73. It is hard to square, though, the monopolies for playing cards and starch to such high-minded motives.

*Nations*.<sup>220</sup> Mercantilist economic thinking dictated control over markets, and Parliament accepted its role in legislating that control willingly.<sup>221</sup>

That control was not exercised to benefit consumers. The connection between individual and communal well-being is an invention of the classical economics that developed in the eighteenth century; it had no place in the mercantilist economic thought prevalent in the seventeenth. Thus,

[a]rtisans who withdrew from the pressure of burgh rates and the restrictions of craft guilds, landlords who raised their rents, miners who did their work in the easiest way, capitalist who asked for a definite return on their capital, were all branded as the victims of covetousness, not merely by preachers and writers, but in public documents.<sup>222</sup>

When Raleigh's administration of the tin monopoly was attacked in Parliament in 1601, his response was not that he was operating the mines to maximize the production of tin at the lowest price possible; it was that he was operating the monopoly to assure full employment at reasonable wages.<sup>223</sup>

Closed markets were such a widely accepted part of the economic structure – and so different was the economic theory from today's dominant laissez-faire tradition – that those who were accused of being monopolists frequently defended themselves on the ground that they were actually oligopolists. In his defense of the Merchant Adventurers' Company, John Wheeler pointed to the company's organization as a regulated rather than a joint-stock company and its strict controls limiting competition between the various members as preventing the evils of monopoly.<sup>224</sup> In this regard, open competition was regarded as aligned

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<sup>220</sup> See Vaggi & Groenewegen at 27 (“[M]ercantilist views on wealth and on economic policy continued to dominate the scene at the beginning of the eighteenth century.”).

<sup>221</sup> 2 Cunningham at 18 (In the 17th century, “the times were not ripe for repudiating State-interference in business affairs; all parties were agreed that governmental action was necessary, in order to foster industry and promote commerce.”); Price at 128.

<sup>222</sup> 1 Cunningham at 480-81.

<sup>223</sup> 1 Cobbetts at 928 (Nov. 20, 1601) (statement of Raleigh.); see also 2 Cunningham at 428-29 (describing Walpole's pro-manufacturer economic policies).

<sup>224</sup> In addition to diversified ownership of the company's stock, Wheeler pointed to the strict restrictions on the amount of trade each individual member was permitted to engage in.

with (and was considered the first step to) monopoly since, if one supplier were able to under-price his competitors, all business would come to him and he would eventually monopolize the trade.<sup>225</sup> Monopoly was abhorrent, but so was free competition. The ideal was cartel.<sup>226</sup>

Regulated as opposed to free trade was entirely consistent with the popular economic policy advanced by the parliamentary supremacists, as demonstrated by the inclusion in the Statute of Monopolies of § 9, which exempted from the statute's ambit any rights accorded to cities, towns, merchant corporations, or "fellowships of any art, trade, occupation, or mystery" by virtue of custom, charter or letters patent.<sup>227</sup> The crown could not create monopolies, but the exclusive trade privileges held by guilds or "regulated" companies were perfectly acceptable to the champions of the Statute of Monopolies.<sup>228</sup> The tension did not go unnoticed; Bacon argued that the 1601 draft bill's distinction between royal monopolies and corporations was arbitrary.<sup>229</sup> But the alternative of free trade, with its price wars, displacement, and inherent instability was simply out of the question. During the reigns of James and Charles I, Parliament played a

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Wheeler, *A Treatise of Commerce*, 78, 142 (G.B. Hotchkiss, ed., 1931). See also 1 Heckscher at 381 (discussing the "stints" that limited how much each member of the company could trade).

<sup>225</sup> 1 Heckscher at 272-73.

<sup>226</sup> See Fox at 24 n.3. The view, while prevalent, was not universal. See 1 Heckscher at 273-74 (citing arguments made by Sandys against all exclusive foreign trade privileges as "monopolies").

<sup>227</sup> The full section reads:

Provided also, that this act or anything therein contained shall not in any wise extend or be prejudicial unto the city of London, or to any city, borough, or town corporate within this realm, for or concerning any grants, charters, or letters patent to them, or any of them made or granted, or for or concerning any custom or customs used by or within them or any of them; or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies, or societies of merchants within this realm erected for the maintenance, enlargement, or ordering of any trade or merchandise; but that the same charters, customs, corporations, companies, fellowships, and societies, and their liberties, privileges, powers, and immunities, shall be and continue of such force and effect as they were before the making of this act, and of none other; anything before in this act not contained to the contrary in any wise notwithstanding.

Statute of Monopolies, § 9.

<sup>228</sup> Fox at 135; Price at 128.

<sup>229</sup> D'Ewes, Elizabeth at 232 (Nov. 20, 1601) (statement of Bacon).

largely passive role,<sup>230</sup> but during the Interregnum, Parliament not only permitted the guilds and corporations to continue, they granted and reissued their charters.<sup>231</sup> After the Restoration, the focus of government involvement in trade shifted from the guilds to regulated and joint-stock companies.<sup>232</sup> The foreign trading companies flourished during the period of parliamentary ascendancy, the exclusivity of their privileges expanding and contracting over time (frequently with the political influence of their directors), and the East India Company remained a dominant force throughout the eighteenth century.<sup>233</sup>

The parliamentary state used trade monopolies in much the same way as the royal state had: as objects of revenue and as agents of regulation. For example, when the soap monopoly held by the royalist, chartered Westminster Company of Soapboilers was sold to a collection of soapboilers, Parliament supported the fervent exercise of the same exclusive rights by the new company of guild members, the London Company of Soapboilers.<sup>234</sup> But Parliament did not support the company merely for its merits as a collection of tradesmen rather than capitalists; Parliament used the company as a source of revenue as well, as a tool for administering an excise on soap imposed in 1643.<sup>235</sup> Nor do the parallels to crown monopoly practice end there. The company was eventually attacked in the courts, prompting Parliament to defend it against legal challenge by a series of strategies, including ordering that the proceedings against it be stayed, exactly as the crown had done in protection of royal monopolies.<sup>236</sup> During the Civil Wars, confusion reigned and efforts at trade regulation were sporadic.<sup>237</sup> But following the

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<sup>230</sup> But not entirely. Parliament defended and upheld the exclusive rights of the London Company of soap-makers (a company of merchants who had bought out the holder of the royal monopoly) during Charles I's reign. See 2 Cunningham at 306-07; Price at 125-27.

<sup>231</sup> On parliamentary reissuance of charters for domestic corporations see 1 Herbert 182-83; Ramsay at 96-99.

<sup>232</sup> 1 Heckscher at 411-15. See generally 1 Scott chs. 14-18.

<sup>233</sup> See 2 Cunningham at 215-19, 223-84; 1 Heckscher at 421-24. See also Cawston & Keane at 77-78; 2 Hunter at 42.

<sup>234</sup> Price at 119-25.

<sup>235</sup> Price at 126.

<sup>236</sup> Price at 125-27.

<sup>237</sup> In addition to raw regulatory chaos, the economic uncertainty accompanying it led to a decline in speculative activity. The environment did not lend itself for the rapid economic growth that prompted competition for state exclusive trade privileges. See Price at 127.

Glorious Revolution, exclusive privileges (given almost exclusively to foreign trading companies) were systematically used to generate government revenue; they were given either in exchange for below-market-rate loans or for company assumption government debt.<sup>238</sup> With their widespread use came the potential for corruption, a potential that was realized as clearly in Parliament as it had been under the Tudors and early Stuarts.<sup>239</sup> But even at their post-revolutionary height, exclusive trade privileges were not as pervasive as they had been under the Tudors and early Stuarts. The question is why.

Idealism certainly played a role in the different attitude that the Commonwealth and post-revolutionary England had toward the use of exclusive trade privileges, including nascent free-market arguments. The choice to focus on foreign trading companies rather than domestic industries reflects at least some solicitude to the suggestion that the legitimacy of regulation depended in some measure on the locality of the conduct being regulated. Thus, at least with regard to royal privileges, royal discretion was thought to be greater in foreign trade than in domestic, and greater with regard to domestic trade than manufacturing.<sup>240</sup> It was an ideal with political consequences. Control over the few wholesaling traders with India, for instance, was less obvious to the public than control over the many retailers the public dealt with on a daily basis, and the use of the once-removed foreign trading companies to generate government revenue was similarly less transparent.<sup>241</sup>

Given the willingness to protect and reinforce the exclusive rights of the guilds, though, the more likely reason why the use of exclusive trade privileges in local industries was so disparate under crown-dominated and parliament-dominated regimes is the relative strengths and weaknesses of the regimes themselves. Having a single monarch, or a small group in the form of the Privy Council, at the head of government makes lobbying a crown-dominated government for preferential trade privileges more efficient than lobbying a much larger legislature. At the same time, holding power in a smaller circle makes it easier for the individual members of that circle to extract rents than it is for the individual members of a larger body,

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<sup>238</sup> 1 Heckscher at 441.

<sup>239</sup> 2 Cunningham at 404-05.

<sup>240</sup> *The East India Co. v. Sandys*, 10 St. Tr. 371, 522 (1685) (Eng.) (Jeffries, C.J.).

such as Parliament.<sup>242</sup> Political rent-seeking is more efficient when there are a small number of regulators, so it only makes sense that, as power transitioned to a more populous body with uncoordinated membership, there was a decline in the use of government trade privileges as a form of direct rent-seeking by merchants and manufacturers.

Even considering the merits rather than the political economics of nationwide exclusive trade privileges, they are poorly suited to a parliamentary regime. Granting nationwide exclusive privileges requires extensive administrative effort. In addition to handling the competing requests from “promoters” to obtain monopolies, the monopolies required continuing management and surveillance in order to assure that the rents they were producing were finding their way into government coffers. Indeed, the principal failure of James’s monopoly policy was that, through poor management, it failed to provide him with the independence from Parliament that he so desperately desired.<sup>243</sup> Just as it is poorly situated to coordinate in order to capitalize on the potential for rent-seeking, a parliamentary regime was poorly organized to actually control a national economy, be it through monopoly or otherwise, on a national level.<sup>244</sup>

The poor suitability of legislatures to government administration explains the heavy reliance on foreign trade monopolies even as nationwide domestic monopolies fell into disuse. Just as the crown had used monopolies to delegate regulatory authority over particular industries, the parliamentary government was able to delegate regulatory authority over entire branches of international trade. It was impossible for the government structured as it was to manage (especially across great distances) all of the details of maintaining a foreign trade relationship. There were fortresses to build and man, trade relationships to negotiate, convoys to form for security, and interlopers and pirates to capture and punish. These tasks were all delegated to the trading companies, whose exclusive trading privileges have been most forcefully defended on the need to prevent interlopers from consuming the public goods

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<sup>241</sup> See Fox at 153.

<sup>242</sup> Ekelund & Tollison, *Politicized Economics* at 44-45.

<sup>243</sup> See *supra* the text accompanying note 159.

<sup>244</sup> E&T, MRS at 68-69; 2 Cunningham at 409; 1 Heckscher at 295-97.

generated through the companies' long-term investments.<sup>245</sup> In addition to serving as designees for government regulation, to the extent the government chose to interfere directly in the trade (for instance by controlling trade balances, which was very much a part of the mercantilist agenda),<sup>246</sup> the trading companies also reduced administrative costs by collecting the individual traders into structured groups and thereby providing the government a smaller number of entities to regulate and monitor for compliance.<sup>247</sup>

Parliamentary domestic regulation of the period stood in stark contrast to both the royal monopolies and the parliamentary approach to foreign trade regulation. Rather than the system of numerous overlapping industrial monopolies designed by the crown to regulate trade on a national level, the parliamentary regime devolved control over domestic production to what were political bodies (the local guilds), each with exclusive control over its local industry but none with enough power to affect national trade conditions.<sup>248</sup> Of course, the choice to retain the local corporations was not merely a matter of optimal policymaking. The local town corporations provided a means for national actors to retain some of the rents flowing from the

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<sup>245</sup> See 2 Cunningham at 189; 1 Heckscher at 405-07; *The East India Co. v. Sandys*, 10 St. Tr. 371, 552-53 (1685) (Eng.) (Jeffries, C.J.):

That the East-India company have solely run the hazard, and been at great expences,  
In discovering places,  
Erecting forts, and keeping forces,  
Settling factories,  
And making leagues and treaties abroad;  
It would be against natural justice and equity, (which no municipal law can take away) for others to reap the benefit and advantage of all this:

The need to compensate the trading companies was sometimes made quite explicit. Thus, when the government opened up the African trade, it levied a separate customs duty that was given to the Africa Company exclusively to maintain fortifications. 1 Heckscher at 406. The justification survives in modern antitrust doctrine as a justification for intra-brand restraints. See *State Oil v. Khan*; *Sylvania*.

<sup>246</sup> See *Sandys*, 10 St. Tr. at 539 (Jeffries, C.J.).

<sup>247</sup> 2 Cunningham at 221 (trade balance and employment regulations).

<sup>248</sup> By virtue of the concentration of commerce in London, the London guilds could potentially have controlled enough of the national market for a particular good to exercise quasi-national regulatory authority, but the custom of London, which permitted someone free of one company

ability to control the domestic economy (through control over corporation membership, which could be dictated through exercise of the national power to charter the town corporations).<sup>249</sup> Delegating control over production to local corporations allowed the national government to retain the political advantages of having control over local production without the need to actually dictate policy. The parliamentary approach to monopolies was to either minimize their number in order to reduce administrative costs (in foreign trade) or to allow so many of them that they would require no formal national administration (in domestic trade).

Given the widespread use and support of exclusive trade privileges in the decades following both the passage of the Statute of Monopolies and the solidification of parliamentary supremacy, it is implausible to view the statute as exemplifying a theory of free trade. There simply is no such liberal economic theory evident in the statute's text, intended meaning, or execution. While it is certainly plausible to view it merely as a power-grab by both legislators and a politically powerful group, the same can be said for any legislative act; rent-seeking explanations are a guilty pleasure indulged in far too freely by modern legal scholars. Rather, the Statute of Monopolies is better viewed as an instrument of political reform.

### *A Political Regulatory Order*

Of the twenty-nine patents listed in Parliament as grievances in 1601, only seven of them were industrial trade monopolies. Seven were printing patents (which were preserved by the Statute of Monopolies). The majority of the patents (fifteen) were either non obstante grants or delegations of regulatory authority.<sup>250</sup> When the monopolies issue was raised in 1621, numerous

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to practice in *any* trade would have dramatically limited the degree to which each of the London companies was able to control its particular industry.

<sup>249</sup> On the use of the charter power in the furtherance of factional political advantage, see Paul Halliday, *Dismembering the Body Politic* (1998).

<sup>250</sup> Hulme at 54. Hulme breaks them up into three categories, with sub-categories for the largest class: "(A) Dispensations (15), or grants with a non obstante clause, including licences (a) to traffic in forbidden articles, (b) to perform acts prohibited by the penal statutes, (c) offices delegating to an individual the dispensing power of the Crown in respect of a given statute; (B) copyright patents (7); (C) industrial monopolies (7)." Similarly, when exclusive trade privileges were first raised in 1571, the objection was not to "monopolies," but rather to "Licences," specifically those "to do certain matters contrary to the Statutes". See *supra* text accompanying notes 66-68.

patents were called in, but a massively disproportionate amount of time was spent on the patents for inns, alehouses, and gold and silver thread. Of these, the patents for inns and alehouses were delegations of the royal authority to license the institutions, and the gold and silver thread patent was awarded for introduction in to England of the gold and silver thread industry, which would have been a valid grant even under the Statute of Monopolies.<sup>251</sup> Throughout the debates in 1621, the economic consequences of the patents received a distant second billing to what was by far the more important problem of abuse in their practice.<sup>252</sup> Thus, while high prices for staying at inns or consuming ale at an alehouse received scant mention, there was much talk of how the gold-and-silver-thread patentees “ransacked Houses, &c. at their Pleasure”<sup>253</sup> and, in an attempt to compel tradesmen to comply by joining the patentees, the patentees had imprisoned them and taken away their tools and goods.<sup>254</sup> Similarly, while the need for control over inns and alehouses was not widely contested<sup>255</sup> (the licensing of alehouses and inns was justified by the particular risks such institutions presented<sup>256</sup>), the patents for their regulation were abused unabashedly.<sup>257</sup> The vesting in private parties of supervision over entire trades – which could take the form of a trade monopoly or a patent to seal products or license

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<sup>251</sup> See Fox at 108-09 n. 79. The patent also appears to have been motivated by a desire to prevent the use of domestic bullion in the manufacture of gold and silver thread, a condition of exercise of the patent that the patentees allegedly ignored. See 1 JHC 538 (Mar. 5, 1621).

<sup>252</sup> Some of the abuses were economic in nature; a primary complaint about the gold-and-silver-thread patent was that the patentees had blended lead with the precious metals and that they bought and sold using two different standards of weights (see 1 JHC 538 (Mar. 5, 1621); *id.* at 542 (Mar. 6, 1621), which could have been served as an alternative method of obtaining rents in lieu of charging higher prices. But the substitution was possible only because the holders of that patent also assumed the quasi-governmental function of oversight of the gold-and-silver-thread industry; they took over what was traditionally a government (or guild) responsibility to audit the quality of their products.

<sup>253</sup> 1 JHC 538 (Mar. 5, 1621)

<sup>254</sup> *Id.* at 538-41 (Mar. 5&6, 1621). See also *id.* at 549 (Mar. 10, 1621) (seizures); *id.* at 550 (Mar. 12, 1621) (improper use of process).

<sup>255</sup> Coke alone argued that no license should be required to keep an inn. 1 JHC 543 (Mar. 7, 1621).

<sup>256</sup> Fox at 163 & n. 8.

<sup>257</sup> Fox at 107 (“the patent for licensing alehouses and inns gave the most offence, for in its enforcement Mompesson used extreme violence and oppression aided by Michell, a justice of the peace,” leading to the impeachment of both Mompesson and Michell in 1621).

the practice of the trade – became in practice merely the farming of the right to collect fees for exemption from prohibition, and it was widely despised.<sup>258</sup> Frequently, the right to search that accompanied most exclusive trade privileges was used merely to obtain payments from those wishing to be free from search.<sup>259</sup> It was the implications exclusive trade privileges had for regulation – be it the effective delegation of regulation to a private individual or the abuse of enforcement power – that raised the strongest ire. Even for exclusive privileges that were considered entirely valid, the delegation of regulatory authority to non-governmental actors was intolerable.<sup>260</sup> Thus, the primary objection to the Jacobean regulatory state was not the lack of economic freedom; complete regulation had been the cornerstone of English economic activity since the medieval period and was an expected part of the mercantilist system. But, while Elizabeth had controlled the economy through such measures as the Statute of Artificers and the use of (arguably corrupt but nevertheless official) Justices of the Peace, James and his Stuart successors attempted to realize their own nationalist economic plan through a regulatory machinery dominated by favorites rather than officials, and it was at this privatization of regulatory functions that the Statute of Monopolies was principally directed.<sup>261</sup> Although most of the modern focus given to the Statute of Monopolies pertains to its intended effect on trade monopolies, that is far too narrow a reading of “An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof.”<sup>262</sup> In addition to the legislative history, the statute itself makes clear its reach: Section 1 outlaws

all Monopolies, and all Commissions, Grants, Licences, Charters and Letters Patents heretofore made or granted, or hereafter to me bade or granted, to any Person or Persons, Bodies Politick or Corporate whatsoever, of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm, or the Dominion of Wales, or of any other Monopolies

but it also reaches “Licences, Charters and Letters Patents”

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<sup>258</sup> Fox at 187; 2 Heckscher at 253-56.

<sup>259</sup> Fox at 72.

<sup>260</sup> E.g. the Saltpeter Patent, which was also complained of as early as 1601. See 4 Parl. Hist. 458 (Nov. 20, 1601) (statement of George Moore). See generally Fox at 66-67 & n. 33.

<sup>261</sup> See Fox at 92.

<sup>262</sup> See 21 Jam. c. 3 (1624).

of Power, Liberty or Faculty, to dispense with any others, or to give Licence or Toleration to do, use or exercise any Thing against the Tenor or Purport of any Law or Statute; or to give or make any Warrant for any such Dispensation, Licence or Toleration to be had or made; or to agree or compound with any others for any Penalty or Forfeitures limited be any Statute; or of any Grant or Promise of the Benefit, Profit or Commodity of any Forfeiture, Penalty or Sum of Money, that is or shall be due by any Statute, before Judgment thereupon had[.]

The application of the statute to grants of authority to carry out quasi-governmental functions was plain enough to its authors that they expressly limited the act's reach to avoid abrogating the authority of judges to collect fines.<sup>263</sup> Just as the statute failed to abate the trade monopolies, it also did little to solve the problem of non obstante grants and delegations of regulatory authority, and when in 1640 the Long Parliament took the matter up again, there was a similar outcry against the improper use of letters patent as a way to privatize government regulation of the economy, prompting Culpeper (among others) to complain that "they have marked and sealed us from head to foot."<sup>264</sup>

Viewing the Statute of Monopolies as an attempt to restrict regulatory authority to public rather than private actors eliminates the apparent inconsistency between the attack on monopolies in section 1 and the preservation of the guilds' exclusive trade privileges in section 9. When properly understood as an act of political rather than economic reform, the statute's preservation of guild and corporate town rights is entirely consistent with its outlaw of royal monopolies. Indeed, the difficulty in distinguishing between the spheres of guild and municipal government was so pervasive that it would take a separate act of Parliament, the Municipal Corporations Act of 1835, to officially end regulatory control by the guilds and establish separate local governmental authority for English towns and cities. The guilds themselves were

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<sup>263</sup> Statute of Monopolies § 8.

<sup>264</sup> See 2 Cobbetts 656 (Nov. 9, 1640). Pym similarly objected not only to the "inundation of monopolies by the Soap Patent" but also to "[t]he selling of Nuisances": "if a nuisance be compounded for, it is a hurt to the people; if no nuisance, then it is used to the party's prejudice." *Id.* at 641-42 (Nov. 7, 1640). See generally Fox at 140-41; Price at 45.

political institutions and acted in many ways as local governments, rendering their exercise of regulatory authority largely unobjectionable,<sup>265</sup> unlike private regulation by royal favorites.

### ***Darcy* and the Statute of Monopolies Reinterpreted**

When fully considered for both their context and content, the inherently political character of both *Darcy* and the Statute of Monopolies defy any attempt to hold them up as precedents for the right to be free of exclusive trade privileges. While *Darcy* was literally a product of the courts, it was the direct and intended result of a negotiation between crown and Parliament that was politically indistinguishable from the one that eventually led to passage of, and royal assent to, the Statute of Monopolies. Both were part of a larger effort to perpetuate, not restrain, the old order of strict local control over economic affairs, and both draw their provenance not from their adherence to laissez-faire economic theory but to the practical exercise of political power. *Darcy* was hardly an assertion of judicial authority by virtue of its superior reasoning, and the Statute of Monopolies, if viewed as an act of economic liberty, is hopelessly incoherent. But, especially with regard to the Statute of Monopolies, readers should not mistake my interpretation an attack on the statute's legitimacy; my point is merely that its legitimacy is dependent on its status as an exercise of political authority rather than with reference to ideals regarding trade regulation. The Statute of Monopolies represented a political union between idealists like Coke, who favored a limited monarchy and a rational regulatory order embodied in common-law adjudication and parliamentary supremacy, and the interests of the increasingly powerful mercantile classes, who stood to gain from the stability resulting from a rational and systematically enforced regulatory state.<sup>266</sup> Although they suggested the political, accountable *regulatory* regime that eventually replaced autocratic monarchy in the United Kingdom, neither *Darcy* nor the Statute of Monopolies had much to do with the *economic* system that eventually replaced mercantilism.

### **Significance for Modern Intellectual Property Thought**

It is my hope that this discussion will further modern thought about intellectual property in a number of ways. I'd like to suggest a few of the most obvious.

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<sup>265</sup> See *supra* text accompanying notes 22-24.

<sup>266</sup> See 2 Cunningham at 21.

### ***Mercantilist Lawmaking in its Natural Habitat***

A detailed understanding of the substance of *Darcy* and the Statute of Monopolies demonstrates the importance of placing justifications for particular legal rules within the political system in which they were forged. Failing to do so in this case has led to a number of errors, but I'll mention two: First, superimposing twenty-first century capitalist and laissez-faire economic ideas on the text of the Statute of Monopolies, for instance, might suggest a result – condemnation of government restrictions on competition – that would have horrified the statute's authors. Their primary economic concerns were first to avoid social displacement and second to direct productive capacity for the good of the collective (to the exclusion of the individual). Focus on individuals and destabilizing forces of innovation are the cornerstones of dominant modern theories of intellectual property,<sup>267</sup> not seventeenth-century trade doctrine. Second, mercantilist thinking both permeated the common law and served as its factual backdrop. The common-law cases of the era are obsessed with protecting the reliance interest of craftsmen, largely because the then-extant apprenticeship rules made it very difficult for those displaced from one trade to enter another. Again, modern times offer no parallel. Adaptability to displacement is not only a necessary part of modern economic systems, it is largely considered a salutary one. Nor are most modern intellectual property rights capable of excluding anyone from anything even roughly approximating a "trade." If Congress granted Zamfir (of pan-flute fame) the exclusive right to perform the works of Ludwig von Beethoven, it's unlikely that many musicians would lose their jobs. Although their interest in playing Beethoven might be a protectable under modern legal rules, it would not be the sort of interest that English courts were protecting in the years prior to the Industrial Revolution. Similarly, if Microsoft's attempts to dominate the computer operating system market were to go unanswered, it's unlikely that it would result in mass unemployment and retraining for experienced software engineers.<sup>268</sup> The search in the era's common-law cases for a "public

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<sup>267</sup> E.g. those relying on Schumpeterian competition, competitive innovation, anticommons, patent thickets.

<sup>268</sup> One notable exception is the possibility that a foreign firm may use intellectual property rights to displace the local use of culturally established practices. See generally *Intellectual Property Rights for Indigenous Peoples: A Source Book* (Tom Greaves ed., 1994).

benefit” in such grants doesn’t translate well to modern times and our republican government either, since the ubiquitous divergence of interests between the public and their governors is not an adequate basis for searching judicial review.<sup>269</sup>

### *The Resurgence of Mercantilism*

The degree to which so many modern intellectual property scholars have failed to learn the harsh lessons of mercantilism is perhaps best demonstrated by the recent spate of proposals for non-market intellectual property pricing mechanisms. The proposals generally call for a access to intellectual property given at a set price, a compulsory license, the price being set ex ante through a government procedure. In the patent context, compulsory licensing is usually offered as a way to simply provide access to much-needed inventions at below-market rates.<sup>270</sup> In the copyright context, in addition to straightforward price controls, compulsory licenses are additionally being advanced for their effects on related markets, particularly to enable the growth of new technologies of content dissemination whose existence would otherwise be dependent on the acquiescence of copyright owners. In the latter case, the most common proposal is to have consumers of the related technology (for instance peer-to-peer file-sharing software) pay a levy on the technology into a pool to be allocated among copyright owners in exchange for immunity (for both the consumer and the maker of the technology) against copyright infringement.<sup>271</sup> Although uncommon, compulsory licensing is not unheard of in

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<sup>269</sup> Nachbar, *Judicial Review and the Quest to Keep Copyright Pure*.

<sup>270</sup> Andrew Beckerman-Rodau, *Patent Law—Balancing Profit Maximization and Public Access to Technology*, 4 Colum. Sci. & Tech. L. Rev. 1 (2002) (compulsory patent licensing to make pharmaceuticals more accessible to the populations of developing nations).

<sup>271</sup> See, e.g., William W. Fisher III, *Promises to Keep: Technology, Law and the Future of Entertainment* ch.6 (2004) (levy on file-sharing technologies placed into a general pool combined with a file-tracking mechanism used to determine how to divide the pool among individual copyright owners); Glynn Lunney, *The Death of Copyright*, 87 Va. L. Rev. at 911-20; Neil Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harv. J.L. & Tech. 1, 43 (2003) (a “Noncommercial Use Levy” or “NUL” imposed on goods related to peer-to-peer file sharing). See also Lawrence Lessig, *Free Culture* 301-04 (2004) (adapting the Fisher proposal to a temporary system to handle the transition to a new market that accepts P2P freely); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stan. L. Rev. 1345, 1406-10 (extending the Netanel proposal and to other technologies and suggesting that it can be improved through the

existing intellectual property law,<sup>272</sup> although there is only one example in U.S. copyright law of the use of levies to immunize infringement.<sup>273</sup> As mechanisms for setting prices, none of these proposals respond particularly well to the longstanding economic arguments in favor of market pricing,<sup>274</sup> but history sheds even more light on just how ill-suited such proposals are to current intellectual property markets.

The history of English trade regulation provides some insight into the market conditions that favor (and disfavor) the application of non-market price-setting mechanisms. The market control mechanisms used nationally during the mercantilist period were largely carryovers from the previous feudal times.<sup>275</sup> During those times, markets were thin. Commodity surpluses were unusual (and famine a regular event) and the high cost of transportation made trade between towns, much less countries, expensive. Communities living close to subsistence with little competition from outside sources were ideal for market controls; they could be easily justified based on the need to spread the community's few resources in a way to provide for the survival of as many inhabitants as possible and the limited availability of goods at lower prices from other communities meant that there was little pressure to change them. Further, subsistence living reduced the complexity of price setting by limiting the number of goods for which prices actually had to be set. It is hardly happenstance that the Assize of Bread was just

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application of metering); Jessica Litman, *Sharing and Stealing*, 27 *Hastings Comm. & Ent. L.J.* 1, 44-46 (2004) (same, with additional suggestions to fine-tune the Fisher and Netanel proposals).

<sup>272</sup> In the patent context, see Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 *Wm. & Mary L. Rev.* 469, 537-38 (2003) (collecting examples). In the copyright context, see, e.g., 17 U.S.C. § 111(c)-(d), 119 & 122 (cable and satellite television retransmission compulsory license); § 114 (digital transmission compulsory license); § 115 (mechanical license); § 116 (jukebox compulsory license). The intellectual property law of several foreign countries include compulsory licenses (e.g. Canada, Germany, and Japan), and the TRIPS agreement makes explicit accommodation for their use in limited circumstances. See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, April 15, 1994, art. 31.

<sup>273</sup> See *Audio Home Recording Act*, 17 U.S.C. ch. 10. But see Germany (levy on computer sales used to compensate copyright owners).

<sup>274</sup> See Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies": Property Rights, Contracts, and Markets*, 508 *Pol'y Analysis* (2004); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *Cal. L. Rev.* 1293 (1996).

<sup>275</sup> See *supra* text accompanying note 19.

that and not an Assize of Posaune. Of course, as the political environment stabilized and transportation costs fell, subsistence gave way to productive economies and trade became more widespread. The pressure from even these mild changes began to erode the stability of the sorts of market controls that the mercantilist regimes grew out of (and eventually struggled to maintain). The increased competition from rural artisans that the towns faced, for instance, led in large part to the shift from a local to a national system of market regulation.<sup>276</sup> Increased international trade would eventually put irresistible pressure on even nation-wide market regulation; remember that it was Scottish competitors in the book trade that spearheaded the legal and market challenges that eventually led to the collapse of monopolized publishing in England.<sup>277</sup> If the history of monopoly in Britain teaches anything, it is that price-setting is not only unnecessary in thick markets, it is abhorred by them, and the thicker the market, the louder the resistance. Technology having made intellectual property markets considerably thicker than they have ever been before,<sup>278</sup> government price setting seems particularly ill-suited to them.

The period also provides yet another example of the high social costs – both political and economic – likely to accompany any form of governmentally enforced non-market price-setting scheme. As mercantilism was coming of age, price-setting by Justices of the Peace under the Statute of Artificers was rife with corruption,<sup>279</sup> and of course the battles that eventually led to the adoption of the Statute of Monopolies itself were no more than contests for the rents generated by artificial control over prices, whether by guild control over production or a royal monopolist's supracompetitive pricing.<sup>280</sup> Advocates for compulsory licensing who suggest it as a way to prevent entrenched interests from blocking the development of new technologies seem to ignore the fact that the interests they are trying to control owe their entrenchment in no small

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<sup>276</sup> See *supra* text accompanying notes 32-34.

<sup>277</sup> John Feather, *A History of British Publishing* 275-83 (1988).

<sup>278</sup> *Merges* at 4.

<sup>279</sup> See *supra* the text accompanying notes 27-31.

<sup>280</sup> On the social waste from investment in the preservation of monopoly rents, see Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 *Am. Econ. Rev.* 291 (1974).

measure to their previous *success* navigating the very same political process.<sup>281</sup> Price setting through legislation in today's political environment would be like trying to persuade a fox to cut down on its chicken consumption by holding a meeting with it in a henhouse.

Of course, the market errors introduced by government price-setting are not limited to those motivated by greed; it is equally likely that the prices set will simply fail to correctly estimate the market for which the prices are being set.<sup>282</sup> Several of the authors who advocate a levy system, for instance, not only mention the Audio Home Recording Act as a model but also point out that it is essentially defunct because of the limited demand for the media subject to the AHRA levy,<sup>283</sup> apparently without appreciating that the AHRA's failure is itself reason to reconsider the approach it embodies. The AHRA levy seems to have completely missed the boat; the recording media subject to the AHRA levy have almost completely disappeared from the market in favor of computer-based recording technologies, which are not covered by the AHRA.<sup>284</sup> The error represented by the AHRA is doubly disconcerting because it is impossible to determine whether the shift to computer-based recording is independent of the AHRA's levy (representing a mistaken prediction by Congress in 1992 about the technological direction of audio home recording) or is partially the result of it (that the AHRA levy *itself* has harmed the ability of non-computer-based audio home recording to compete with its un-taxed cousin). This second, endogenous potential effect of the AHRA highlights just how ill-conceived government price setting in innovation markets really is.

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<sup>281</sup> E.g. DMCA; Bono Act; Orphan Drug Act.

<sup>282</sup> Merges at 9. See also Merges, *Contracting into Liability Rules*, 84 Cal. L. Rev. at 1308-16 (describing the durability of the sub-optimal mechanical license, which was intended to permit a diverse market for piano rolls but now serves as a below-market-price cheap source of content for record companies).

<sup>283</sup> See, e.g., Lemley & Reese at 1407; Netanel at 33 ("The AHRA might serve as useful precedent for the NUL, but its levy provisions have largely remained a dead letter because the market for digital cassette recorders and other single-purpose devices for digitally recording music never developed.").

<sup>284</sup> See *Recording Industry Ass'n of America v. Diamond Multimedia Systems, Inc.*, 180 F.3d 1072 (9th Cir. 1999).

There is no better example of the incalculable costs of government rate-setting in intellectual property markets than the recent experience of the webcasting<sup>285</sup> compulsory licenses. In 1995 and 1998, respectively, Congress passed the Digital Performance Rights Act (DPRA) and the Digital Millennium Copyright Act (DMCA), which, in combination, established an exclusive right to perform sound recordings by digital transmission<sup>286</sup> as well as a compulsory license available to webcasters who wish to perform those sound recordings over the Internet.<sup>287</sup> The new statute also established a mechanism for determining the compulsory license rates: First, it provided the recording industry an exemption to the antitrust laws that allowed the major record companies to negotiate and set prices as a single block.<sup>288</sup> Second, the act provided for a period of negotiations and, in the event of their failure, the establishment of a Copyright Arbitration Royalty Panel (CARP) to set license rates for a two-year period based on the rates it imagined a willing buyer and a willing seller would agree to in a well-functioning market.<sup>289</sup> The (statutorily created) cartel's negotiating strategy was to unfailingly insist on a license rate for small webcasters of \$.004 per performance (almost six times the final license rate)

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<sup>285</sup> As I use the term, "webcasting" is the transmission over the Internet (usually the World Wide Web) of sound recordings. The sound recordings are sent piecemeal over the Internet and reassembled on the user's computer for playing, but they are not stored on the user's computer and cannot (theoretically) be copied to other media or played again at a later time.

<sup>286</sup> See 17 U.S.C. § 106(6). There is no exclusive right to perform sound recordings by analog transmission; analog radio stations, for instance, are not required to pay any royalties to the owners of copyrights in the sound recordings they play – they need license only from, and consequently pay royalties only to, the owners of the copyrights in the underlying compositions. Cf. 17 U.S.C. § 106(4). Contrast this with downloading the files for later access or copying, which is simply the distribution of copies of sound recordings over the Internet, *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. Feb. 21, 2001), and for which the protection afforded sound recordings is equal to that afforded other copyrighted works. See 17 U.S.C. 106(1) & (3).

<sup>287</sup> My exposition is a dramatic oversimplification of the provisions, which are several pages long. See 17 U.S.C. § 114. My discussion touches only upon one form of webcast service: non-interactive, non-subscription webcasting. Subscription services and interactive services (which allow the user to specify the selection and order in which the songs are played) are treated differently under the statute.

<sup>288</sup> 17 U.S.C. § 114(e)(1).

in an attempt to generate high-priced agreements *as precedent for the CARP proceedings certain to follow*.<sup>290</sup> As anticipated by all, the negotiations fell through, and first CARP was quickly called.<sup>291</sup> To approximate the hypothetical willing-buyer/willing-seller rates, the CARP looked to the twenty-six agreements that the (statutorily created) cartel of record companies had successfully negotiated as part its plan to influence the outcome of the CARP proceedings.<sup>292</sup> Of the twenty-six existing agreements, the CARP disqualified all but one,<sup>293</sup> effectively setting the rates to be charged all webcasters based on a single agreement between the RIAA and Yahoo!, one of the largest and most heavily capitalized Internet companies in the world.<sup>294</sup> Based on that agreement, the CARP chose a rate of \$.0014 per performance for “Internet-only” digital transmissions and \$.0007 for webcasts that were retransmissions of radio broadcasts (“radio retransmissions”).<sup>295</sup> The CARP justified the difference as representing the increased “promotional value” enjoyed by copyright owners whose songs are played over the radio at the same time they are webcast,<sup>296</sup> even though it found elsewhere in the report that the very existence of the separate rates in the Yahoo! agreement was the product of collusion between

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<sup>289</sup> 17 U.S.C. § 114(f)(2)(C)(ii), § 114(f)(2)(B). Of course, the very need for a compulsory license establishes that the as yet non-existent market contained neither willing buyers nor willing sellers.

<sup>290</sup> CARP Report 47-50.

<sup>291</sup> See Digital Performance Right in Sound Recordings and Ephemeral Recordings, 64 Fed. Reg. 52,107, 52,108 (Sept. 27, 1999); CARP Report at 10-11. The CARP was supposed to set the royalty rates for the period 1998-2000, but that CARP took so long in constituting itself that those proceedings were consolidated with the proceedings for 2000-02. CARP Report at 105.

<sup>292</sup> CARP Report at 45-46.

<sup>293</sup> Twenty-one of them were disqualified because the webcasters either had paid little or no actual royalties under the agreements or had ceased operating. CARP Report at 51-54. Two more were disqualified because the webcasters had agreed to the licenses under exogenous, idiosyncratic time constraints that prevented them from waiting for the results of the CARP proceeding itself. *Id.* at 54-56. One was disqualified because it was in settlement of litigation and contained a most-favored-nation clause that made pricing dependent on the lowest prices the RIAA eventually gave to others (both defects in some degree of the agreement the CARP eventually used as a model – see *infra* n. 300), and one was disqualified because the CARP found it was superficially irrational for the webcaster to agree the license in the first place. *Id.* at 56-59.

<sup>294</sup> CARP Report at 60-61. See

<sup>295</sup> CARP Report at 75-78.

the RIAA and Yahoo! in yet another attempt to generate inflated license rates to serve as precedent for the CARP proceeding.<sup>297</sup> When the CARP's final report was reviewed by the Register of Copyrights,<sup>298</sup> she injected a grain of much-needed reason by rejecting the two-tiered approach, but the single rate she chose was still based on the price stipulated by the single Yahoo! agreement<sup>299</sup> without any regard to the agreement's other terms, including a most-favored-nation (MFN) clause allowing Yahoo! a potential reduction in rates based on the outcome of the CARP itself.<sup>300</sup> Instead, the Register Solomonically chose \$.0007 per song, a rounded average between the two different license rates paid by Yahoo! under the agreement (one an average rate calculated from a one billion-webcast lump sum payment of \$1.25 million and one the "effective" rate for each webcast above one billion),<sup>301</sup> a rate roughly *ten times* the rate charged by performing rights societies for use of the underlying musical works in over-the-

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<sup>296</sup> CARP Report at 74-75.

<sup>297</sup> Because 90% of Yahoo!'s webcasts were radio retransmissions, they were willing to take a sharply inflated Internet-only rate in exchange for a slightly decreased radio retransmission one. See CARP Report at 64-67; LoC at 45,255.

<sup>298</sup> The scheme calls for review of the CARP determination by the Librarian of Congress upon recommendation by the Register of Copyrights. 17 U.S.C. § 802(f).

<sup>299</sup> LoC at 45,255.

<sup>300</sup> The Register refused to consider the value of the MFN clause because "the record contains no information quantifying the added value of the [MFN clause and some avoided litigation expense] that purportedly resulted in inflated rates" and because the actual rate chosen by the Register was half-way between the two possible rates at either end of the "zone of reason" as defined by the maximum and minimum license rates possible under the Yahoo! agreement itself. The Register concluded that picking that mid-point leaves some room for error in the final rate without it becoming unreasonable, which is presumably what happens when one strays from the "zone of reason" bounded by the highest and lowest rates that a single webcaster – Yahoo! – is willing to pay. See LoC at 45,255. Of course, "no information" does not equal "zero," which is the value effectively assigned by the Register's refusal to consider the clause within the \$.00018 gap between the maximum and minimum Yahoo! license rates. See *id.* The specific terms of the MFN clause were not disclosed subject to protective order, LoC at 45,249, but its value can only be zero if it has no potential effect on Yahoo!'s future license rates at all. The existence of similar (if not identical) terms was cause for the CARP to disqualify another one of the twenty-six agreements as precedent. See *supra* n. 293.

<sup>301</sup> LoC at 45,255.

air radio broadcasts.<sup>302</sup> The chosen rate proved to be so unworkable that it took Congress less than six months to devise and execute an alternative scheme that pushed the interested parties to negotiate a more realistic set of rates based on the size of each webcaster.<sup>303</sup> But-for an infusion of rationality from Congress (from Congress!), the CARP's administrative rate-setting would have wiped out Internet webcasting in its infancy – at an estimated cost of \$25 million.<sup>304</sup> Of course, there is no way to estimate the lost value to the economy of the more than four years (encompassing both the inflation and burst of the “Internet bubble”) the process ate up before it was effectively scrapped for a solution based on a decades-old rate scheme adopted by private parties under the supervision of no one but the antitrust enforcers.<sup>305</sup> Although it received a great deal of attention due to its rocky first few steps, the path to the digital distribution of music over the Internet, which is governed by nothing more publicly minded than strong

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<sup>302</sup> See Copyright Royalties: Where Is the Right Spot on the Dial for Webcasting? Hearing Before the Senate Comm. on the Judiciary, 107th Cong. (2002) (statement of Jonathan Potter, Executive Director, Digital Media Association),

[http://www.senate.gov/~judiciary/testimony.cfm?id=258&wit\\_id=523](http://www.senate.gov/~judiciary/testimony.cfm?id=258&wit_id=523)). While analog radio stations are not required to obtain rights from the owners of copyrights in the sound recordings they play, they are required to get permission from the owners of copyrights in the underlying musical works, a process coordinated by three major “performance rights organizations” (ASCAP, BMI, and SESAC), which grant blanket licenses to radio stations to play their members’ music. Mr. Potter’s comparison is based on the rates charged radio stations by the performance rights organizations for the right to broadcast those underlying musical works.

<sup>303</sup> Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified at 17 U.S.C. § 114(f)-(g)). The agreement reached as a result of that renewed negotiation, which preserved the recording industry’s antitrust exemption but specifically excluded the possibility that the agreements reached could be used in future CARPs (see 17 U.S.C. § 114(f)(5)(C)), charges webcasters with revenues under \$1.25 million per year the greater of 5% of their revenues or 8% of their expenses, with a minimum fee of \$2,000 for webcasters generating less than \$50,000 in revenue. See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510, 78,511-78,512 (Dec. 18, 2002).

<sup>304</sup> Copyright Royalty and Distribution Reform Act of 2003: Hearing before the Subcommittee on Courts, The Internet, and Intellectual Property of the Committee on the Judiciary, House of Representatives, 108th Cong., 1st Sess., H.R. 1417, April 1, 2003 (Statement of Michael J. Remington), pp. 28, 31. Approximately \$ 1.2 million went for the arbitrators’ expenses alone Paige Albinak, CARP is Thrown Back, *Broadcasting & Cable*, May 27, 2002, at 14.

<sup>305</sup> See generally *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 564-65 (2d Cir. 1990) (describing antitrust supervision over performing rights organizations).

intellectual property rights and unabashed market pricing, has been a comparative walk in the park.<sup>306</sup>

Whether the disastrous experience of the CARP was a product of incompetence or greed is irrelevant. Attempts to generate ideal markets by altering the basic rules of exchange are equal invitation to both, a lesson that the British experience with guilds and monopolies should make clear to us all. Government interference with the operation of free pricing is always a tempting for those who do not like the outcomes generated by unregulated markets, but a solution so amenable to rent-seeking is likely to lead to a “vicious cycle” of increasing regulation as interested parties demand tighter restrictions in order to correct for the injustices created by previous ones.<sup>307</sup> The Small Webcaster Settlement Act, by encouraging a negotiated settlement, is something of a step back from the brink, but there is no reason why it should have been so: Congress’s structural response to the webcasting debacle has not been to eliminate the market restrictions that naturally and inexorably caused it but rather to replace the CARP with a panel of “copyright royalty judges.”<sup>308</sup> Plus ça change ...

#### *The Inherent Conservatism of Market Controls*

Targeted market controls, including compulsory licensing, will necessarily benefit some products over others – that is the very point of the schemes – but the political economics surrounding any technology-specific proposal for compulsory licensing necessarily suggest that the benefits are likely to accrue not to new technologies but to old ones. Again, history calls to us as a reminder: The vast majority of mercantilist price regulation, for instance, was conservative in nature. The Statute of Artificers was intended to forestall the growing market power of laborers stemming from the Black Death’s effects on the labor supply and to further

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<sup>306</sup> After the rights of copyright owners to control digital distribution of their works were confirmed in *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001), it was a matter of months before music became widely available for licensed download on the Internet and less than two years before the launch of the wildly popular iTunes, which just celebrated its quarter-billionth download. See *iTunes Music Store Downloads Top a Quarter Billion Songs*, press release dated Jan. 24, 2005, available at <http://www.apple.com/pr/library/2005/jan/24itms.html>.

<sup>307</sup> Krueger, 64 *Am. Econ. Rev.* at 302.

<sup>308</sup> See Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419.

entrench the powers of the then-dominant local guilds,<sup>309</sup> and the Statute of Monopolies itself was an effort to undo the effects of the royal exclusive trade privileges and restore the status quo of guild regulation.<sup>310</sup> Even common-law courts, arguably the least politicized source of trade policy, used their power to protect established artisans, not new ones.<sup>311</sup> It is passing strange given the history of market regulation for some to now argue that government price controls are necessary in order to enable the introduction of new technologies of content dissemination. Such a statement is self-falsifying; truly “new” technologies have no one to advocate for them in the political process. Only established ones (even recently established ones) do. Peer-to-peer is not a “new” technology that needs to be enabled; it is an existing technology whose backers (including its financial backers) want to see it grow.<sup>312</sup> The difference is a significant one, because the availability of a preferential license for *existing* technologies is more than likely to forestall the development of *future* ones. Thus, the preferential treatment that the Copyright Act provides to analog radio broadcasters provided them with a tremendous competitive advantage over webcasters as that new technology was struggling to get off the ground. The \$.0007 per-song licensing fee produced by the CARP was only burdensome to webcasts because it didn’t *also* apply to the transmissions of their well-established competitors in the broadcast world. Of course, if the entire broadcast industry had been equally subject to the license fees, public choice theory suggests that the chosen rate would have been much lower. The webcasting licensing experience fared no better as a catalyst of change than as an

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<sup>309</sup> See *supra* text accompanying notes 17-31. Centuries later, when women and children arose as potential competitors to the adult-male-dominated labor force, the early labor unions rediscovered the Statute of Artificers, and its exclusion of women and children, and they petitioned Parliament to enforce it, shifting its meaning from a conservative pro-employer measure to a conservative pro-labor one. See Fox at 11-12.

<sup>310</sup> See *supra* text accompanying notes 215-218.

<sup>311</sup> See *supra* text accompanying notes 107-108.

<sup>312</sup> Thus, it is hardly surprising that the loudest calls for compulsory licensing to change the recording industry’s business model frequently come from those who have a vested interest in preserving their own, competing business model. See, e.g., Ciarán Tannam, “Interview with the President of Grokster,” MP3Newswire.net, [www.mp3newswire.net/stories/2003/grokster.html](http://www.mp3newswire.net/stories/2003/grokster.html) (April 30, 2003). At the time of the Napster litigation, that company had received \$65 million in investments. See Joseph Menn, *All the Rave: The Rise and Fall of Shawn Fanning’s Napster* (2003).

equalizer of markets. One seemingly lasting effect of the webcasting compulsory licensing movement was to award the major record companies with a legislated cartel – hardly the path to a new market model for music. Opponents of economic progress have always been more successful in effecting their conservatism in legislatures than they have in markets.<sup>313</sup>

### *The Political Tradition of Exclusive Rights*

The recent trend of intellectual property scholars toward the “constitutionalization of intellectual property,”<sup>314</sup> presents an additional opportunity for us to learn from the English response to the monopoly problem, although it also presents the potential for history’s misuse. Age alone lends *Darcy* and the Statute of Monopolies a certain gravity; it is tempting to suggest that they represent fundamental limits on the state’s ability to award exclusive trade privileges. Out of context, *Darcy* becomes the common law’s centuries-old condemnation of trade monopolies and, with the Statute of Monopolies (ignoring § 9), a nearly four-hundred-year old tradition that the only legitimate exclusive trade rights are those granted only for limited terms, to inventors, and only for the introduction of new industrial technology.

It approaches irony to offer these examples as the justification for searching judicial review of legislative action in the field of intellectual property.<sup>315</sup> *Darcy*, far from an assertion of judicial authority to control illegitimate exclusive trade privileges, was itself the product of political compromise. The Statute of Monopolies – and its exception for both legislatively conferred and guild exclusive trade privileges – was not have been motivated by animus or suspicion of government restrictions on free trade. Parliament continued to regulate trade through national exclusive trade privileges when it served Parliament’s regulatory purposes. But the failure of the Statute of Monopolies to embody free-trade ideology does not reduce is

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<sup>313</sup> See Mark S. Nadel, How Current Copyright Law Discourages Creative Output: The Overlooked Impact Of Marketing, 19 Berkeley Tech. L.J. 785, 855 (2004) (arguing for compulsory licenses while acknowledging that “setting reasonable license fees is inherently political and has proved to be a thorny problem under existing compulsory licensing law”). See generally, Joseph P. Liu, Regulatory Copyright, 83 N.C. L. Rev. 87 (2004) (discussing various costs of adopting market-specific rules in copyright).

<sup>314</sup> Lemley, *The Constitutionalization of Intellectual Property*; see generally the many briefs filed in *Eldred*.

<sup>315</sup> See sources cited supra note 7.

political legitimacy. It is exactly as legitimate – no more, no less – as the Sonny Bono Copyright Term Extension Act of 1998.

*Translating the Political Experience*

That is not to say that the events of the seventeenth century do not bear more practical lessons for the intellectual property debates of today.

The compromises leading to both *Darcy* and the Statute of Monopolies provide refreshing historical counterexamples to the oft-repeated presage of public-choice-minded theorists who speculate that intellectual property protection will, without external limits, ever-expand.<sup>316</sup> The lesson from seventeenth-century England is not the triumph of principle in the face of well-organized economic interests, it is the combination of politicians and merchants. They are stories not of idealism but of coalition. The Statute of Monopolies and the restrictions on crown authority were desired equally by political theorists eager to limit the arbitrary exercise of royal power (and power-seekers in their own right) and merchants seeking regulatory efficiency and stability.<sup>317</sup> In order for that coalition to have formed, the monopolies question had to become both more general and more practically important. The challenged practices had to be systemic enough to be a threat to a critical mass of both political and economic actors. No individual monopoly could have done so, even if it affected a powerful guild. It is much more difficult to garner political opposition to narrow trade restrictions affecting particular transactions than to broad property rights affecting us all. Those who propose limiting the rights of intellectual property owners given the development of new technologies would do well to keep the need for a broad base of support in mind when they argue for licenses or exemptions to allow specific uses of specific forms of intellectual property.

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<sup>316</sup> See sources cited *supra* note 4.

<sup>317</sup> See *supra* text accompanying notes 204-219; 2 Cunningham at 21.

Another significant moment in the history of English intellectual property law, the lapse of the Stationers' Company's statutory publishing monopoly, was similarly a merger of political interests opposed to government censorship with commercial interests (of authors and excluded publishers and booksellers) against a national publishing monopoly. Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 *The Library* 296, 314-16 (1978).

It may have been difficult 10 years ago to foresee the development of strong commercial interests opposed to extending intellectual property protection, but it has always been shortsighted to think that, given the wealth they generate, telecommunications and technology companies would not find a way to assert their own interests when they conflict with those of content providers.<sup>318</sup> It is hardly surprising to see major corporate sponsors for organizations such as the Center for Democracy and Technology and the Digital Media Association, and it's becoming harder and harder to tell the policy positions of the Electronic Frontier Foundation<sup>319</sup> from those of the Consumer Electronics Association.<sup>320</sup> The lobbying has barely begun.

The events I've discussed also suggest that those whose financial interests are tied to strong intellectual property protection should be careful of what they ask for, or at least how they use it. The Statute of Monopolies was spurred more by abuse in the means of enforcement of exclusive trade privileges (such as the impositions and extortions of the monopolists' searchers) than by the economic consequences of the rights themselves. Owners of intellectual property rights would be wise to exercise caution in *how* they protect their statutory rights<sup>321</sup>

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I have explained elsewhere why a fourth moment in history, the 1710 adoption of the Statute of Anne, had little to do with the problem of trade monopolies. See Nachbar, *Intellectual Property and Constitutional Norms* at 332-34.

<sup>318</sup> In re Verizon. (successful legal challenge by a telecommunications giant to the use of subpoenas by intellectual property owners to discover the names of telecommunications customers).

<sup>319</sup> The Induce Act (S.2560, 108th Cong. (2004)) is "a measure premised on the misguided notion that the dilemmas currently facing the music industry can be solved by holding the threat of more lawsuits and more uncertainty over the heads of America's high technology innovators." Open Letter from Shari Steele to All United States Senators (undated) Available at [http://www.eff.org/IP/?f=eff\\_induce\\_letter.html](http://www.eff.org/IP/?f=eff_induce_letter.html).

<sup>320</sup> "The Inducing Infringement of Copyrights Act of 2004 (the 'Induce Act') stands as the biggest threat to technology, innovation and consumer rights in 20 years." See [http://www.ce.org/div\\_comm/glossary/induce\\_act.asp](http://www.ce.org/div_comm/glossary/induce_act.asp).

<sup>321</sup> See 15 U.S.C. § 1116(d) (authorizing ex parte order for privately instituted seizure of allegedly counterfeited goods); 17 U.S.C. § 506 (criminal infringement of copyright). Indeed, mere civil enforcement actions are gaining wide press as multinational corporate copyright owners pursue individual file sharers. See *More Downloading Suits By Recording Industry*, N.Y. Times, Feb. 18, 2004 (describing what has become a "routine reminder that college students, teenagers and others can face expensive lawsuits for swapping music online"). See also Recording Industry

and restraint in seeking rights that may prove impossible to enforce without generating broad opposition in the community.<sup>322</sup>

## **Conclusion**

*Darcy v. Allen* and the adoption of the Statute of Monopolies are remarkable events; they represent a virtual revolution in the role of political accountability in the administration of the regulatory state. It is unfortunate that they are so often advanced as representing a revolution in the substance of economic regulation, for that they were not. Attempts to resurrect them as such are confounded by their absolute consistency with core mercantilist principles and are likely the result of their invocation without adequate translation of the mercantilist vernacular in which they were debated, agreed upon, and put into practice. Relying on them as an argument for restricting the decision-making authority of politically accountable public actors would be to completely ignore their significance as assertions of political authority. Instead, the lessons of the period suggest that government attempts to control markets rarely succeed and are much more likely to lead to stagnation than innovation. While politics frequently favors select groups, the identities and relative power of those groups change over time as new coalitions form in response to old ones. Indeed, the events of the early seventeenth century leave one to wonder whether, even if the courts will not take a stand against the continued expansion of intellectual property rights,<sup>323</sup> Congress might.

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Countersued, *N.Y. Times*, Feb. 19, 2004, at C1 (story of a file-sharing defendant counterclaiming violations of extortion and racketeering laws).

<sup>322</sup> H.R. 5211, 107th Cong. § 514 (2002) (immunization from civil or criminal liability for disruption of downloading activities).

<sup>323</sup> Lessig, *Free Culture* ch. 13.