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MONOPOLY, MERCANTILISM, AND THE POLITICS OF REGULATION

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INTRODUCTION

THE politics of regulation are a one-way street. That is the message of public choice theory, which in its simplest form describes how an entrenched few can succeed in furthering their special political interests against a larger, more diffuse population.¹ It is a lesson zealously applied by many intellectual property scholars,² who have argued that bias in the political process in favor of those with large holdings of intellectual property has resulted in illegitimate expansions of intellectual property protection. Examples are many: the extension of copyright in both its term and coverage,³

¹ Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 12–37 (1991).

² I use the term “intellectual property” loosely to describe patent, copyright, and similar doctrines that confer exclusive rights to produce or use particular intellectual works and consequently raise barriers against the use of those works by others. Although the term frequently includes trademark and unfair competition law, this Article does not necessarily address issues related to competition-based doctrines.

³ 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 (2000)) (extending the term of copyright by twenty years); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C. (2000)) (extending copyright

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the awarding of intellectual property protection for subject matter already in the public domain,⁴ and the extension of intellectual property protection to articles that do not meet the traditional tests of originality or novelty⁵ 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.⁶

Evidence for the substantive illegitimacy of 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*⁷ and the passage of the Statute of Monopolies,⁸ with its exception for invention patents, in

terms and removing formalities, thereby increasing the number of works subject to copyright protection).

⁴Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 514, 108 Stat. 4809, 4976-81 (1994) (codified at 17 U.S.C. § 104A (2000)) (restoring copyright in some foreign-authored works).

⁵Federal Trademark Dilution Act, Pub. L. No. 104-98, 109 Stat. 985 (1996) (codified at 15 U.S.C. §§ 1125(c), 1127 (2000)) (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 (2000)) (protection for unpatentable semiconductor designs); Vessel Hull Design Protection Act, Pub. L. No. 105-304, 112 Stat. 2905 (1998) (codified at 17 U.S.C. §§ 1301-1332 (2000)) (protection for unpatentable boat hull designs).

⁶E.g., *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003) (challenging the Copyright Term Extension Act); *Kahle v. Ashcroft*, No. C-04-1127, 2004 WL 2663157, at *1 (N.D. Cal. Nov. 19, 2004) (challenging the current duration of copyright protection and the 1976 Copyright Act's elimination of formalities); *United States v. Martignon*, 346 F. Supp. 2d 413 (S.D.N.Y. 2004) (challenging the constitutionality of the federal anti-bootlegging act, 17 U.S.C. § 1101 (2000)); *Golan v. Ashcroft*, 310 F. Supp. 2d 1215, 1216-17 (D. Colo. 2004) (challenging the URAA); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 *Berkeley Tech. L.J.* 535, 574 (2000); Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Restraint on Congress*, 2000 *U. Ill. L. Rev.* 1119, 1197; Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 *Loy. L.A. L. Rev.* 199, 245-46 (2002); Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 *Harv. J. on Legis.* 45, 52-56 (2000).

⁷*Darcy v. Allen* (The Case of Monopolies), (1603) 77 Eng. Rep. 1260 (K.B.).

⁸An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof (Statute of Monopolies), 21 *Jam.*, c. 3 (1624).

1624.⁹ Many, including the Supreme Court itself,¹⁰ 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,¹¹ and some have even 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.¹² Even ignoring such sweeping constitutional claims,¹³ the pervasive sense in intellectual property law and scholarship is that these two events, or rather the rejection of state-sanctioned monopolies that they embody, define the legitimate scope of government-sanctioned exclusive trading rights.¹⁴

⁹ Just a sample of references *from the last 24 months*: Lawrence Lessig, Free Culture 88 (2004); 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); Jay Dratler, Jr., Does Lord Darcy Yet Live? The Case Against Software and Business-Method Patents, 43 Santa Clara L. Rev. 823, 824–32 (2003); Mark A. Lemley, Ex Ante versus Ex Post Justifications for Intellectual Property, 71 U. Chi. L. Rev. 129, 135 (2004); Joshua D. Sarnoff, Abolishing the Doctrine of Equivalents and Claiming the Future After *Festo*, 19 Berkeley Tech. L.J. 1157, 1187–88 (2004).

¹⁰ E.g., *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

¹¹ E.g., Dratler, *supra* note 9, at 835–36; Heald & Sherry, *supra* note 6, at 1160; 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); Tyler T. Ochoa, Origins and Meanings of the Public Domain, 28 U. Dayton L. Rev. 215, 215 (2002); Edward C. Walterscheid, To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power, 43 IDEA 1, 11 (2003).

¹² See, e.g., Dan T. Coenen & Paul J. Heald, Means/Ends Analysis in Copyright Law: *Eldred v. Ashcroft* in One Act, 36 Loyola L.A. L. Rev. 99, 111 (2002); Heald & Sherry, *supra* note 6, at 1144.

Others have advanced the constitutional significance of *Darcy* or the Statute of Monopolies (or both) in litigation seeking to invalidate federal copyright legislation as unconstitutional. See, e.g., Brief for Petitioners at 24, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618) (citing the statement in *Graham v. John Deere*, 383 U.S. 1, 5 (1966)); Brief for the Free Software Foundation as Amicus Curiae Supporting Petitioners at 5, *Eldred*, 537 U.S. 186 (No. 01-618).

¹³ See Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104 Colum. L. Rev. 272, 328, 330–31 (2004) (arguing that there is no coherent connection between the monopoly practice in England and the constitutional limits on congressional powers); Thomas B. Nachbar, Judicial Review and the Quest to Keep Copyright Pure, 2 J. on Telecomm. & High Tech. L. 33, 34 (2003) [hereinafter Quest] (arguing for a relaxed standard of judicial review for copyright laws).

¹⁴ See, e.g., *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964); *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948) (citing *Darcy* in an antitrust case,

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This optimistic view of seventeenth-century English monopoly policy is not universal, particularly in fields outside of intellectual property.¹⁵ The less sanguine view is that the events of the period were not so much the product of applied economic theory as they were the incidents of a conflict over financial (and therefore political) control over the English government,¹⁶ and some scholars have applied public choice theory to highlight the political and financial ambitions of those who opposed the royal monopolies.¹⁷

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. Failure to recognize the mercantilist economic backdrop for both *Darcy* and the Statute of Monopolies has led courts and intellectual property scholars 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 order dominant at the time. Neither event, understood in context, can plausibly be offered as supporting any particular restriction on modern intellectual property laws. For those who see the era as an object lesson in the proper use of exclusive rights, the period presents both hazard and opportunity. Many of the long-since-rejected economic principles underlying both events are already seeing a resurgence in proposals seeking to reform modern intellectual property policy. At the same time, the period's history

the Court stated, "Public policy has condemned monopolies for centuries."); *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 18 (1829) (citing the Statute of Monopolies as instructive in interpreting the federal patent statute); Donald S. Chisum, 1 *Chisum on Patents* § 1.01, at 1–6 (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].") (citation omitted); Robert P. Merges et al., *Intellectual Property in the New Technological Age* 126 (2d ed. 2000).

¹⁵ E.g., Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* 12–14 (1986); William L. Letwin, *The English Common Law Concerning Monopolies*, 21 *U. Chi. L. Rev.* 355, 366 (1954).

¹⁶ E.g., J.R. Tanner, *English Constitutional Conflicts of the Seventeenth Century: 1603–1689*, at 34–50 (1928); Letwin, *supra* note 15, at 366; see also *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 66 (1872) ("[T]he contest [in *Darcy*] was between the crown, and the people represented in Parliament.").

¹⁷ See generally Robert P. Ekelund, Jr. & Robert D. Tollison, *Politicized Economies* (1997).

offers hope for those seeking political solutions to recent expansions in intellectual property rights.

I will proceed first by laying out the mercantilist regulatory order that served as the backdrop for *Darcy* and the Statute of Monopolies. I will 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 will next examine both the adoption of the Statute of Monopolies and regulatory practice that followed it to provide a new, more comprehensive understanding of the statute's meaning—a meaning with important implications for American political design, if not for intellectual property theory. Having presented a reinterpretation of both *Darcy* and the Statute of Monopolies within the broader context of regulation, I will consider the narrower question of how this new interpretation informs today's disputes over the proper reach of intellectual property rights.

I. 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 seventeenth century are two concepts that are treated quite loosely by modern legal scholars: “mercantilism” and “monopoly.”

A. Mercantilism: Trade Regulation for National Wealth

At base, mercantilism was control of the economy in order to further national interests. What most clearly separated mercantilism from the capitalist economic systems that followed was its emphasis on collective, rather than individual, wealth.¹⁸ 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 have much more than what was needed to survive. The result was that not only profit but also free competition was discouraged, for while competition might maximize supply, it would result in prices too low for craftsmen to live on. Mer-

¹⁸ 2 W. Cunningham, *The Growth of English Industry and Commerce in Modern Times* 16–17 (5th ed. 1968).

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cantilists sought a balance that would lead to full employment for the maximum number of people who could be reasonably well-sustained.¹⁹ 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, resulting in a set of “fair” prices.²⁰ 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.²¹ 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 associate with mercantilism: trade regulation favoring local manufacture, the accumulation of bullion, and protectionist shipping policies designed to encourage strong navies.²² But, while trade policy could be made at the national level to fur-

¹⁹ *Id.* at 285; 1 Eli F. Heckscher, *Mercantilism* 271 (Mendel Shapiro trans., 1935).

²⁰ 1 Cunningham, *supra* note 18, at 249–50. The Assize of Bread, for instance, set the price of bread based on the price of wheat. See *id.* at 250–51; 1 E. Lipson, *The Economic History of England* 266–67 (1915). Although English policy involved price regulation, there was development toward market-based pricing, more notably on the continent than in England. See Terence Hutchison, *Before Adam Smith: The Emergence of Political Economy, 1662–1776*, at 15–16 (1988).

²¹ 1 Cunningham, *supra* note 18, at 211–13; Harold G. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* 30–31 (1947); 1 Heckscher, *supra* note 19, at 374–76.

²² See 1 Cunningham, *supra* note 18, 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, *supra* note 18, at 5–8 (describing the culmination of the transformation in the sixteenth century); Gustav Schmoller, *The Mercantile System and Its Historical Significance* 50–51 (New York, Augustus M. Kelley 1967) (1897). “Nationalist” policy does not mean “forward-thinking.” National trade policy was often the product of changing priorities and exigencies; there was no single set of coherent nationalist trade policies undertaken by mercantilists. See B.A. Holderness, *Pre-Industrial England, Economy and Society 1500–1750*, at 179–80 (1976).

ther 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 be paid. The Crown-chartered municipal corporations were 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 most royal commercial regulation. The members of the corporation fulfilled their pledge by collecting shares of the assessment from the other citizens of the town.²³

These municipal corporations became the merchant guilds (either by extension of previously existing medieval guilds or explicitly by their charters). As formed, the merchant guilds were not one and the same as local governments—they did not have general civil jurisdiction, but they had regulatory authority over commercial practices and practitioners and could fine violators of guild rules.²⁴ Although many were originally democratically organized, most guilds evolved into self-perpetuating oligarchies in which the senior members selected their replacements.²⁵ Eventually the structure of the merchant guilds evolved into networks of specialized

²³ 1 Cunningham, *supra* note 18, at 212–20.

²⁴ *Id.* at 219–22. On the confusing relationship between the guilds and the municipal governments, see generally Stella Kramer, *The English Craft Gilds and the Government*, 23 *Stud. Hist., Econ. & Pub. L.* 445 (1905).

²⁵ George Unwin, *The Guilds and Companies of London* 217–18 (2d. ed. 1925).

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trade guilds, each exercising regulatory authority over its particular trade.²⁶

The Statute of Artificers—a national labor regulation setting the terms for employment for both skilled and unskilled workers²⁷—cemented the local guilds’ position in the national regulatory machinery, and in doing so dramatically opened up the potential for guild rent-seeking. First, the Statute placed in the guilds control over the means of industrial production in England. While the Statute established the guilds (through the requirement of apprenticeship) as the only way to become a tradesman, it did not establish any rules regulating the means of manufacture.²⁸ The power to set the terms of entry into the trades combined with a lack of any outside standards for performing them left the guilds, collectively, largely in control 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 by the Crown from among prominent citizens and were unpaid.²⁹ The Justices of the Peace were directed to consult with “discreet and grave Persons” in order to determine the appropriate local wage rates.³⁰ This task should not have been difficult because the JPs frequently had extensive financial interests in the industries they were supposed to be regulating³¹—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.³² 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.³³

²⁶ 1 Cunningham, *supra* note 18, at 344–46.

²⁷ An Act touching divers Orders for Artificers, labourers, Servants of Husbandry and Apprentices (Statute of Artificers), 5 Eliz., c. 4 (1563).

²⁸ 1 Heckscher, *supra* note 19, at 235–37.

²⁹ On the Statute of Artificers and its general regulatory effect on the guilds, see 1 Cunningham, *supra* note 18, at 250–51; 1 Heckscher, *supra* note 19, at 235, 246–47.

³⁰ 5 Eliz., c. 4, § 15; see 1 Heckscher, *supra* note 19, at 235.

³¹ 1 Heckscher, *supra* note 19, at 248.

³² See, e.g., *id.* at 246–47 (potential for bribery); *id.* at 252 (inefficiency).

³³ Ekelund & Tollison, *supra* note 17, 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

The guilds were used as the instruments of mercantilist regulation and had a major stake in maintaining that authority and the benefits accruing to them from its exercise.³⁴ But they were inherently local in nature. Commerce eventually moved out of the towns and into the countryside, which was not subject to guild control, largely in response to the onerous burdens of guild taxation and regulation.³⁵ When that happened, a substantial amount of England's economic activity was no 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.³⁶

B. 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, Edward 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 the Statute of Monopolies had made them so.³⁷ As Coke himself recognized (if somewhat belatedly),³⁸ outlawing “monopolies” does little to establish the word's definition.³⁹

The term was commonly used in its economic sense: the condition of having a single seller in a particular market.⁴⁰ That condition

points to self-interested acts and rulings on the part of landed and industrialist justices of the peace. See 1 Heckscher, *supra* note 19, at 246.

³⁴ On the use of guilds to effect national regulation, see 1 Cunningham, *supra* note 18, at 441; on their self-interest in maintaining this power, see 1 Heckscher, *supra* note 19, at 235–36.

³⁵ 1 Cunningham, *supra* note 18, 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 *id.* at 455–56.

³⁶ Fox, *supra* note 21, at 125–26.

³⁷ Edward Coke, *The Third Part of the Institutes of the Laws of England* 181 (London, W. Clarke and Sons 1644).

³⁸ See *infra* text accompanying note 184.

³⁹ Coke, *supra* note 37, at 181.

⁴⁰ Fox, *supra* note 21, at 24.

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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.⁴¹ 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,⁴² although the terms also could describe any illegitimate attempt to affect market prices.⁴³

As the exercise of royal authority to bestow exclusive rights on individuals became the subject of debate, the term “monopoly” 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 did so twenty years later:

[A]n 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 freedome, or liberty that they had before, or hindred in their lawfull trade.⁴⁴

Of course, Coke’s rendition is in the context of describing the coverage of the law itself and describes only the grants made illegal under the Statute of Monopolies and common law. 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.⁴⁵ It is little surprise, therefore, that the term came to carry a pejorative and

⁴¹ Cf. *United States v. E.C. Knight Co.*, 156 U.S. 1, 9–10 (1895) (discussing the relationship between grants of monopoly and private monopolization).

⁴² See generally Letwin, *supra* note 15, at 367–69. Contracts in restraint of trade were also unenforceable. *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347, 352 (Ch.).

⁴³ See William Illingworth, *An Inquiry into the Laws, Ancient and Modern, Reflecting Forestalling, Regrating, and Ingrossing* 14 (London, Luke Hansard 1800).

⁴⁴ Coke, *supra* note 37, at 181.

⁴⁵ See John Keay, *The Honourable Company: A History of the English East India Company* 450–56 (1991).

even tautological meaning, “monopolies” being those restrictions and privileges that the speaker considered to be illegal. At the time, the term “monopolies” was used most commonly to describe a set of royal privileges granted to individuals that offered them certain advantages in trade,⁴⁶ although other terms 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” today. To avoid being similarly misleading, I shall refer to the grants at issue collectively as “exclusive trade privileges” since they were all exclusive and pertained to trade. Dealing with the oversimplification requires explanation of the four forms that royal exclusive trade privileges took.⁴⁷

The first was the analog to today’s invention patents: grants to inventors for the exclusive right to use their inventions. During the period, this category would have included equally patents given for the exclusive use of a technology or industry that the recipient had merely imported into England.⁴⁸ As an inducement to undertake the investment of either invention or importation, they were not politically contested and were sanctioned by both the Statute of Monopolies⁴⁹ and the common

⁴⁶ See Fox, *supra* note 21, 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.”); Vernon A. Mund, *Monopoly: A History and Theory* 20–21 (1933). 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.

⁴⁷ For the four categories generally, see 3 E. Lipson, *The Economic History of England* 352–56 (6th ed. 1956); see also D. Seaborne Davies, *Further Light on the Case of Monopolies*, 48 L.Q. Rev. 394, 397–99 (1932) (adding patents of importation to Lipson’s categories).

⁴⁸ See sources cited *supra* note 47; see also E. Wyndham Hulme, *The History of the Patent System under the Prerogative and at Common Law*, 16 L.Q. Rev. 44, 52 (1900). Indeed, providing an incentive for importation was frequently a more significant motive than invention. Christine MacLeod, *Inventing the Industrial Revolution* 11 (1988).

⁴⁹ Statute of Monopolies, 21 Jam., c. 3 (1624).

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law.⁵⁰ The second class of privileges, which I refer to as “non obstante grants” or “exemptions from regulation,” were just that: exceptions from the force of other laws.⁵¹ For example, while the Navigation Laws required the use of English shipping for English trade, Henry VIII granted exemptions as a source of revenue “so frequently that the law became a dead letter.”⁵² 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.⁵³ The third category—which I call “delegations of regulatory authority”—were patents granting the right to *super-vise* rather than practice a particular trade. Sir Walter Raleigh, for instance, was given the sole authority to license taverns.⁵⁴ Finally, the fourth kind were common trade monopolies: exclusive rights to practice a trade whose justification depended either on grounds unrelated to the trade’s novelty to England⁵⁵ 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, could include the right to grant the exemption to others, converting them essentially into delegations of regulatory authority.⁵⁶ A slightly different, but closely related, form was the patent for the right to collect fines for violations of trade regulations. In practice those patents were 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 transfer-

⁵⁰ See *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (Ch.). Modern academics frequently distinguish between patents granted as a reward for invention and those granted as a reward for loyalty to the crown, but the common law did not draw so harsh a distinction. Patents given as a reward for past labor or sacrifice were at least theoretically proper. See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History*, 52 *Hastings L.J.* 1255, 1275 (2001).

⁵¹ See Fox, *supra* note 21, at 64–65.

⁵² 1 Cunningham, *supra* note 18, at 490.

⁵³ See William Hyde Price, *The English Patents of Monopoly 9–14* (1913).

⁵⁴ See 2 Cunningham, *supra* note 18, at 301–03.

⁵⁵ 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. *Darcy*, 77 Eng. Rep. at 1261–62.

⁵⁶ See, e.g., Price, *supra* note 53, at 13–14 (discussing the patent for the power to grant exemptions to the statutorily dictated means of tanning leather).

able non obstante grants.⁵⁷ 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.⁵⁸ A non obstante grant of exemption to a universal prohibition of some trade practice, such as the import or export of a particular commodity, created in its bearer an effective trade monopoly in the otherwise prohibited article.⁵⁹ 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,⁶⁰ and also contained a non obstante clause allowing Darcy to avoid the long-standing statutory prohibition against their import.⁶¹

The one operative similarity shared by the 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.⁶² 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—

⁵⁷ See, e.g., *id.* at 12–13 (discussing the patent for the right to collect fines for the use of prohibited gig-mills).

⁵⁸ Fox, *supra* note 21, at 42.

⁵⁹ One of the earliest challenges to royal trade privileges, for instance, was for a “monopoly” held in the form of an exclusive non obstante grant exempting the holder from the statutory prohibition against selling sweet wines in London. *Peche's Case* (Parl. 1376), *cited in Darcy*, 77 Eng. Rep. at 1266; Letwin, *supra* note 15, at 356–58; see also J.W. Gordon, *Monopolies by Patents* 33 (1897) (noting the ability to use “dispensations” to create monopolies).

⁶⁰ *Darcy*, 77 Eng. Rep. at 1260–61.

⁶¹ See Jacob I. Corré, *The Argument, Decision, and Reports of Darcy v. Allen*, 45 *Emory L.J.* 1261, 1305–06 (1996).

⁶² 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 among them.

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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.⁶³ 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 the same economic outcomes (in terms of both rents and prices) as would 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.

II. *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 granting Darcy 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 basis for the outcome was that a monopoly in a formerly available commodity was void 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. The royal prerogative did not extend to the making of such grants.⁶⁴ *Darcy* was a landmark 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 *Darcy* signal the death of exclusive trade privileges or trade monopolies; courts (common-law and conciliar) upheld those institutions for decades to follow. Rather, *Darcy*’s significance is as evidence of an important political compromise between the Crown and Parliament over the exercise of royal authority.

⁶³ Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987); see also Unwin, *supra* note 25, at 295–97 (providing several examples of cases in which delegations of regulatory authority were used to simulate trade monopolies); Harold Demsetz, Why Regulate Utilities?, 11 J.L. & Econ. 55, 65 (1968). Indeed, one of Edward Darcy’s early exploits was to secure a patent to search leather in London, which he planned to use to extract rents from craftsmen in the leather trades. *Id.* at 256–58.

⁶⁴ *Darcy*, 77 Eng. Rep. at 1262–64.

A. 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.⁶⁵ 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 discussion of Parliament's contribution to crown revenues, Robert 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 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.⁶⁶

Others quickly jumped on 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)⁶⁷ that required redress, and a committee was formed to consider items of reform. This is the first time in recorded history that the subject of royal trade privileges was expressly tied to that of the subsidy. Just how sensitive a topic Bell had raised became clear three days later, when Elizabeth responded to his suggestion

⁶⁵ The monopoly was originally granted to Ralph Bowes and Thomas Bedinfield. After Bowes died, it was reissued to Darcy. Davies, *supra* note 47, at 399.

⁶⁶ Simonds D'Ewes, *A Compleat Journal of the Votes, Speeches and Debates, both of the House of Lords and House of Commons Throughout the Whole Reign of Queen Elizabeth of Glorious Memory 158* (Scholarly Resources 1974) (1693). The monopolies question had also been raised in 1566, 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 *id.* at 115–16.

⁶⁷ *Id.* at 158. Bell's questioning of the prerogative was, unlike the other complaints raised that day, omitted from the *Journal of the House of Commons*. *Id.*

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by admonishing the Commons to “spend little Time in Motions, and to avoid long Speeches.”⁶⁸

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 nothing,⁶⁹ but they were at the very least discussed in committee. After the discussion, the Commons voted to present a “Note” to the Queen seeking “her Highness[’s] most gracious care and favour, in the repressing of sundry inconveniences and abuses practiced by Monopolies and Patents of priviledge.”⁷⁰ 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 was a set and penned Speech, made at a Committee.”⁷¹ 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. Even more remarkable (and likely indicative of what was going on outside of Parliament⁷²) was Elizabeth’s response, which was considerably more solicitous than it had been in 1571:

⁶⁸ 1 H.C. Jour. 83 (April 10, 1571). 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 Licenses granted by her Majesty, to do certain matters contrary to the Statutes, wherein he seemed (as was said) to speak against her Prerogative.” D’Ewes, *supra* note 66, at 159; see also 4 Parl. Hist. Eng. 154 (1571).

⁶⁹ Compare Price, *supra* note 53, at 20, and 4 Parl. Hist. Eng. 416 (Nov. 8, 1597) (discussing a draft bill), and D’Ewes, *supra* note 66, at 554 (discussing, on November 9, 1597, a motion “delivered yesterday” by Francis Moore), with Heywood Townshend, *An Exact Account of the Proceedings of the Four Last Parliaments of Queen Elizabeth of Famous Memory* 103 (London 1680) (showing how, on November 9, 1597, the committee being chosen was postponed on Cecil’s request and no further mention of the committee was made during that Parliament).

⁷⁰ D’Ewes, *supra* note 66, at 573 (report by Francis Moore on December 14, 1597, of the committee’s product with a vote to present it to the Queen).

⁷¹ 4 Parl. Hist. Eng. 419 (Feb. 9, 1598).

⁷² On the depressed industrial conditions of the time, which placed pressure on the monopolies, see 4 William Holdsworth, *A History of English Law* 347 (3d ed. 1945).

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.⁷³

Elizabeth's response—a suggestion that Parliament might have the 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.⁷⁴

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. Orders from the Privy Council and the Star Chamber prevented common-law courts from exercising jurisdiction over patent cases.⁷⁵ Monopolies were brought up early 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 20,⁷⁶ 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.⁷⁷ There was, however, real concern over whether the Commons should be considering legisla-

⁷³ 4 Parl. Hist. Eng. 420 (Feb. 9, 1598).

⁷⁴ Tanner, *supra* note 16, at 5–6.

⁷⁵ 4 Holdsworth, *supra* note 72, at 347–48.

⁷⁶ 4 Parl. Hist. Eng. 452 (Nov. 20, 1601). The bill was first mentioned on November 18, but the Speaker had cut off the discussion. Townshend, *supra* note 69, at 224.

⁷⁷ 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 Commons so vote. 4 Parl. Hist. Eng. 459–60 (Nov. 20, 1601).

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tion 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.⁷⁸ 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.⁷⁹ 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,⁸⁰ 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 attention⁸¹ and expressing her astonishment "[t]hat my Grants should be grievous to my People, and Oppressions to be privileged under Colour of our Patents,"⁸² 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. This time, however, that promise was made in the more tangible form of a royal proclamation, and was reinforced by a concomitant promise to issue no more writs of assistance staying cases in common-law courts.⁸³

⁷⁸ Id. at 455–68.

⁷⁹ Id. at 452 (Nov. 20, 1601) (statement of Spicer).

⁸⁰ Id. at 457 (statement of Francis Moore); id. at 458 (statement of George Moore); id. at 464 (Nov. 23, 1601) (statement of Spicer).

⁸¹ Id. at 480 (Nov. 30, 1601) (speech of Elizabeth).

⁸² Id. at 481.

⁸³ The substance of the proclamation was communicated to the Commons through the speaker and promised "that some should be presently 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." Id. at 469 (Nov. 25, 1601). 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' laws of this realm, any matter or thing 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* 2 *Tudor Royal Proclamations* 235, 237 (Paul L. Hughes & James F. Larkin eds., 1969). There is no specific mention in the proclamation of suspending the grants themselves, only their

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.⁸⁴ By bending in this way, Elizabeth not only avoided (at least for a time) a direct confrontation over the monopolies problem, but she was also able to placate Parliament without even conceding that the prerogative was subject to parliamentary authority.⁸⁵ The members of the House of Commons, for their part, were gratified to see the Queen respond to their as yet unspoken entreaties.⁸⁶ They voted a record subsidy five days later.⁸⁷ 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)."⁸⁸ The offending writs of assistance had similarly been obtained "upon like false suggestions."⁸⁹ 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 of one of the minor patents Elizabeth had not cancelled—the one for playing cards—by making his own,⁹⁰ which in turn prompted the holder of that patent to sue him for in-

enforcement outside of the common-law courts. Elizabeth followed the proclamation with her own speech to the Commons. See 4 Parl. Hist. Eng. 479–82 (1601); D'Ewes, *supra* note 66, at 659–60 (Nov. 30, 1601).

⁸⁴ Fox, *supra* note 21, at 79; 4 Holdsworth, *supra* note 72, at 348–49.

⁸⁵ 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 Price, *supra* note 53, at 158.

⁸⁶ *Id.* at 22.

⁸⁷ 4 Parl. Hist. Eng. 478, 483 (the Queen's speech was given on November 30, 1601; the vote was taken on December 5, 1601).

⁸⁸ Price, *supra* note 53, at 156.

⁸⁹ *Id.*

⁹⁰ See *id.* at 22–23.

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fringement 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.

B. Exclusive Trade Privileges in the Common Law

Although *Darcy* has become an historically important case, its status should not be attributed to its purported reasoning. Coke's report of the case, by far the dominant one,⁹¹ 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.⁹² Indeed, it appears that, in his zeal, Coke likely raised and resolved against the Crown an issue—whether the Crown can grant exemptions to statutory import restrictions—that did not come up at all.⁹³ That is not to say that Coke's report of *Darcy* is affirmatively wrong. The case did con-

⁹¹ The case was reported by three reporters: Coke, Moore, and Noy. Noy's report included only the arguments by Nicholas Fuller, whose arguments on monopolies and the reach of the king's prerogative were by far the most radical made during the case. Corr , supra note 61, at 1265, 1300. And Noy, like Coke, was extremely anti-monopoly. He was a co-sponsor in 1621 of a predecessor to the Statute of Monopolies. MacLeod, supra note 48, at 18. Moore's report, which was originally issued in Law French, has yet to appear in an authoritative English translation, although Gordon had it translated to create his own report of *Darcy* that is an amalgam of Coke, Noy, and Moore's reports. See Gordon, supra note 59, at 199–232. As pieced into Gordon's revised report, Moore's report ignored the argument (Fuller's) that Coke eventually put into the mouths of the justices and that, over time, has become the popular (mis)understanding of *Darcy*. Id. at 199.

⁹² Corr , supra note 61, at 1267–71. After reciting the allegations of the complaint (which were in all material aspects admitted), Coke's report spends 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 to the contrary by the defendant's counsel, and resolved by Popham, Chief Justice, *et per totam Curiam . . .*" See *Darcy*, 77 Eng. Rep. at 1262. Coke made no distinction between the arguments of the defendants and the (undisclosed) reasoning of the court.

⁹³ Paul Birdsall, "Non Obstante" —A Study in the Dispensing Power of English Kings, in *Essays in History and Political Theory in Honor of Charles Howard McIlwain* 37, 61–62 (Carl Wittke ed., 1936); Corr , supra note 61, at 1305–08. Coke was criticized for the time and, with regard to this second question, he actually retracted it. Birdsall, supra, at 62.

clude 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.⁹⁴ 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.⁹⁵

For the two hundred years following *Darcy*, exclusive trade privileges based in custom or confirmed by statute were routinely upheld by common-law courts.⁹⁶ *Darcy* and the cases that followed were an assault on the monarchy, not on exclusive trade privileges.⁹⁷

But royal privileges did not always lose.⁹⁸ Courts generally upheld privileges supported by patents if the privilege was also supported by custom or Act of Parliament, and I have yet to find a case striking a trade privilege supported by statute.⁹⁹

⁹⁴ Chartered towns (guilds) 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, *supra* note 18, at 219.

⁹⁵ The Case of the City of London (*Wagoner's Case*), (1610) 77 Eng. Rep. 658, 663 (K.B.) (footnote omitted).

⁹⁶ 1 Heckscher, *supra* note 19, at 284–86.

⁹⁷ Letwin, *supra* note 15, at 366.

⁹⁸ See *East-India Co. v. Sandys*, (1685) 10 St. Tr. 371 (K.B.); see also *The Company of Merch. Adventurers v. Rebow*, (1687) 87 Eng. Rep. 81 (K.B.) (upholding the Merchant Adventurers' exclusive foreign trade privileges).

⁹⁹ The closest is *Dr. Bonham's Case*, (1610) 77 Eng. Rep. 646, 657–58 (K.B.), 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. A strong reading of *Dr. Bonham's Case* puts Coke, as in *Darcy*, in the position of overreaching considerably in his approach to the case as part

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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 from modern arguments. Following the mercantilist economic thought of the time, the primary harm from monopolies, for instance, was largely identified as 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.¹⁰⁰

Perhaps the most sweeping concept appearing in the cases, and certainly the most relevant to the American experience, is the steady reference (in somewhat varying language) to the “liberty of the subject” 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.”¹⁰¹ Reference to the same concept—as enshrined in the common law—is one of the most consistent features of litigation of the period.¹⁰² But, while the

of his longstanding attack on the Crown and on monopolies more generally. There is no apparent legal basis for Coke’s willingness to question Parliament’s ability to regulate without interference from the common-law judges, see Harold J. Cook, *Against Common Right and Reason, in Law, Liberty, and Parliament: Selected Essays on the Writings of Sir Edward Coke* 127, 146–47 (Allen D. Boyer ed., 2004), a point on which Coke was attacked at the time. Louis A. Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* 149 (1977). See also *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 65–66 (1872) (distinguishing between royal and parliamentary monopolies). The prevalent modern, weak reading of the case is that Coke read the statute strictly but without implicating Parliament’s authority. Corinne C. Weston, *England: ancient constitution and common law*, in *The Cambridge History of Political Thought 1450–1700*, at 374, 389 (J.H. Burns ed., 1991).

¹⁰⁰ See, e.g., *Darcy*, 77 Eng. Rep. at 1262–63; *Davenant v. Hurdis* (The Merchant Tailors’ Case), (1599) 72 Eng. Rep. 769 (K.B.), *translated in* Fox, *supra* note 21, at 312 (argument of Moore); William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 28 (1965).

¹⁰¹ *Darcy*, 77 Eng. Rep. at 1262–63.

¹⁰² See, e.g. *Raynard v. Chase*, (1756) 97 Eng. Rep. 155, 157 (K.B.) (opinion of Mansfield, C.J.) (the Statute of Artificers should be read restrictively because, among other reasons it is in “restraint of natural right” and “it is contrary to the general right given by the common law of this kingdom”); *Sandys*, 10 St. Tr. at 523 (opinion of Jeffries, C.J.) (the right to manufacture “remain[s] with the most liberty by the common law” compared to the right to conduct inland or foreign trade, which are pro-

concept's rhetorical appeal made it popular among lawyers, it seems to have done no 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.¹⁰³ 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.

Even if the liberty of the subject had had traction in the seventeenth- and eighteenth-century English cases, there are reasons why this general 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.¹⁰⁴ The importance of that liberty has to be considered in context—in an industrial system with extremely limited employment mobility. 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, most workers could not move to another city in response to the granting of a new exclusive trade privilege.¹⁰⁵ 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

tected to declining degrees); *Mayor of Winton v. Wilks*, (1705) 92 Eng. Rep. 247, 248 (K.B.) (argument for defendant) (noting that "every man at common law might use what trade he would without restraint"); *The Case of the Tailors &c. of Ipswich*, (1614) 77 Eng. Rep. 1218, 1220 (K.B.) ("[W]ithout an Act of Parliament, none can be in any manner restrained from working in any lawful trade."); *The Chamberlain of London's Case*, (1590) 77 Eng. Rep. 150, 150 (K.B.) (argument of defendant).

¹⁰³ *Wagoner's Case*, 77 Eng. Rep. at 664; Letwin, *supra* note 100, at 29–30.

¹⁰⁴ See Timothy Sandefur, *The Right to Earn a Living*, 6 *Chap. L. Rev.* 207, 214–17 (2003) (describing Coke's outsized understanding of economic liberty).

¹⁰⁵ Letwin, *supra* note 15, at 375. 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. See 1 *Cunningham*, *supra* note 18, at 345–46.

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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 could turn to other industries requiring machinists. Nor do the sorts of intellectual property rights that any modern, representative government would realistically award pose a threat of handing entire industries over to monopolists.¹⁰⁶

If liberty-of-the-subject arguments could be sensibly made in modern intellectual property debates, it is not clear that anyone opposing the expansion of intellectual property 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.”¹⁰⁷ There was no concern for the right for anyone to *become* a playing-card maker; it was understood that only the rights of the *current* playing-card makers 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 Crown “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 lawfull trade.”¹⁰⁸ 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 (although it is certainly true that the common law was obsessed with the use of

¹⁰⁶ Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 *Vand. L. Rev.* 1727, 1730–31 (2000).

¹⁰⁷ See Noy’s report of Fuller’s argument in *Darcy v. Allin*, (1603) 74 *Eng. Rep.* 1131, 1137 (K.B.). Coke appears to have overreached in this portion of his report of *Darcy* as well: 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*, 77 *Eng. Rep.* at 1263 (citing *Davenant*, 72 *Eng. Rep.* at 769). That interest, unlike the one identified by Fuller, does not appear to have been taken up in later cases.

¹⁰⁸ Coke, *supra* note 37, at 181; see Mossoff, *supra* note 50, at 1263.

custom as the basis for legal rules more generally).¹⁰⁹ Right or wrong, custom always meets 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,¹¹⁰ 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.”¹¹¹ But the same argument was used to uphold not only importation patents—which were not treated any differently than invention patents under the common or statute law¹¹² but are treated differently as a matter of American constitutional law¹¹³—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.¹¹⁴ While the absence of any right to engage in foreign trade might be a harder sell under the American constitutional scheme, it is easy to come up with more likely examples. There is no established right to manufacture or sell pharmaceuticals in the United States, for instance.¹¹⁵ 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

¹⁰⁹ Howell A. Lloyd, *Constitutionalism*, in *The Cambridge History of Political Thought 1450–700*, supra note 99, at 254, 271–72.

¹¹⁰ E.g., Lee, supra note 11, at 112–13.

¹¹¹ *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347, 350 (Ch.).

¹¹² See supra text accompanying notes 48–50.

¹¹³ U.S. Const. art. I, § 8, cl. 8; see Alexander Hamilton, *The Report on the Subject of Manufactures (1791)*, reprinted in 10 *The Papers of Alexander Hamilton* 230, 296–309 (Harold C. Syrett ed., 1966) (proposing importation patents but acknowledging their dubious constitutional status).

¹¹⁴ *East-India Co. v. Sandys*, (1685) 10 St. Tr. 371, 542–43 (K.B.).

¹¹⁵ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–397 (2000) (amended 2005).

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patents to someone other than authors and inventors, which few commentators or courts would accept as legitimate under current conceptions of intellectual property.

Rather than liberty of the subject, the concept that appears to have done the most analytical work was the requirement that trade privileges must benefit the public to be valid. 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.¹¹⁶ In 1599 in *Davenant v. Hurdis*, Coke argued successfully that, in 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."¹¹⁷ During the period, the most commonly deployed justification for guild or company privileges was the public benefit flowing from their regulation of commerce.¹¹⁸ 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, but 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.¹¹⁹ 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?"¹²⁰ The discretionary

¹¹⁶ 77 Eng. Rep. at 151 (footnotes omitted).

¹¹⁷ Fox, supra note 21, at 312 (translating from Law French *Davenant*, 72 Eng. Rep. at 769).

¹¹⁸ See Sir Thomas Hardres, Reports of Cases 53–59 (Dublin, Henry Watts 2d ed. 1792) (reporting on *Hays v. Harding* (1656)).

¹¹⁹ See *Darcy*, 77 Eng. Rep. at 1261–62. According to this line of argument, the reduction of card playing was a public benefit in its own right, but the recreational nature of card playing also subjected it to the prerogative. Id; see also Corr e, supra note 61, at 1298–1302.

¹²⁰ *Sandys*, 10 St. Tr. at 513 (Williams's argument for plaintiff).

exercise of royal prerogative was a *necessary* component of the monopoly, but there was no pretense of its *sufficiency* 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.”¹²¹

C. 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 proclamation itself mentioned the common-law standard,¹²² 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: “[I]f the Judges do find the Privilege good, and beneficial to the Common-Wealth, they then will allow it, otherwise disallow it.”¹²³ 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.¹²⁴ *Darcy* did not break any new legal ground; the legal rule was already in place and well understood. The reality, though, was

¹²¹ Id. at 518 (opinion of Withins, J.) (“[I]f it happen to be of advantage to the public, as this trade is; then it ceases also to be against the prohibiting part of the law, and so not within the law of Monopolies.”).

¹²² The proclamation declared with regard to the monopolies “that some should be presently 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*.” 4 Parl. Hist. Eng. 469 (Nov. 25, 1601) (emphasis added).

¹²³ Id. at 454–55 (Nov. 20, 1601) (statement of Francis Bacon). 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 (Nov. 23, 1601).

¹²⁴ That is, she was not 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 void,” Id. at 465–66 (Nov. 23, 1601), 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. Moreover, the possibility of divergence between the Queen’s interest and the public’s was well-developed enough at the time that she could not argue that lucre for the Crown itself qualified as a public benefit. Lloyd, *supra* note 109, at 262; see *The Case of the King’s Prerogative in Saltpetre*, (1606) 77 Eng. Rep. 1294, 1295 (K.B.).

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that the established common-law doctrine 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. Free trade and the rule of law coincidentally advanced in the early seventeenth century, but their mutual advance was not a product of *Darcy*—rather, *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.¹²⁵ It is virtually inconceivable that the English common-law courts, whose political position has never been as strong as that occupied by American ones, could have intervened to deny the Crown access to monopolies as a source of rents.¹²⁶ 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 1615.¹²⁷ During the parliamentary debates over monopolies in 1614, for example, Francis Moore cited several cases to demonstrate the limits on the prerogative to grant monopolies, and while he mentioned *John the Dyer*¹²⁸ and *Dr. Bonham's Case*,¹²⁹ he did not mention *Darcy*.¹³⁰ Elizabeth died less than two years after she issued the Proclamation of 1601, and the new monarch ascended, a monarch who was not willing to give up on the monopolies question so easily. In the eighty years following *Darcy*, only a handful of cases actually reached the common-law courts, restricting the impact of the rule applied in the case. James I's attempt to re-take the ground that Elizabeth had

¹²⁵ See Michael J. Klarman, Rethinking the Civil Rights and Civil Liberties Revolutions, 82 Va. L. Rev. 1, 2–6 (1996) (questioning whether courts actually perform a “heroic counter-majoritarian function”).

¹²⁶ See Lloyd, *supra* note 109, at 276 (pointing out that, while some contemporary legal thinkers may have thought the king's authority subject to the common law or custom, it was not widely believed that those obligations were institutionally enforceable).

¹²⁷ Corr e, *supra* note 61, at 1262.

¹²⁸ Case of John the Dyer, *cited in* The Case of the Tailors & Co. of Ipswich, (1614) 77 Eng. Rep. 1218, 1219 (K.B.).

¹²⁹ (1610) 77 Eng. Rep. 646 (K.B.).

¹³⁰ 1 H.C. Jour. 472 (May 4, 1614).

ceded would eventually lead to the seventeenth century's next great innovation in trade regulation: the Statute of Monopolies.

III. THE STATUTE OF MONOPOLIES AND THE POLITICS OF ECONOMIC REGULATION

A. Introduction: Latent Political Conflict in the Early Seventeenth Century

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 shifting from a barter to a cash economy.¹³¹ While the move to a cash economy and the perceived need for a large royal treasury increased the Crown's need for specie, 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), reduced dramatically the Crown's income in real money terms.¹³² 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 near-universal adoration of his predecessor. James's policies in many areas generated tension. 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 foreign policy of engagement, hoping that a lasting peace with the continental powers would make England a powerbroker among them.¹³³ But doing so led to entanglements with the Spanish, including an ill-fated plan to marry his son Charles to the Catholic Infanta Maria Anna of Spain, opening the possibility of a Catholic king of England and giving a popular, domestic immediacy to James's foreign policy, normally an area of little con-

¹³¹ 2 Cunningham, *supra* note 18, at 1–5.

¹³² *Id.* at 170; Tanner, *supra* note 16, at 7–8.

¹³³ Mark Kishlansky, *A Monarchy Transformed: Britain 1603–1714*, at 93 (1996); Tanner, *supra* note 16, at 49–50.

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cern to most citizens.¹³⁴ 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. As the church matured, these questions came to the fore, and James's own views on religion did not coincide with the rising popular view.¹³⁵ Finally, James was either unable or unwilling to follow Elizabeth's model of controlled spending.¹³⁶ The increased financial pressure drove James 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 a particularly destructive cycle of avoidance, distrust, and conflict between Crown and Parliament.¹³⁷

Monopolies were not the only, nor even the primary, source of fiscal dispute. In 1608, James increased impositions¹³⁸ 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 and to submit to parliamentary consent for future increases, while Parliament agreed to make up the difference. Before the deal was finalized, James dissolved the parliament.¹³⁹ The question of impositions

¹³⁴ Robert E. Ruigh, *The Parliament of 1624: Politics and Foreign Policy* 8–9 (1971); Tanner, *supra* note 16, at 47–48.

¹³⁵ *Id.* at 11–13, 29–32.

¹³⁶ See *id.* at 8. In 1607, James's court spent more than double (over £500,000) what Elizabeth had spent in a normal year. *Id.*

¹³⁷ See Ruigh, *supra* note 134, at 4; Tanner, *supra* note 16, at 8–9; see also Price, *supra* note 53, 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).

¹³⁸ Impositions were duties, over and above tonnage and poundage, that were ostensibly instituted as protectionist trade measures. Because of their regulatory nature, they had always been considered a matter of prerogative. Tanner, *supra* note 16, at 43. Their use as a revenue source had been recognized by statute, but such use was customarily voted to the king for life shortly after ascending to the throne. Fox, *supra* note 21, at 99. The question came up again during the Addled Parliament of 1614, *id.* at 100, and was finally resolved by the Tonnage and Poundage Act, 16 Car., c. 8 (1641) (Eng.).

¹³⁹ Fox, *supra* note 21, at 98–100; Tanner, *supra* note 16, at 42–45.

dominated the next parliament, too, leading James to dissolve it in two months without obtaining a subsidy.¹⁴⁰

*B. The Assertion of Parliamentary Control
over Economic Regulation*

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,¹⁴¹ 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 James's monopolies than under Elizabeth's. Although fiscal control would have been 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,¹⁴² and suspended the operation of patents issued by Elizabeth, subject to review by the king-in-council.¹⁴³ 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.¹⁴⁴ James appears to have done nothing until the opening of the third session

¹⁴⁰ See *infra* text accompanying note 149.

¹⁴¹ Fox, *supra* note 21, at 99–100.

¹⁴² Price, *supra* note 53, at 25–26.

¹⁴³ 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).

¹⁴⁴ See Fox, *supra* note 21, at 95; Price, *supra* note 53, at 26. For the text of the petition, see *id.* app. VI, at 329. 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*, (1606) 77 Eng. Rep. 1294 (K.B.). The saltpeter industry would receive much mention for the abuses of its executors, but Parliament never seriously challenged the right of the king to take saltpeter.

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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 largely reasserted his right to issue delegations of regulatory authority, non obstante 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.¹⁴⁵ He apparently did none of this, for 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 complained that the promises had not been kept.¹⁴⁶ James responded with 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*, which 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.¹⁴⁷ 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 of the old and some of the new monopolies.¹⁴⁸ 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 House of Lords on the impositions question broke down over what the Lords considered to be an incursion into the royal prerogative to regulate for-

¹⁴⁵ 1 H.C. Jour. 316–18 (Nov. 19, 1606); see Fox, *supra* note 21, at 95; Price, *supra* note 53, at 26–27.

¹⁴⁶ See Fox, *supra* note 21, at 95; Price, *supra* note 53, at 27.

¹⁴⁷ See Fox, *supra* note 21, at 96–97; Price, *supra* note 53, at 27–28. The *Book of Bounty* is reprinted in Gordon, *supra* note 59, at 161–92.

¹⁴⁸ 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 Answers; 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 H.C. Jour. 491 (May 20, 1614) (statement of Sir Edwyn Sands).

eign trade, leading James to dissolve his second parliament in just two months without having obtained a subsidy.¹⁴⁹

The dissolution of this 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 his 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, as James dismissed Thomas Edgerton (who was chary of patents) as Lord Keeper of the Seal and replaced him with the more liberal (and compliant) Francis Bacon.¹⁵⁰ 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 Privy Council.¹⁵¹ Increasingly desperate for revenue, James granted broad supervisory control over whole industries and with it broad powers to search and arrest infringers. These powers were predictably subject to frequent and profound abuse by the patentees, who were commonly unpopular favorites of James and allies of George Villiers (Duke 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 administered that James received very little of the economic rents they generated. James was forced to call Parliament in 1621.¹⁵²

When James’s third parliament met in the spring of 1621, monopolies came up almost immediately and featured prominently in the first session. The Commons appointed a Committee of Grievances that, under Coke’s chairmanship, pursued the monopolies question with particular vigor and reported a bill

¹⁴⁹ See 5 Parl. Hist. Eng. 286–303 (1614); 1 H.C. Jour. 505–06 (June 3, 1614); Fox, *supra* note 21, at 98; Tanner, *supra* note 16, at 46–47.

¹⁵⁰ 4 Samuel R. Gardiner, *History of England* 3, 11 (London, Longmans, Green & Co, 1886); Price, *supra* note 53, at 30.

¹⁵¹ Price, *supra* note 53, at 29 & n.4.

¹⁵² Fox, *supra* note 21, at 102 & n.45; Price, *supra* note 53, at 31–32.

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question with particular vigor and reported a bill against monopolies later that spring.¹⁵³ James's response to early news of the bill's consideration typified his cagey approach to monopolies: he encouraged the attack on monopolies in warmest terms while suggesting in the same breath 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."¹⁵⁴ The exact scope of the bill (for which there is limited legislative history) is unclear. Harold Fox hypothesized that it outlawed trade monopolies, subjected their trial to common-law courts, and prohibited the use of letters patent to excuse violations of statute law.¹⁵⁵ The bill passed the Commons on May 12,¹⁵⁶ but did not pass the Lords, although their objections were not to the core of the bill.¹⁵⁷

Although several patents were attacked or called in for review during the session (with about three dozen "removed" by Commons),¹⁵⁸ 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—Sir Giles Mompesson and Sir Francis Michell—for their abuses in the execution of the three patents.¹⁵⁹ Perhaps recognizing that the impeachments did not attack the va-

¹⁵³ 1 H.C. Jour. 575 (Mar. 25, 1621).

¹⁵⁴ The King's Speech to the Lords, 4 Parl. Hist. Eng. 379 (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.

¹⁵⁵ Fox, *supra* note 21, at 106. It does not appear to have had an exception for invention patents until it reached the conference stage. See *id.*

¹⁵⁶ 1 H.C. Jour. 619 (May 12, 1621). For a detailed discussion of the examination of specific patents in both the 1621 and 1624 parliaments, see Elizabeth Read Foster, *The Procedure of the House of Commons Against Patents and Monopolies, 1621–1624*, in Boyer, *supra* note 99, at 302, 312–17.

¹⁵⁷ 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 H.L. Jour. 177 (Dec. 1, 1621); *id.* at 178–79 (Dec. 3, 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.

¹⁵⁸ Fox, *supra* note 21, at 105–06.

¹⁵⁹ See *id.* at 107–10; Price, *supra* note 53, at 31–33. Mompesson and Michell were essentially proxies for anger toward Buckingham and others who were unreachable for political reasons. *Id.* at 32.

lidity of the patents themselves but rather the manner in which they were carried out, James gave Mompesson and Michell up to punishment without a fight and canceled the three patents.¹⁶⁰ After the session, James issued yet another proclamation, canceling eighteen patents and submitting seventeen to the common law.¹⁶¹

The second session of James's third parliament (in the fall of 1621) was dominated by debate over James's plan to marry his son Charles to Infanta Maria of Spain.¹⁶² Parliament responded to the plan with petition, and James's attempts to squelch the discussion eventually led to the Protestation of December 18, 1621, which asserted Parliament's right to debate the issue.¹⁶³ 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 parliament¹⁶⁴—a somewhat less diplomatic approach than Elizabeth might have taken.¹⁶⁵ Whatever monopolies bill that had been under consideration died with the dissolution of parliament. Some evidence suggests that, even between parliaments, there was resistance to the monopolies; James issued yet another royal proclamation in February of 1623, this time creating a committee to receive complaints about “monopolies, excessive fees, and other matters, and the Proclamation 10 July [1621].”¹⁶⁶

¹⁶⁰ See The King's Speech to the Lords, 4 Parl. Hist. Eng. 376 (Mar. 26, 1621) (confirming the punishment of Mompesson and banishing him from the kingdom); id. at 379 (canceling the patents); 1 H.C. Jour. 576–77 (March 26–27, 1621).

¹⁶¹ A Proclamation declaring His Majesties grace to his Subjects, touching matters complained of, as publique greivances, July 10, 1621, *reprinted in* 1 Stuart Royal Proclamations, supra note 143, at 511, 511. See generally Fox, supra note 21, at 112.

¹⁶² See supra note 134.

¹⁶³ Protestation of December 18, 1621, *reprinted in* 1 Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I, at 313, 313–14 (G.W. Prothero ed., 2d ed. 1898); see also Tanner, supra note 16, at 48–49.

¹⁶⁴ Fox, supra note 21, at 107; Tanner, supra note 16, 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).

¹⁶⁵ James's absolutist approach to monarchy not only generated friction between him and Parliament, but also made compromise difficult for him. In the instances in which he did have to retreat on particular issues, the result was utter rather than partial defeat. See Ruigh, supra note 134, at 7–8.

¹⁶⁶ A Proclamation declaring His Majesties grace to His Subjectes for their reliefe against publique Grievances (Feb. 14, 1623), *reprinted in* 1 Stuart Royal Proclamations, supra note 143, at 568, 568.

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The plan to marry Charles to the Infanta having failed, James called his fourth parliament in anticipation of war with Spain. This parliament's proceedings were consumed largely with matters of supply (which was given readily), diligence against the potential for insurgency by popish "recusants," and impeachment of a high officer for bribery, Lionel Cranfield (Earl of Middlesex), who was Lord Treasurer. But there was also a substantial amount of time given over to matters of "free trade": a committee chaired by Edwin Sandys actively pursued investigations, and many patents were called in by the Commons and examined, with special attention given to the practices of the Company of Merchant Adventurers.¹⁶⁷ The bill that became the Statute of Monopolies was introduced early in the session and sailed through the Commons with very little debate.¹⁶⁸ Ostensibly the same bill had passed the Commons in 1621, but had failed the Lords, so the bill's sponsors (with Coke as their leader) were anxious to get it to the Lords quickly so they could finish the intercameral negotiations they had begun three years earlier.¹⁶⁹

The Lords agreed to the bill in principle, as they had in 1621, but they had a number of concerns about its operation. For instance, they objected that the bill did not define "monopoly" and that it was unclear whether actions against monopolies were to be brought at common law or pursuant to the statute itself.¹⁷⁰ While Coke seems to have allayed such concerns quickly, the Lords were also concerned that the statute might prevent the King from chartering corporations, and they also wanted a series of patents to be exempt from the operation of the statute, prompting protracted

¹⁶⁷ See, e.g., 1 H.C. Jour. 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, *supra* note 21, at 114 (listing many of the patents called in and examined).

¹⁶⁸ See 1 H.C. Jour. 715–16 (Feb. 23, 1624) (first reading in Commons); id. at 680 (Mar. 9, 1624) (report of committee on changes); id. at 685 (Mar. 13, 1624) (act passed the Commons).

¹⁶⁹ 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." Id. at 685 (Mar. 13, 1624).

¹⁷⁰ See id. at 770 (Apr. 19, 1624).

negotiations between the two houses over the exceptions.¹⁷¹ 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 of the final version 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.¹⁷² The exception for corporations, though, he likely thought was redundant.¹⁷³ His original response to the Lords' objection was not to insert the clause, but rather to argue that the statute did not reach the guilds and corporations, an interpretation 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."¹⁷⁴ 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' exclusive trade privileges should be opened up, they considered opening them only to members of the merchant guilds.¹⁷⁵ 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.¹⁷⁶ Indeed, while the Commons considered some elements of the Merchant Adventurers' monopoly problematic, their chosen means of reform was

¹⁷¹ See *id.* at 770–71 (Apr. 19, 1624) (report of seventeen exceptions sought by the Lords; appointment of a sub-committee to negotiate the various exceptions without altering the body of the statute); *id.* at 781–82 (May 1, 1624) (report of the sub-committee on exceptions); *id.* at 788 (May 13, 1624) (same, with appointment of a committee of eight to meet with the Lords).

¹⁷² *Id.* at 781 (May 1, 1624).

¹⁷³ The draft bill written by the Lords in December of 1621 had contained an express exception for corporations, further underscoring Coke's decision not to include an explicit exception in his first 1624 draft. See 3 H.L. Jour. 188 (Dec. 10, 1621). Section 9 as written is even broader.

¹⁷⁴ 1 H.C. Jour. 770 (Apr. 19, 1624).

¹⁷⁵ See *id.* at 790 (May 19, 1624).

¹⁷⁶ See 21 Jam., c. 22, §§ 5–6 (1624).

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through the issuance of a *new royal patent* for the Company.¹⁷⁷ The points of contention between Commons and Lords on the Statute of Monopolies 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, 1624;¹⁷⁸ the Commons approved it on May 25.¹⁷⁹

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 sole buying, selling, making, working or using of any thing” 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 in furtherance of them.¹⁸⁰ Section 2 subjects monopolies and the like to trial “according to the common laws of this realm, and not otherwise.” Section 3 prevents anyone

¹⁷⁷ 1 H.C. Jour. 791 (May 19, 1624).

¹⁷⁸ 3 H.L. Jour. 400 (May 22, 1624).

¹⁷⁹ 1 H.C. Jour. 794 (May 25, 1624).

¹⁸⁰ The statute renders “utterly void and of none effect, and in no wise to be put in [use] or execution”:

[1] all monopolies, and all commissions, grants, licences, charters and letters patents heretofore made or granted, or hereafter to be made 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 by 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 . . .

21 Jam., c. 3, § 1 (1624).

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 *præmunire* (the severity of which was a point of concern among the Lords¹⁸¹) anyone who attempts to have an action at law “stayed or delayed by colour or means of any order, warrant, power or authority, save only by writ of error or attaint.”¹⁸² 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 court would do when confronted with a patent.¹⁸³ Thus Coke’s reply to the Lords’ objection that the statute did not define “monopoly”: This was all a matter for the common-law judges.¹⁸⁴ Sections 5 and 6 contain the exceptions for current and future invention patents.¹⁸⁵ Section 7 excepts grants by Parliament;¹⁸⁶ Section 8 clarifies that the act does not apply to the ability of judges to collect fines in cases they hear,¹⁸⁷ and Sections 9 through 14 provide the previously mentioned exceptions for corporations and some specific patents.¹⁸⁸

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)¹⁸⁹ or he recognized that it was a *fait ac-*

¹⁸¹ See 1 H.C. Jour. 770 (Apr. 19, 1624).

¹⁸² 21 Jam., c. 3, §§ 3–4 (1624).

¹⁸³ See Fox, *supra* note 21, at 118–19 (noting that the statute restated the common law except with regard to the prohibition of stays and the limitation of the term for invention patents).

¹⁸⁴ See 1 H.C. Jour. 770 (Apr. 19, 1624) (“[The Lords] would have had a Description of a Monopoly in the Bill. *Answ.* Definitions, in Law, dangerous; yet well described in the Bill.”).

¹⁸⁵ See 21 Jam., c. 3, §§ 5–6 (1624).

¹⁸⁶ See *id.* § 7.

¹⁸⁷ See *id.* § 8.

¹⁸⁸ See *id.* §§ 9–14.

¹⁸⁹ But see Fox, *supra* note 21, 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, 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.

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compli given his financial circumstances and the Commons' enthusiasm for the bill. James was deeply in 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 Michell 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.¹⁹⁰

Protests continued in and out Parliament.¹⁹¹ In 1641, Parliament abolished the Star Chamber, the most infamous of the conciliar courts and the focal point for judicial enforcement of royal trade privileges,¹⁹² called in and cancelled a number of monopolies,¹⁹³ and declaimed monopolies in the Grand Remonstrance. These assertions of parliamentary authority—only a small part of which related to the royal privileges—were the early steps toward the Civil War.¹⁹⁴ After the Restoration, when the battle for control had been firmly decided in Parliament's favor, royal trade privileges were no longer a useful means for Crown evasion of what had become the

¹⁹⁰ See Fox, *supra* note 21, 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 added); *id.* at 119–24, 131–32; Hulme, *supra* note 48, at 55 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.”); Edward J. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents* (Part 3), 77 *J. Pat. & Trademark Off. Soc’y* 771, 774 (1995) (citing instances in which conciliar courts interfered with common-law actions).

¹⁹¹ See Fox, *supra* note 21, at 127–28 (citing complaints against patents for soap, starch, saltpeter, gunpowder, alum, iron, glass, whale oil or whale fins, latten wire, books and printing, lighthouses, dice, and even playing cards).

¹⁹² An act for the regulating of the privy council, and for taking away the court commonly called the star-chamber, 16 *Car.*, c. 10 (1641). See generally Fox, *supra* note 21, at 140–45.

¹⁹³ Fox, *supra* note 21, at 151–54. Charles himself had cancelled a number of patents in 1639 in anticipation of calling Parliament. *Id.* at 133; Price, *supra* note 53, at 44–45.

¹⁹⁴ See generally Tanner, *supra* note 16.

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.¹⁹⁵ 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.

C. Politics and Free Trade in Seventeenth-Century England

While the Statute of Monopolies had little to do with free-trade ideology, neither was it merely a naked exercise of political power. Although its passage is frequently cited as an important blow in the fiscal power struggle between Parliament and the Crown, that appears unlikely given the context in which it was adopted. Mismanagement meant that the monopolies were not providing James an appreciable stream of revenue for the Statute to interrupt, and the pro-war spirit dominant in 1624 had pushed financial disputes into the background, as evidenced by the ready grant of a subsidy (hardly a given in James’s past parliaments) and Parliament’s failure in 1624 to revisit its compromise with James over impositions, a far more lucrative source of extra-parliamentary revenue. Nor did the problem of subverting Parliament’s authority over taxation receive much attention during any of the debates over monopolies (although modern sensibilities might suggest that relying on what the members of Parliament actually said is simply naïve). Given the relatively amicable state of Crown-Parliament relations over money at the time, combined with the low fiscal impact of the monopolies question, it is hard to view the Statute of Monopolies as an assertion of fiscal control. Even so, the Statute was motivated more by concerns over the allocation of power than it was by the pursuit of free trade.

That the Statute of Monopolies was 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

¹⁹⁵ 2 Cunningham, *supra* note 18, at 201, 205; Fox, *supra* note 21, at 156–57.

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statute declares “all grants and monopolies . . . are contrary to your Majesty’s laws,”¹⁹⁶ parliamentary ones are perfectly legal without reference to the common law.¹⁹⁷ 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, albeit as a byproduct of special-interest politics. 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.

Having lost their stranglehold on trade regulation as the result of competition from rural tradesmen,¹⁹⁸ 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.¹⁹⁹ 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). 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 fighting for society’s right to freely manufacture and use playing cards; it was financed as a test case by the Mayor and Aldermen of the City of London in order to vindicate the livery companies’ own exclusionary trading

¹⁹⁶ 21 Jam., c. 3, pmbl. (1624).

¹⁹⁷ “Provided also . . . That this act or any thing 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.” *Id.* § 7.

¹⁹⁸ See *supra* text accompanying notes 35–36.

¹⁹⁹ 1 Cunningham, *supra* note 18, at 392.

rights.²⁰⁰ 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.²⁰¹ 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 jurisdiction over particular industries. Technological or organizational change could alter the underlying assumptions behind those agreements and created discord within the entire system.²⁰² 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.²⁰³ Many of the technologies introduced from overseas were introduced by foreigners,²⁰⁴ 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.²⁰⁵ Because guilds controlled entire industries, they had control over whether and how any single technology would be applied to that industry.²⁰⁶

²⁰⁰ Davies, *supra* note 47, at 395, 411. The same was also true of *Davenant v. Hurdis*. Letwin, *supra* note 100, at 31.

²⁰¹ See Fox, *supra* note 21, 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, *supra* note 18, 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 power to control trade within three miles of the city. 2 *id.* at 320.

²⁰² 2 Cunningham, *supra* note 18, at 294.

²⁰³ Hulme, *supra* note 48, at 52.

²⁰⁴ See *id.* (showing that twenty-one out of fifty-five patents granted between 1561 and 1603 were granted to foreigners).

²⁰⁵ 2 Cunningham, *supra* note 18, at 79–84.

²⁰⁶ Fox, *supra* note 21, at 42.

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While the guilds were unhappy about the many individual patents handed out during Elizabeth's reign, 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 monarchy, national industrial control.²⁰⁷ James used monopolies in an attempt to either grow²⁰⁸ or control²⁰⁹ 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.²¹⁰ 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.²¹¹ Many of the Stuart trade privileges were motivated by rent-seeking,²¹² 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. Given the regulatory tools available at the time, separating economic from regulatory control was unworkable, and so attempts to award economic control to individuals necessarily entailed giving them regulatory control as well. James's attack on the status quo by shifting regulatory

²⁰⁷ Id. at 81–82; Price, *supra* note 53, at 14–16.

²⁰⁸ 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, *supra* note 18, at 309; Fox, *supra* note 21, at 168–69, 171–72.

²⁰⁹ Instead of relying on government officials to procure saltpeter 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, *supra* note 21, at 169–71. See generally *The Case of the King's Prerogative in Saltpetre*, (1606) 77 Eng. Rep. 1294 (K.B.).

²¹⁰ Fox, *supra* note 21, at 173–74.

²¹¹ 2 Cunningham, *supra* note 18, at 286–87.

²¹² Fox maintains that industrial development was the Stuarts' sole motivation and that "[i]f 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." Fox, *supra* note 21, at 172–73. It is hard to square, though, the monopolies for playing cards and starch with such high-minded motives.

and economic control to individuals consequently led to the union of interests between guilds and Parliament that served as the foundation for the Statute of Monopolies.

D. 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 Nations*.²¹³ Mercantilist economic thinking dictated control over markets, and Parliament accepted its role in legislating that control willingly.²¹⁴

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, capitalists 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.²¹⁵

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

²¹³ See Ekelund & Tollison, *supra* note 17, at 61; Gianni Vaggi & Peter Groenewegen, *A Concise History of Economic Thought* 27 (2002) (“[M]ercantilist views on wealth and on economic policy continued to dominate the scene at the beginning of the eighteenth century.”).

²¹⁴ 2 Cunningham, *supra* note 18, at 18 (noting that in the seventeenth 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, *supra* note 53, at 127–28; Letwin, *supra* note 15, at 363–65.

²¹⁵ 1 Cunningham, *supra* note 18, at 480–81 (internal citations omitted).

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possible; it was that he was operating the monopoly to assure full employment at reasonable wages.²¹⁶

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 among its members as preventing the evils of monopoly.²¹⁷ In this regard, open competition was regarded as aligned 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.²¹⁸ Monopoly was abhorrent, but so was free competition. The ideal was cartel.²¹⁹

Regulated 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 Section 9, which exempted from the statute’s ambit any rights accorded to cities, towns, merchant corporations, or “fellowshipps of any art trade occupacion or mistery” by virtue of custom, charter, or letters patent.²²⁰ 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.²²¹ The tension did not go unnoticed; Bacon, for instance, argued that the 1601 draft bill’s distinction between royal monopolies

²¹⁶ 4 Parl. Hist. Eng. 459–60 (Nov. 20, 1601) (statement of Raleigh); see also 2 Cunningham, *supra* note 18, at 428–29 (describing Walpole’s pro-manufacturer economic policies).

²¹⁷ See John Wheeler, *A Treatise of Commerce*, 204 (G.B. Hotchkiss ed., 1931). See also 1 Heckscher, *supra* note 19, at 381 (discussing the “stints” that limited how much each member of the company could trade).

²¹⁸ 1 Heckscher, *supra* note 19, at 272–73.

²¹⁹ See Fox, *supra* note 21, at 24 n.3; Raymond De Roover, *Monopoly Theory Prior to Adam Smith*, 65 Q.J. Econ., 492, 512 (1951). The view, while prevalent, was not universal. See 1 Heckscher, *supra* note 19, at 273–74 (citing arguments made by Sandys against all exclusive foreign trade privileges as “monopolies”).

²²⁰ 21 Jam., c. 3, § 9 (1624).

²²¹ Fox, *supra* note 21, at 135; Price, *supra* note 53, at 128.

and corporations was arbitrary.²²² But the alternative of free trade, with its price wars, social displacement, and inherent instability was simply out of the question. During the reigns of James and Charles I, Parliament played a largely passive role,²²³ but during the Interregnum, Parliament not only permitted the guilds and corporations to continue, they granted and reissued their charters.²²⁴ After the Restoration, the focus of government involvement in trade shifted from the guilds to regulated and joint-stock companies.²²⁵ 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 and its monopoly on that branch of foreign trade remained a dominant force throughout the eighteenth century.²²⁶

The parliamentary state used trade monopolies in much the same way 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.²²⁷ But Parliament did not support the company merely for its merits as a collection of tradesmen rather than capitalists; the company served as a source

²²² D'Ewes, *supra* note 66, at 645 (Nov. 20, 1601) (statement of Bacon).

²²³ 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, *supra* note 18, at 306–07; Price, *supra* note 53, at 125–27.

²²⁴ For a discussion of parliamentary reissuance of charters for domestic corporations, see 1 William Herbert, *The History of the Twelve Great Livery Companies* 182–83 (1937); G.D. Ramsay, *Industrial Laissez-Faire and the Policy of Cromwell*, 16 *Econ. Hist. Rev.* 93, 96–99 (1946). See also *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 66 (1872) (noting Parliament's willingness to award exclusive rights to companies and guilds).

²²⁵ 1 Heckscher, *supra* note 19, at 411–15. See generally 1 William R. Scott, *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720*, at 263–374 (1968).

²²⁶ See 2 Cunningham, *supra* note 18, at 214–84; 1 Heckscher, *supra* note 19, at 420–24. See also George Cawston & A.H. Keane, *The Early Chartered Companies* 77–78 (London, Edward Arnold 1896); 2 William W. Hunter, *A History of British India* 42 (London, Longmans, Green, and Co. 1900).

²²⁷ Price, *supra* note 53, at 119–25.

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of revenue by administering an excise on soap imposed in 1643.²²⁸ 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.²²⁹ Following the 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 of government debt.²³⁰ 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.²³¹ 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.

While idealism certainly played a role in the different attitude that the Commonwealth and post-revolutionary England had toward the use of exclusive trade privileges, 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. Political rent-seeking is more efficient when there are a small number of regulators (like a monarch or the small Privy Council) than a large one (like rule by Parliament), 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.²³²

Even considering the merits rather than political economics, nationwide exclusive trade privileges 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 monopo-

²²⁸ Id. at 125–26.

²²⁹ Id. at 126–27.

²³⁰ 1 Heckscher, *supra* note 19, at 440–41.

²³¹ 2 Cunningham, *supra* note 18, at 404–05.

²³² Ekelund & Tollison, *supra* note 17, at 44–45.

lies required continuing management and surveillance 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.²³³ Just as its size left it poorly situated to capitalize on the potential for rent-seeking, the parliamentary regime was poorly organized to actually control a national economy, by monopoly or otherwise, on a national level.²³⁴

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 generated by the companies' long-term investments.²³⁵ In addition to serving as designees for government regulation, 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.²³⁶

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

²³³ See *supra* text accompanying note 152.

²³⁴ See 2 Cunningham, *supra* note 18, at 409; Ekelund & Tollison, *supra* note 17, at 84; 1 Heckscher, *supra* note 19, at 295–97.

²³⁵ See *The East India Co. v. Sandys*, 10 St. Tr. 371, 552–53 (K.B. 1685) (Jeffries, C.J.); 2 Cunningham, *supra* note 18, at 189; 1 Heckscher, *supra* note 19, at 405–07.

²³⁶ 2 Cunningham, *supra* note 18, at 221 (trade balance and employment regulations).

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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. 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 ability to control the domestic economy (through control over the town corporations' charters).²³⁷ 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 exclusive trade privileges 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 as no more than 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 scholars. Rather, the Statute of Monopolies is better viewed as an instrument of political reform.

E. A Political Regulatory Order

Of the twenty-nine patents listed in Parliament as grievances in 1601, only seven 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

²³⁷ For a discussion of the use of the charter power in the furtherance of factional political advantage, see generally Paul Halliday, *Dismembering the Body Politic* (1998).

grants or delegations of regulatory authority.²³⁸ When the monopolies issue was raised in 1621, numerous 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 into England of the gold and silver thread industry, which would have been a valid grant even under the Statute of Monopolies.²³⁹ 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.²⁴⁰ Thus, while high prices for staying at inns or patronizing an alehouse received scant mention, there was much talk in Parliament of how the gold-and-silver-thread patentees “ransacked Houses, &c. at their Pleasure”²⁴¹ and, in an attempt to compel tradesmen to comply by joining them, the patentees had imprisoned tradesmen and taken away their tools and goods.²⁴² Similarly, while the need for control over inns and alehouses was

²³⁸ Hulme, *supra* note 48, 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.

²³⁹ See Fox, *supra* note 21, 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 H.C. Jour. 538 (Mar. 5, 1621).

²⁴⁰ 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 *id.* at 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.

²⁴¹ *Id.* at 538 (Mar. 5, 1621).

²⁴² *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).

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not widely contested²⁴³ (the licensing of alehouses and inns was justified by the particular risks such institutions presented²⁴⁴), the patents for their regulation were abused unabashedly.²⁴⁵ 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 to license 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.²⁴⁶ 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.²⁴⁷ It was the implications exclusive trade privileges had for regulation 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.²⁴⁸ 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.²⁴⁹

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 penall Lawes, and the Forfeiture thereof.”²⁵⁰ In

²⁴³ Coke alone argued that no license should be required to keep an inn. See *id.* at 543 (Mar. 7, 1621).

²⁴⁴ Fox, *supra* note 21, at 163–64 & n.8.

²⁴⁵ *Id.* at 107.

²⁴⁶ *Id.* at 187; 1 Heckscher, *supra* note 19, at 253–56.

²⁴⁷ Fox, *supra* note 21, at 72.

²⁴⁸ For example, the Saltpetre Patent, which was also complained of as early as 1601. See 4 Parl. Hist. Eng. 458 (Nov. 20, 1601) (statement of George Moore). See generally Fox, *supra* note 21, at 66–67 & n.33.

²⁴⁹ See Fox, *supra* note 21, at 92–93; Hulme, *supra* note 48, at 54; Letwin, *supra* note 15, at 366–67.

²⁵⁰ 21 Jam., c. 3 (1624).

addition to the legislative history,²⁵¹ 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 be made 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”

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 by 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.²⁵²

Viewing the Statute of Monopolies as an attempt to restrict regulatory authority to governmental 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. The guilds themselves were political institutions and acted in many ways as local governments, rendering their exercise of regulatory authority largely unobjectionable,²⁵³ unlike private regulation by royal favorites. The difficulty in distinguishing between the spheres of guild and municipal government

²⁵¹ See Foster, *supra* note 156, at 319–21 (listing three “grounds” for parliamentary objection to patents: that they created monopolies, that they authorized private dispensation of penal laws, and that their execution was illegal, either as authorized or in practice).

²⁵² See 21 *Jam.*, c. 3, § 8 (1624).

²⁵³ See *supra* text accompanying notes 23–24.

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was so pervasive that it would take a separate act of Parliament, the Municipal Corporations Act of 1835,²⁵⁴ to officially end regulatory control by the guilds and establish separate local governments for English towns and cities.

IV. *DARCY* AND THE STATUTE OF MONOPOLIES REINTERPRETED:
THE ROLE OF POLITICS

Although study of the period is certainly relevant to understanding the development of intellectual property,²⁵⁵ the intellectual legacy of *Darcy* and the Statute of Monopolies to American law runs not to modern theories about intellectual property (or trade more generally) but rather to those regarding the proper boundaries between the private and governmental spheres. Whatever theories about intellectual property the era has to offer have found painfully little traction within the American constitutional scheme, which presupposes an underlying system of free, rather than controlled, trade.²⁵⁶ But the political intuitions that prompted opposition to the vesting of regulatory authority in private hands, and in turn led to the Statute of Monopolies, have been a constantly reinforced theme within American constitutional law.

A. *The American Experience with Delegations of Regulatory Authority*

In March of 1869, the Louisiana legislature passed a statute incorporating and granting a twenty-five-year slaughterhouse monopoly to the Crescent City Live-stock Landing & Slaughter-house Company. Excluded butchers immediately challenged the statute as “void” under the common law for violating the rule of *Darcy*²⁵⁷ and in violation of both the Thirteenth and Fourteenth Amendments.²⁵⁸ The Supreme Court upheld the grant in the face of a dissent premised in large part on the universality of “the right to pur-

²⁵⁴ 5 & 6 Will. 4, c. 76 (1835).

²⁵⁵ See *infra* Part V.

²⁵⁶ See *supra* the text accompanying notes 101–115.

²⁵⁷ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 48–49 (1872) (argument of Campbell and Fellows).

²⁵⁸ *Id.* at 49–57.

sue a lawful employment in a lawful manner”²⁵⁹ as exemplified by *Darcy* and the Statute of Monopolies.²⁶⁰ In 1879, however, Louisiana adopted a new constitution that abolished all existing monopolies and prohibited the use of monopolies as a means to regulate the slaughter of livestock. The holders of the monopoly challenged the constitutional repeal of the statutory monopoly as a violation of the Contracts Clause.²⁶¹

The claim was hardly frivolous. As early as 1810, the Supreme Court had held that states were prohibited by the Constitution from reneging on executed land grants,²⁶² a prohibition that had been extended to grants of corporate charters²⁶³ and even grants of exclusive commercial rights²⁶⁴ in the decades since.

But just as well established was an inherent limitation on the power of governments to make such grants: government could not grant to private entities the power to regulate. The limitation began as a necessarily implied reservation. States could grant away many privileges and rights, but the one power that states could not grant away was the power to resume such grants with just compensation—the power of eminent domain.²⁶⁵ In the years leading up to *Butchers’ Union* and culminating in *Stone v. Mississippi*, the doctrine evolved to include the right of governments to cancel, without compensation, any grant whose exercise touched upon public health or morals.²⁶⁶ The underlying justification was the same as in

²⁵⁹ *Id.* at 97 (Fields, J., dissenting).

²⁶⁰ *Id.* at 104.

²⁶¹ *Butchers’ Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 748–49 (1884).

²⁶² See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (finding the restriction to be “either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States,” found in Article I, Section 10, including the prohibitions against bills of attainder, ex post facto laws, and impairments of the obligation of contracts). The rule came to be based on the Contracts Clause alone. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 698 (1819).

²⁶³ See *Dartmouth College*, 17 U.S. (4 Wheat.) at 700.

²⁶⁴ See *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 531 (1848). See generally *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 419 (1837).

²⁶⁵ *West River Bridge*, 47 U.S. at 531–32.

²⁶⁶ See *Stone v. Mississippi*, 101 U.S. 814 (1879) (constitutional repeal of lottery franchise statute); *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878) (village ordinance banning carriage of offal, in contravention of corporate charter granting franchise to convert dead animals into fertilizer); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1877)

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both the eminent-domain and public-health-and-morals contexts: Contracting away the ability to exercise such powers would effectively place necessary elements of sovereignty outside of government control, and only governments can exercise sovereignty.

[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must “vary with varying circumstances.”²⁶⁷

When *Butchers’ Union* came up for decision, the *Slaughter-House* dissenters resuscitated the same anti-monopoly arguments (again based in part on *Darcy* and the Statute of Monopolies) to suggest that the grant was void in the first instance,²⁶⁸ but the majority decided the case by a far less controversial, straightforward application of *Stone*: While Louisiana had the power to grant the monopoly, it did not have the power to make it irrevocable, and thus the revocation was not an abrogation of the state’s contract with the (former) monopolists.²⁶⁹

The constitutional interest in separating government from private action has only strengthened over time. The rule that governments must be able to revoke grants that contract away essential elements of sovereignty—the “reserved powers doctrine”—lives on to this day, and applies to both the federal and state govern-

(prohibition law upheld in the face of an earlier corporate charter allowing the production of beer); *Boyd v. Alabama*, 94 U.S. 645 (1876) (statutory repeal of lottery franchise).

²⁶⁷ *Stone*, 101 U.S. at 820; see also *West River Bridge*, 47 U.S. at 531 (“[I]t cannot be justly disputed, that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large.”).

²⁶⁸ *Butchers’ Union*, 111 U.S. at 761–64 (Bradley, J., concurring); *id.* at 755–56 (Field, J., concurring).

²⁶⁹ *Id.* at 752–54.

ments.²⁷⁰ But it has also expanded. In 1936, the Supreme Court held in *Carter v. Carter Coal Co.*—as not even a close question—that giving a super-majority of coal producers the power to set maximum hours for all coal producers in a particular area was a violation of the Fifth Amendment’s Due Process Clause.²⁷¹ The same principle that originally suggested a right of governments to recoup their grants had become the basis for an individual right to *prevent* governments from making grants of regulatory authority.

That principle, that regulatory authority must be limited to politically legitimate bodies, is the same one embodied in the Statute of Monopolies. I do not mean to suggest that the nineteenth-century American cases establishing that certain governmental functions cannot be privatized are direct descendants of the Statute of Monopolies, or that the movement leading to the Statute of Monopolies was the first time such ideas were used to shape public institutions. Rather, my claim is that both the seventeenth-century British politics and nineteenth- and twentieth-century American caselaw were motivated by common, near-universal intuitions about the separation between governmental and private spheres.

The economic implications of shifting regulatory authority to private actors is frequently controversial and is in some measure contingent on the particular circumstances of the grant (or of the industry in which it is exercised), but the political illegitimacy of doing so is largely self-evident, and depends little on the economic effects of the delegation being challenged. Just as the supporters of the Statute of Monopolies did not need to establish that the alehouse monopoly had resulted in higher ale prices in order to demonstrate the illegitimacy of vesting alehouse regulation in private hands, the Supreme Court did not distract itself in *Carter Coal* by

²⁷⁰ See *United States v. Winstar*, 518 U.S. 839, 874–75 (1996) (collecting cases); *id.* at 888–89 (applying the reserved powers doctrine to a promise made by the federal government).

²⁷¹ *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (“The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.”); see also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (dismissing as not “seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups” and thus examining the delegation as one to the executive branch); *Eubank v. City of Richmond*, 226 U.S. 137, 143–44 (1912) (striking down city ordinance delegating the power to set building lines to a super-majority of the local property owners).

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considering whether the power to set maximum work hours was actually being used to generate supra-competitive rents for those who exercised it. Of course, the statute's political ideal of legitimacy requires some translation; the oligarchic guilds that were politically legitimate in a mercantilist monarchy no longer would be in a capitalist republic. But the ideals themselves have always been close to the core of western notions of legitimate government, unlike any of the economic policies or rhetoric surrounding *Darcy* and the Statute of Monopolies. While representative socialism, and its attendant government control of the economy, is hardly appealing, it is a more viable fit with the federal Constitution than a system of free entry into markets in which the laws are made by mutual agreement among conglomerates.

V. SIGNIFICANCE FOR MODERN INTELLECTUAL PROPERTY THOUGHT

While the primary contribution of the period producing *Darcy* and the Statute of Monopolies is to political theory rather than trade or intellectual property theory, the events of the period do offer some lessons for modern intellectual property thinkers. I would like to suggest a few of the most obvious.

A. 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 will focus on three: 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). A focus on individuals and the destabilizing forces of innovation are the cornerstones of dominant mod-

ern theories of intellectual property,²⁷² 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.²⁷³ 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 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.²⁷⁴ Third and finally, it is critical to keep in mind that these events took place under a monarchy, a form of government in which the well-being of the governor and the governed are not necessarily related. Thus, the necessity in the era’s common-law cases for a “public benefit” to support such grants doesn’t translate well to modern times and our republican government, since the ubiquitous divergence of interests between the public and their republican government is not an adequate basis for searching judicial review.²⁷⁵

²⁷² See Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 *Va. L. Rev.* 1575 (2003) (summarizing the modern theories, including those focused on the innovative benefits of disruption, like competitive innovation, anticommons, and patent thickets).

²⁷³ Letwin, *supra* note 15, at 375.

²⁷⁴ 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).

²⁷⁵ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938); *Nachbar, Quest*, *supra* note 13, at 44–45; see also *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810) (refusing to condition the validity of a state land grant on the proper motives of the legislature passing it).

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B. The Resurgence of Mercantilism and the Inherent Conservatism of Market Controls

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. Such proposals generally call for access to intellectual property 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.²⁷⁶ In the copyright context, in addition to straightforward price controls, compulsory licenses are 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.²⁷⁷ While uncommon, compulsory licensing is not unheard of in existing intellectual

²⁷⁶ Andrew Beckerman-Rodau, Patent Law—Balancing Profit Maximization and Public Access to Technology, 4 Colum. Sci. & Tech. L. Rev. 1, ¶¶ 39–42 (2002), at <http://www.stlr.org/cite.cgi?volume=4&article=1> (compulsory patent licensing to make pharmaceuticals more accessible to the populations of developing nations).

²⁷⁷ See, e.g., William W. Fisher III, Promises to Keep: Technology, Law and the Future of Entertainment 216–34 (2004) (discounting his first choice of funding intellectual property from an increase in income taxes as “politically unpopular” and opting instead on a 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. 813, 911–20 (2001); 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 Lessig, *supra* note 9, at 301–04 (adapting the Fisher proposal to a temporary system to handle the transition to a new market that accepts P2P freely); Jessica Litman, Sharing and Stealing, 27 Hastings Comm. & Ent. L.J. 1, 44–46 (2004) (endorsing the Netanel proposal with additional suggestions to fine-tune the Fisher and Netanel proposals).

property law.²⁷⁸ As mechanisms for setting prices, none of these proposals respond well to the longstanding economic arguments in favor of market pricing,²⁷⁹ but history sheds even more light on just how ill-suited such proposals are to current intellectual property markets.

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 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 entrench the powers of the then-dominant local guilds,²⁸⁰ 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.²⁸¹ Even common-law courts, arguably the least politicized source of trade policy, used their power to protect established artisans, not new ones.²⁸² Given the history of market regulation, it is

²⁷⁸ 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, for example, 17 U.S.C. §§ 111(c)–(d), 119 & 122 (2000) (cable and satellite television retransmission compulsory license); § 114 (digital transmission compulsory license); § 115 (mechanical license); § 116 (jukebox compulsory license); §§ 1001–1010 (audio home recording devices). The intellectual property law of several foreign countries includes compulsory licenses, and the TRIPS agreement makes explicit accommodation for their use in limited circumstances. See *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 *I.L.M.* 81 (1994).

²⁷⁹ See Robert P. Merges, *Compulsory Licensing vs. the Three “Golden Oldies”*: Property Rights, Contracts, and Markets, 508 *Pol’y Analysis* 1 (2004) [hereinafter *Golden Oldies*]; Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *Cal. L. Rev.* 1293 (1996) [hereinafter *Contracting into Liability Rules*]. For the underlying objection, see F.A. Hayek, *The Constitution of Liberty* 227–28 (1960).

²⁸⁰ See *supra* text accompanying notes 27–33; 1 Cunningham, *supra* note 18, at 333–35.

²⁸¹ See *supra* text accompanying notes 207–212.

²⁸² See *supra* text accompanying notes 107–108; Letwin, *supra* note 100 at 28–29.

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passing strange 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.²⁸³ The difference is a significant one, because the availability of a preferential, statutory license for *existing* technologies is more than likely to forestall the development of *future* ones. Opponents of economic progress have always been more successful in effecting their conservatism in legislatures than they have in markets.²⁸⁴

C. *The Political Tradition of Exclusive Rights*

The recent trend of intellectual property scholars toward the “constitutionalization of intellectual property”²⁸⁵ presents an additional opportunity for us to learn from the English response to the monopoly problem even as it 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-

²⁸³ 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 (April 30, 2003), at <http://www.mp3newswire.net/stories/2003/grokster.html>. At the time of the Napster litigation, that company was valued at \$65 million. See Joseph Menn, *All the Rage: The Rise and Fall of Shawn Fanning’s Napster* 228 (2003).

²⁸⁴ 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). On the most recent attempt to legislate broad compulsory licensing (the attempt to create a webcasting compulsory license), the incredible resources devoted to skewing the license in favor of established interests, and the fallout, see Merges, *Golden Oldies*, *supra* note 279, at 7–9.

²⁸⁵ Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 *Berkeley Tech. L.J.* 529, 533 (2000).

old condemnation of trade monopolies and, with the Statute of Monopolies (ignoring Section 9), a nearly four-hundred-year-old tradition legitimating only those exclusive trade rights that are granted for limited terms, to inventors and authors, and only in exchange for their inventive and creative effort.

It approaches irony to offer these examples as the justification for searching judicial review of legislative action in the field of intellectual property.²⁸⁶ *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 motivated by animus or suspicion of government restrictions on free trade. Legislative interference with free participation in commercial activity has never, except perhaps during the *Lochner* Era, been subject to attack by reference to absolute legitimating substantive criteria. The test for the legitimacy of legislation has always been (with a few specific exceptions) political rather than by reference to higher social or economic principles.²⁸⁷

D. Translating the Political Experience

That is not to say that the events of the seventeenth century do not bear 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.²⁸⁸ The lesson from seventeenth-century England is not the triumph of principle in the face of well-organized economic in-

²⁸⁶ See sources cited *supra* note 11.

²⁸⁷ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 & n.4 (1938); *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”); Nachbar, *Quest*, *supra* note 13, at 44–45.

²⁸⁸ See sources cited *supra* note 6.

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terests. It is the triumph of an alliance between politicians and merchants. They are stories not of idealism but of coalition. The Statute of Monopolies' 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.²⁸⁹ 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 threaten 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.²⁹⁰ 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; broad rules (like changes to the scope of intellectual property) are less susceptible to the influences of public choice than narrow ones (like compulsory licenses for specific uses of specific works).

It may have been difficult ten years ago to foresee the development of strong commercial interests opposed to extending intellec-

²⁸⁹ See 2 Cunningham, *supra* note 18, at 21; Ekelund & Tollison, *supra* note 17, at 80–81; *supra* text accompanying notes 198–212.

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. See Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 *The Library* 296, 314–16 (1978).

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*, *supra* note 13, at 332–34.

²⁹⁰ See Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 *U. Chi. L. Rev.* 63, 88–89 (1990) (suggesting public choice factors are strongest when legislation is narrow and technical and constituents do not care about it). In Becker's terms, broader rules allow greater opportunity for cooperation between multiple pressure groups, reducing the deadweight loss of duplicative lobbying efforts. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 *Q.J. Econ.* 371, 388 (1983).

tual property protection, but it has always been short-sighted 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 whose political interests are dominated by their ownership in intellectual property.²⁹¹ It is hardly surprising to find major corporate sponsors backing organizations such as the Center for Democracy and Technology and the Digital Media Association, and it is becoming harder and harder to tell the policy positions of the Electronic Frontier Foundation²⁹² from those of the Consumer Electronics Association.²⁹³ The lobbying has barely begun.

The events I have 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. Abuse in the means of enforcement of exclusive trade privileges (such as the impositions and extortions of the monopolists' searchers) spurred the Statute of Monopolies more than the economic consequences of the rights themselves.²⁹⁴ Owners of intellectual property rights would be wise to exercise both caution in choosing the means they use to protect their statutory rights²⁹⁵ and restraint

²⁹¹ See, e.g., *Recording Indus. Ass'n of Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003) (successful legal challenge by a telecommunications giant to the use of subpoenas by intellectual property owners to discover the names of telecommunications customers).

²⁹² The Inducing Infringement of Copyrights Act of 2004, 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." Letter from Shari Steele, Electronic Frontier Foundation Executive Director, to All United States Senators, available at http://www.eff.org/IP/?f=eff_induce_letter.html (last accessed August 20, 2005).

²⁹³ See Press Release, Consumer Electronics Association, Act Today: Oppose the Induce Act!, available at http://www.ce.org/div_comm/glossary/induce_act.asp (last accessed August 20, 2005) ("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.").

²⁹⁴ See *supra* text accompanying notes 239–248.

²⁹⁵ See 15 U.S.C. § 1116(d) (2000) (authorizing *ex parte* order for privately instituted seizure of allegedly counterfeited goods); 17 U.S.C. § 506 (2000) (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, at C3 (describing what has become a "routine reminder that college students, teenagers and others

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in seeking rights that may prove impossible to enforce without resort to extreme remedies.²⁹⁶

CONCLUSION

Darcy v. Allen and the adoption of the Statute of Monopolies were remarkable events; they represented a virtual revolution in the role of political accountability in the administration of economic regulation. 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 inadequate understanding of the mercantilist vernacular in which they were debated, agreed upon, and put into practice. On the other hand, the political principles favoring public over private regulation that found practice in the early-seventeenth-century disputes between Crown and Parliament have been applied by American courts almost since our founding with very little need for translation. Of course, the era does bear some lessons for modern intellectual property thought. The political strife of the early seventeenth century reinforces what we already know about the direct relationship between increased government control of markets (for instance, by setting prices) and increased political rent-seeking. But reliance on the events of the period as an argument for restricting the decisionmaking authority of politically accountable public actors completely ignores that the period's dominant movement was the assertion of political authority. Indeed, the events of the early seventeenth century leave one to wonder whether, even if the courts will not take a stand against special interests, including those favoring the continued expansion of intellectual property rights,²⁹⁷ Congress might.

can face expensive lawsuits for swapping music online"); see also Recording Industry Countersued, N.Y. Times, Feb. 19, 2004, at C9 (story of a file-sharing defendant counterclaiming violations of extortion and racketeering laws).

²⁹⁶ E.g., H.R. 5211, 107th Cong. § 514 (2002) (immunization from civil or criminal liability for disruption of downloading activities).

²⁹⁷ Lessig, *supra* note 9, at 213–47.