BARRISTERS AND BARRIERS: SIR EDWARD COKE AND THE REGULATION OF TRADE

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Introduction

Sir Edward Coke (1552–1634) has long been acclaimed as a key figure in the emergence of the modern free-market economy in England. During a long career in which he was successively Attorney General (1594–1606), Chief Justice of the court of Common Pleas (1606–1613), Chief Justice of the Court of King's Bench (1613–1616), and from 1620 leader of the Parliamentary opposition to the king in the House of Commons, many historians have interpreted Coke as having been a significant force behind deregulation of the English economy, most notably through his role as leading opponent of royal grants of monopoly rights to favored individuals. Modern scholars generally agree that Coke was primarily motivated by his philosophical commitment to the rule of law—not to a vision of free trade so much as to his belief in the majestic rationality of the common law, of which he was a leading practitioner for most of his adult life.

Previous writers have tended to accept Coke's stated views at face value, and have usually ignored the impact that the implementation of these views as actual public policy had on Coke's own professional position, or on the wealth of the professional interest group—the practitioners of the common law, the barristers—of which he was a leading member. Our purpose in the present paper is to redress this neglect.

In early modern England, judicial services were provided in a competitive market, in which a variety of different courts and court systems, operating according to different sets of legal principles and

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precedents, adjudicated disputes.[1] Most of these judges received most of their income not from salaries paid by the king or Parliament, but from the fees they charged litigants for the use of their courts. Although there were many restrictions imposed by the English state on the operation of this competitive market—for example, most courts had legally defined boundaries beyond which their decisions were not supposed to apply—as a practical matter, different courts were often in direct competition for the same potential litigants.

Beginning in the late 16th century, the court system based on the English common law had begun to achieve clear dominance in the market for judicial services by erecting various legal entry barriers which hampered the ability of other court systems to successfully compete. The three common law courts—Common Pleas, King's Bench, and the Exchequer—colluded together, and generated substantial rents for the privileged barristers.

Expansion of the monopoly jurisdiction of the common law courts tended to increase the net rents received by barristers and judges. Sir Edward Coke was the single most effective leader of this expansion of the common law jurisdiction by means of restricting the activities of competing courts. The opponent of royal grants of monopoly privileges was a vigorous defender of monopoly privileges in his own bailiwick.

The paper is organized as follows. We first discuss the market for adjudication services in early modern England, describe the organization and operation of the common law courts, and explain how those courts emerged as a kind of law cartel. We next consider the implications of Coke's supposedly deregulatory agenda for the economic interests of the barristers, himself included. Coke's activities in pursuit of an expanded monopoly jurisdiction for the common law are then outlined. We proceed to analyze the actual economic substance of the case for Coke as an "opponent of monopoly." A final section summarizes and concludes our argument.

Barriers and Barristers

There were three common law courts, which all used the same body of legal precedents and procedure, but had different basic jurisdictions. The court of Common Pleas had jurisdiction over legal

[1]In addition to the common law courts, there were the court of Chancery, the courts of the law merchant, the Admiralty court, the court of the Constable and Marshal, the Ecclesiastical courts, the Council, the House of Lords, the courts held by the Justices of the Peace, the various Franchise courts, and many others. For a detailed overview of this bewildering array of competing courts, see Holdsworth (1956).

actions between individual subjects of the Crown, i.e., handled the bulk of ordinary law suits; the court of King's Bench had jurisdiction over crimes, and functioned as a kind of appeals court in that decisions made in Common Pleas could sometimes be appealed there; and the court of the Exchequer had a jurisdiction which largely limited its activities to cases involving government revenues (e.g., tax cases).

These three common law courts operated as a cartel, with each court in effect assigned a particular general jurisdiction. However, as is normal in the case of such collusive agreements, this cartel arrangement was imperfectly enforced, and competition between the different courts frequently arose at the margin of respective jurisdictions.[2] William Holdsworth observes (1945: 238) that when the expected fee income made such activity seem potentially profitable to the judges of one of the courts, they "grasped at any kind of jurisdiction [they] could obtain."[3]

Common law judges were selected from the ranks of barristers, lawyers called to the bar and allowed to practice in common law courts. In 1600, there were approximately 2,000 barristers (Levack 1973: 3). However, this number reflected the outcome of strict legal limits on entry of potential barristers. Practice before the bar of the common law was highly restricted.

Entry into the practice of the common law was reserved to members of the Inns of Court. A Royal Proclamation of 1546 made Inn membership necessary before litigants could plead in Chancery, and Star Chamber, courts in addition to the common law courts. Thus,

[2]Holdsworth (1956: 196) quotes Bracton as noting that "the special competence of each court is only vaguely defined," and in fact the courts often competed with one another for certain kinds of cases. The sometimes vigorous competition between the three courts was facilitated by the use of "legal fictions" of various kinds. For example, if a court's technical jurisdiction was limited to cases involving certain specified circumstances, that court could simply redefine the actual circumstances applying in a particular case so that its jurisdiction seemed to apply; the mere act of fictional redefinition sometimes was sufficient to obtain the business the case represented (Holdsworth 1956: 119–220).

[3]Throughout the Middle Ages in England, until the later 19th century, the principal source of judges' income was not salary (which tended to be small), but fees charged for judicial services by litigants. Rather than public employees, judges were the "owners" of their judicial offices, who "rented" their services at market prices. Technically, judgeships were not "saleable freeholds," i.e., such positions could not be openly bought and sold for cash; but nevertheless the judges were residual claimants to the value of their court's output (Holdsworth 1956: 252). This, incidentally, was the rule rather than the exception among government officials generally until quite recently; in the Middle Ages, almost all government officials of all types were entirely paid out of fees they charged for their services (see Webber and Wildavsky 1986).

Inn members had the exclusive right to practice law in all important English courts except Admiralty and the Ecclesiastical courts. From about 1600, seven-years membership, in effect, apprenticeship, in one of the Inns was required, to be followed by the performance of learning exercises for a period of three years after receiving the call to the bar. Residency was required for the period of membership; although this rule was sometimes loosely enforced, after 1596 enforcement was fairly strong (Holdsworth 1945: 264).

Life at any of the Inns of Court was subject to an extremely detailed, and tightly enforced set of social regulations (Holdsworth 1945: 264). A primary function of these regulations was to prevent residents from offering legal advice to clients prior to the call to the bar. Some regulations continued to apply to barristers throughout their careers. For example, if after being called to the bar, one member brought an action against another member, the offender was fined; and a member of an Inn was forbidden from appearing professionally in court against a bencher (Holdsworth 1945: 269). The administration of the Inns was controlled by common law judges, who issued extremely detailed instructions about Inn regulations and policy. Sitting judges ordered election of students to the judicial bench, strongly influenced who did (and who did not) receive a call to the bar, and frequently intervened in Inn admission decisions ((Holdsworth 1945: 269). In addition, common law judges erected a considerable variety of entry barriers which restricted competition amongst barristers (Prest 1986: 13). In 1614, the judges sought to impose a fixed, annual quota on calls to the bar. Entry of new barristers into the common law practice was tightly restricted.

Coke was a dedicated, in fact pugnacious, defender of these rent-generating entry barriers which protected barristers from competition. He consistently worked to expand the jurisdiction of the common law and the privileges of barristers, while simultaneously restricting the jurisdiction of other courts and impeding the activities of non-barrister lawyers.[4] One of his principal interests throughout his writings concerned strengthening jurisdictional boundaries between courts, supposedly because absence of such clear boundaries led to "excessive" and more costly lawsuits—although without explaining how this counter-intuitive result could come to pass (White 1979: 50). He led the fight to limit the fees charged by lawyers

[4]Incidentally, while non-barristers were prevented from practicing in common law courts, the reverse was not true; both barristers and common law benchers could legally practice in non-common law courts, but usually did not simply because the fees available tended to be lower (Prest 1986: 265).

in the Chancery court, which would have restricted the ability of that jurisdiction from competing with the common law (White 1979: 61–62). He fought to restrict the Chancery jurisdiction directly as well as other non-common law courts; these efforts were ultimately unsuccessful. Coke also worked to limit entry into the Inns of Court, although the effect of this effort seems to be unclear (Malament 1967: 1324).

Returns available to barristers were potentially very high. Most competent barristers could expect to earn at least 600 pounds sterling per year, "an excellent salary in the seventeenth century" (Richardson 1975: 488). Many barristers became extremely wealthy as the result of their legal practices; Coke himself was one of the richest, and is described by one historian as having been "fabulously wealthy" (Prest 1986: 155). After his death, Coke left a bequest of 99 separate estates (Malament 1967: 1324).

Competition for Jurisdictional Rents

The barristers and the common law judiciary did not have a monopoly over legal disputes in early 17th-century England. As we noted above, the common law faced competition from a variety of other court systems, whose jurisdictions overlapped at the margin.

Court of Admiralty

The most significant area of jurisdictional overlap occurred with the Admiralty law. By the early 17th century, this body of law had begun to attract large numbers of commercial litigants, who increasingly preferred its more efficient procedures to the relatively cumbersome operations of the common law courts. One of the most interesting, albeit neglected, aspects of Coke's activities concerned the relationship between the common law courts and the court of Admiralty. Therefore, a brief digression outlining the history and functioning of this jurisdiction is in order.

The law of Admiralty began as the rulings of local port courts which arose by the 14th century in order to adjudicate disputes involving issues arising from maritime trading activities. Given the poor transportation and communications systems, and the importance of specialized knowledge of maritime trading activities required for efficient adjudication in such disputes, this early development was straightforward. These local courts were eventually superseded in the 15th century by a system of central courts established by the king called the High Court of Admiralty (Holdsworth 1956: 549); this system grew rapidly until by the mid-16th century

it had begun to handle most cases involving contracts made at sea, or which stipulated delivery in a foreign country.[5]

The period beginning in the early 16th century saw a massive expansion in the value of foreign trade for England. International commerce was growing rapidly, and maritime trade generated an increasingly large fraction of the total demand for adjudication of legal disputes. The concession to hear cases involving maritime disputes was consequently very lucrative.

Throughout the 16th century, the Admiralty courts began to acquire an increasing share of litigation business resulting from this expansion of trade. Merchants and mariners preferred Admiralty courts because their "civilian" lawyers tended to be more competent in maritime law, and the courts followed legal procedure very similar to that employed on the Continent (thus facilitating the resolution of disputes involving Continental individuals and their lawyers). Further, the Admiralty court could sit at any time, and was not restricted by the peculiar, convoluted legal calendar followed by common law courts; consequently, important business was never delayed until the following term. Finally, Admiralty courts did not use juries; instead, judges controlled the entire proceeding, delivered the verdict, and determined penalties. These judges usually had a high level of expertise in the subject areas of typical litigation, and often had a better understanding of the real issues at dispute than would untrained and often poorly-educated jury members (see Levack 1973: 155). In short, the Admiralty court was able to provide superior service to certain litigants, who therefore transferred their business from the common law courts. According to Holdsworth (1945: 259, 284), by the end of the 16th century the common law had begun to experience a significant drop in litigation business as a result, and this decline was amply justified by the common law's various defects.

The common law courts benefited from litigation transferred to their jurisdiction for elementary financial reasons: they were losing substantial revenues to the Admiralty court. For example, the court received 14 pounds sterling, on average, per writ in the early decades

[5]The jurisdiction of the Admiralty courts, as laid down by royal proclamation, was divided into two major sections. The first, cases involving prizes seized at sea during time of war, was fairly minor in extent and scope. The other major section was termed the "ordinary" jurisdiction. This was in turn divided into three portions. First was the Admiralty Droits, fixed percentages of the value of goods taken from pirates, and/or marine salvage, as determined by the Crown. Of greater importance were the other two portions, criminal cases, and civil cases, involving maritime activities. See Holdsworth (1956: 544ff.).

of the 17th century (Levack 1973: 74). Legal fees paid to barristers were frequently higher than this.

In 1575, the common law courts entered into a kind of provisional agreement—i.e., a kind of truce—with the Admiralty courts, in which each system recognized the commercial jurisdiction of the other. In effect, this provisional agreement was an agreement to collude, in which both court systems avoided competing with each other for cases at the margin of their respective jurisdictions. However, in 1606, Coke—in one of his first acts as Chief Justice of Common Pleas—expressly repudiated this agreement (Holdsworth 1956: 553). Coke denied that the Admiralty was a court of record, and that those judges had the power to compel appearance, which in turn meant that the courts had no legal recourse in the event that a witness, or even a defendant, simply refused to appear after being summoned. He also denied that the Admiralty had the legal right to compel acquiescence to its judgements, and denied the jurisdiction of the Admiralty court over any contracts made on land, including those stipulating performance of the contract at sea. The ruling implied that virtually all contracts actually adjudicated in Admiralty courts were contracts over which those courts had no legal competence, thus leaving almost nothing of the "ordinary" jurisdiction of the Admiralty courts; this meant prize jurisdiction was left for the common law courts, a fact that Coke does not appear to have commented on.

True to form, Coke did not stop with the claim that the Admiralty courts did not possess legal jurisdiction over the commercial, and criminal, cases they were increasingly adjudicating. He went further, and insisted that the common law courts were the appropriate venue for all such cases. The contracts made on land virtually all fell within Coke's interpretation of the common law jurisdiction. Moreover, even contracts made overseas (and offenses committed abroad) were claimed by the common law courts to be within their exclusive jurisdiction. As mentioned earlier, this legalistic expropriation operated by use of "legal fictions," which redefined the location of the claim or dispute. For example, assume that a particular contract was drawn up in Marseilles. As such, it clearly fell within the Admiralty court's jurisdiction as assigned by the king. But the common law courts could legally claim jurisdiction and proceed to try the case as long as they first defined "Marseilles" as being a place in England. Incredibly, this arbitrary fiction worked; in fact, in one such case, Marseilles in France was simply claimed to represent "Marseilles in Kent," and jurisdiction over a contract for delivery overseas was claimed by the court of Common Pleas and lost by the Admiralty

courts (see Levack 1973: 78). The use of such legal fictions was a common occurrence (see Bourguignon 1977: 12).

Another important technique used by the common law courts, implemented aggressively by Coke, was the prohibition. This was a judicial ruling that literally prohibited another, "inferior" court from proceeding to hear a particular case, on the grounds that the case in question was outside that court's legal jurisdiction. In the 1590s common law judges began a "full scale attack" on the so-called inferior courts, using this technique (Levack 1973: 73). The common law courts issued writs of prohibition against Admiralty courts especially to prevent the latter from hearing cases of contracts entered into abroad, or in English ports; with Coke as Chief Justice, such writs became "frequent" (Bourguignon 1977: 12–13). The major effect of prohibitions was in their potential to establish jurisdiction-limiting precedents, that would bar certain categories of cases altogether from future hearing in the prohibited court (Levack 1973: 76). By the later half of the 17th century, the Admiralty court's "instance," or commercial, jurisdiction had been highly restricted—to the benefit of the common law courts (Levack 1973: 76). These legal shenanigans imposed costly delays in court, and even occasioned diplomatic difficulties when foreign litigants were affected.[6] (Admiralty courts frequently tried cases in which foreign nationals were directly involved.) Such delays were often exploited by unscrupulous litigants; as Holdsworth writes (quoting a biography of a contemporary), "[not] one cause in ten comes before the [Admiralty] court but some of the parties or witnesses in it are pressing to go to sea with the next tide" (1956: 555). Gradually, litigants began to abandon the Admiralty court in favor of the (prohibition-issuing) common law courts; over the course of the 17th century, Parliament supported the common law over its rivals, while the monarch tacitly accepted the outcome of the jurisdictional dispute. By mid-century, the once thriving civil jurisdiction of the Admiralty had been sharply curtailed.

Merchant Courts and Ecclesiastical Courts

Another jurisdictional dispute prosecuted by Coke involved the law merchant. This was a special body of commercial law administered in merchant courts, which had emerged in the Middle Ages, and continued to appeal to many merchant-litigants despite its gradual decline in Tudor times. This form of law primarily involved

[6]For example, Holdsworth (1956: 555, n. 1) cites a complaint by the Spanish Ambassador about the delays in Admiralty, caused by prohibitions, affecting Spanish nationals.

judgments by private arbitration. In 1606, Coke, then Chief Justice of Common Pleas, ruled that the law merchant was actually part of the common law, and that the decisions of merchant courts could be reversed by common law courts (Benson 1990: 61). Bruce Benson quotes Leon Trakman, a recent authority on the law merchant, as concluding that as a result "merchant courts. . .were abolished, or alternatively, they were integrated into the common law system." During the 17th century, "the internal trade of [England] was regulated by a common law. . .and not by a separate Law Merchant" (Holdsworth 1956: 569).

Coke also was a leader of the common law opposition to the Ecclesiastical courts, which in addition to cases involving strictly religious matters had jurisdiction over matrimonial and testamentary cases. This latter jurisdiction was a lucrative source of legal fees, and the Ecclesiastical courts, particularly the court of High Commission, were depriving the common law courts of this litigation business. In the 1590s, the common law courts began a "determined attack" (Levack 1973: 79) on these competitors, by means of the issuance of writs of prohibition, as had been done with the Admirality courts. Although this campaign was not initiated by Coke, he played a prominent role while Chief Justice; writs of prohibition against the ecclesiastical jurisdiction increased markedly during his tenure (Eusden 1968: 89) and "cripple[d] the jurisdiction of the ecclesiastical courts" (Holdsworth 1956: 629).[7]

Regulation, Rent Seeking, and Suit Seeking

The common law has often been interpreted as having been a source of consistent opposition to governmental restrictions on free competition. This traditional view, however, is very misleading. The common law courts consistently fought for the privilege to allocate monopoly rents to be granted to the common law courts. Coke was a leader of this effort. Finally, the common lawyers achieved a successful alliance with Parliament, and together those two groups sought and obtained a legal monopoly in the granting of monopoly privileges. We will proceed to review the facts of this strange, and neglected episode in the history of rent seeking.

[7]According to the same source, Coke did not limit his activities to restricting the ecclesiastical courts' non-religious jurisdiction. Coke argued that if spiritual goods were sold (e.g., tithes) they became temporal goods and thus subject to the common law. If a parishioner was enjoined to make pecuniary, instead of corporal, penance, any consequent action must also be taken to a common law court. Eusden maintains that Coke distorted the interpretation of precedents in his effort to limit the ecclesiastical jurisdiction, using "biased and exaggerated" reasoning (1958: 92).

By the mid-16th century, the central government of England began to enact a wide array of legal restraints on free trade. Both the king and Parliament generated these market restrictions. The main difference between the regulations promulgated by the two branches of government was that the monarch tended to issue grants of monopoly privileges, or "patents of monopoly," to specific individuals, whereas Parliament produced numerous legal entry barriers which restricted competition in specific markets.

Eli Heckscher and other economic historians have tended to emphasize royal grants of monopoly as the prime examples of domestic restrictions on competition. But many important sources of restriction rent were parliamentary in origin. For example, regulated and chartered companies gradually came under parliamentary control, although most had originally secured royal sanction (Holdsworth 1945: 320). Most important, economic regulation was statutory in nature, and enacted by Parliament. For example, consider the following parliamentary acts which were in force during the early 17th century (as discussed in Elton 1986: 231–50). Domestic trade in grain was licensed; the prices of beer barrels were fixed; alehouses were licensed, inns were restricted, the number of taverns in towns was strictly limited, and their prices were fixed; the highly detailed Clothmaking Act of 1552 fixed standards of quality and specified regulations for the cloth industry; a 1581 law controlled the quality of wax; and a 1581 law prohibited iron-making within 22 miles of London. There were many other such statutory regulations.[8]

Moreover, although some older historians imply that such parliamentary regulation was aimed at promoting the "public interest," supposedly unlike the purely venal royal grants of monopoly, rent seeking by particular interest groups who expected to benefit from the passage of many such regulations was quite blatant and overt.[9]

[8]In addition to these various and sundry domestic regulations, Parliament passed numerous restrictions on foreign trade, such as the law which made it a felony to carry leather out of the country, a prohibition on the export of sheepskins and buckskins, a prohibition on the importation of gloves, girdles, knives, daggers, scabbards, pins, and points, and even a law which made it a crime for a traveler to take his own horse abroad for personal use (Elton 1986: 234, 247–48, 255).

[9] See for example Holdsworth (1945, and elsewhere). Strangely, Holdsworth himself provides a long list of examples of overt rent seeking behind legislated regulations. English pewterers lobbied for a law prohibiting the sale of imported pewter; hatters did the same to restrict competition from imported hats; manufacturers of leather goods were granted the exclusive privilege of purchasing raw leather; and cappers succeeded in convincing Parliament to pass a law requiring the wearing of woolen caps on Sundays and holidays (Holdsworth 1945: 335). Amazingly, after listing these and other examples of blatant rent seeking, Holdsworth concludes that such legislation nevertheless "served to promote trade," (ibid.) and thus promoted the public interest.

Historians since David Hume have honored Sir Edward Coke as a key defender of liberty against royal tyranny. A number of prominent economic historians have described Coke as having played a leading role in the fight against monopoly grants in the early 17th century. Ephraim Lipson (1956), Eli Heckscher (1955), John Nef (1968), Donald Wagner (1935, 1937), and Bruce Yandle (1993) all argue that Coke was an early advocate of *laissez faire*, and link his views to the later writings of the classical economists. Although more recent economists agree that Coke was indeed a major force behind the deregulation of the 17th-century economy, some of them have treated these claims with greater skepticism. Still, even they maintain that Coke was principally motivated by his philosophical commitments to the dominance of the common law.

But, neither Coke nor any of his fellow barristers opposed government economic regulations of the competitive process in principle. In fact, the common law courts consistently supported parliamentary regulation of all sorts. On several occasions, the courts even extended the coverage of parliamentary regulations. Although Coke often railed against monopolies, he specifically approved of statutory, i.e., legislative, restraints on trade (White 1979: 123).[10] According to Coke "liberty of trade" could lawfully be restricted by "common consent," i.e., all parliamentary regulations, no matter how anticompetitive, were by definition lawful (White 1979: 122). Coke was also a strong proponent of the full panoply of mercantilist restrictions on foreign trade; by Tudor times, the bulk of such restrictions were statutory in origin (White 1979: 138).

This pattern of support for governmental restrictions on free competition was consistent with the economic interests of barristers in general. Practitioners of the common law were beneficiaries of government economic regulations for several reasons. According to Wilfrid Prest, "[virtually] every major political, economic, and social development in Tudor and early Stuart England helped make more work for common lawyers in general, and barristers in particular" (1986: 49). This effect took several different forms.

When alleged violators of economic regulations were tried in court, barristers were employed by the defense, the prosecution, and provided the judge or judges. For example, cases brought under the

[10]The term "monopoly" was used inconsistently by contemporaries, including Coke; by use of the term, he normally meant to refer only to royal grants of exclusive privileges to specific individuals. In the course of debate over the bill to restrain monopolies in 1621, it was apparent that members of the House of Commons meant a variety of different things by the term "monopoly," none of which included the notion of legal entry barriers (White 1979: 129).

Elizabethan Statute of Apprentices were normally tried in the court of King's (or Queen's) Bench, where all legal counsel were barristers, or in the court of the Exchequer, in which most legal counsel were barristers. Between 1563 and 1603, these two courts tried at least 360 such cases, counting only cases brought by informers (Davies 1956: 48). Each such case generated fees not only for the legal counsel on both sides, but for the various court officials (e.g., the judge, the bailiff, the clerk, etc.).

The rapid growth of paternalistic state regulation during Tudor times was a strong source of demand for the services of barristers. For example, the proliferation of grants of monopoly—issued by both the monarch, and by Parliament—led to the demand on the part of both monopolists and potential entrants for the services of barristers during court challenges (Prest 1986: 298). Even bringing a single motion, no matter how inconsequential, at the common law bar required a payment to a barrister of between 10 and 20 shillings (Prest 1986: 162).

The most important officials responsible for enforcement of domestic economic regulation in Tudor and Stuart England were the justices of the peace (JPs). These men were the "agents of unified industrial legislation" (Heckscher 1955: 246); they fixed wages under the Statute of Apprentices, enforced detailed industrial regulations, and even operated a system of courts for this purpose (see Holdsworth 1956).

Royal grants of monopoly to specific firms were not a primary source of demand for the services of JPs. Owners of monopoly privileges had a strong incentive to bring suits against interloping competitors in courts of law, and the policing activities of JPs were therefore unnecessary. On the other hand, parliamentary regulations like the Statute of Apprentices, which imposed detailed regulations over a large sector of the economy, required massive enforcement efforts to be effective. Enforcing such broad statutory regulations occupied a large proportion of the JPs' time and efforts. The JPs were responsible for fixing and enforcing wage maximums under that Statute, and also the wage minimums required under the Woolens Act of 1604 (Holdsworth 1945: 382; Lipson 1956: 254).

Many of these important officials, whose jobs depended on the proliferation of statutory restrictions on market exchange, were either barristers or members of one of the Inns of Court. One survey of JP commissions from six counties indicated that in 1636, 21 percent were barristers or serjeants (cited by Prest 1986: 237); another report for 1608 (Gleason 1969: 87) finds that 175 of 311 total JPs (i.e., over

56 percent) had been admitted to a common law Inn of Court.[11] Moreover, the barrister justices appear to have been especially diligent and industrious in their regulatory enforcement activities, so that their actual influence was probably greater than their relative numbers indicate (Prest 1986: 238).

A principal form of economic regulation in Coke's time involved the myriad, often excruciatingly detailed restrictions on market competition imposed by towns and municipalities, thus creating municipal "corporations." Barristers were hired by these corporations to defend their privileges from "interlopers" in court, and they required the services of the common law courts for such prosecutions. The rapid expansion of government economic regulation, at both the national and the local levels, during the Tudor era generated increased litigation business for the common law (see Prest 1986: 242).

There was another, more direct, reason for practitioners of the common law to favor parliamentary over royal forms of economic regulation; barristers were responsible for designing and enacting many of the legislative controls. By the time of Henry VI, between one-quarter and one-fifth of the House of Commons were lawyers, and this continued to reflect the approximate proportion in Coke's time (Prest 1986: 254). Barrister-MPs tended to dominate the design and drafting of legislation by virtue of their legal expertise. A seat in the Commons produced additional benefits for lawyers in the form of contacts and connections which led to increased business in their law practices; many members of Parliament who were also barristers continued to plead at bar even while the Parliament was actually in session (Prest 1986: 255). In addition to the number of barristers who actually held seats in Parliament, legislative activity tended to benefit many other barristers whose services were required in various legislative support roles.

Finally, some common lawyers had investments in regulated, or monopoly, companies. Barristers were prominent "projectors" in overseas trading and colonizing companies, mining ventures, fen-draining enterprises, and various other speculative investments (Prest 1986: 20). Such individuals could expect to receive increased profits on their investment if their firms received protection from potential competing entrants. While barrister-investors had no special reason to favor parliamentary as opposed to royal grants of special

[11]Of these 175, 48 had actually been "called to the Bar" (Gleason 1969: 87). The rest either had yet to receive such a call, or had for some reason chosen not to pursue careers as barristers.

privileges, such grants became increasingly the province of Parliament in the early 1600s.

Coke, Parliament, and the Reallocation of Political Rents

For purposes of evaluating the effect of the common law courts in general, and Coke in particular, on the deregulation of trade in early 17th-century England, two major events stand out; the first being a court decision, and the second being a Parliamentary statute. Neither event represented the clear victory for free trade some scholars have claimed; but both events were clear victories for the economic interests of barristers.

The *Darcy v. Allen* case (1603) has received much attention as the opening shot in the campaign against monopoly grants purportedly initiated by the common law. The basic outline of this "Case of Monopolies" is familiar. Darcy held a royal monopoly grant to the importation of playing cards. Allen imported cards without asking Darcy for permission. Darcy sued Allen, and the court ruled that the monopoly grant was invalid.[12]

Since Coke wrote about this ruling, and placed great emphasis on its fundamental importance, some writers leave the impression that Coke was somehow partially responsible for this supposed challenge to monopoly grants.[13] But in fact, Coke was the Attorney General at the time, and was obliged to *defend* the contested patent in court, which he did.

Moreover, the ruling itself simply did not claim all monopoly grants to be invalid. It only stated that trade must be left free *except* for "definite restrictions known to and recognized by common law" (Holdsworth 1945: 350).[14] The common law recognized a bewildering array of restrictions on free trade, which shared no common thread in any economic sense. According to Barbara Malament (1967: 1354), Coke "again and again. . . distinguished between trade

[12]For a detailed account of the case, see Donald (1961: 208–49); Pound and Plucknett (1927: 184–85) provide a short sketch of the essentials.

[13]For example, Hayek (1960: 168) discusses Coke's later account of the *Darcy* case, but fails to note that Coke was the lawyer for the monopolist plaintiff.

[14]The *Darcy* decision defined a monopoly to mean cases in which price had risen excessively, quality had fallen, and skilled artisans had become unemployed—the decision made no reference to monopoly in the sense of legal privileges to a sole proprietor (Holdsworth 1945: 349ff.).

regulation and trade restriction" and provides numerous examples for this entirely arbitrary distinction-without-a-difference.[15]

The very nature of the *Darcy v. Allen* case bears on a related issue. Darcy had received a monopoly privilege to violate a previously existing parliamentary ban (3 Edward IV. c. 4) on the importation of playing cards. According to Coke's later account, the court decided that a dispensation of this kind "wholly defeated the aim of the statute [and] was 'utterly against law' " (Holdsworth 1945: 358). The 1603 court decision repudiated the Crown's right to issue such an exemption, so the outcome was that neither Darcy nor anyone else had a legal right to import playing cards.[16]

This most peculiar feature of the 17th-century monopoly debate has been generally ignored: the common law jurists were adamantly opposed to royal grants of monopoly *dispensation* to parliamentary regulations. Many royal "patents of monopoly" were just grants of exemption to specific individuals from legislated restrictions on markets.[17] The existence of such loop-holes reduced the value of trade barriers produced by Parliament from the standpoint of their rent-seeking beneficiaries. However, most such dispensations surely enhanced economic efficiency, and made a greater variety of goods available to consumers at lower prices. Nevertheless, in the case of the Penal Statutes (1605), the judges declared that such royal dispensations were the "scandal of justice and the offence of many" (Holdsworth 1945: 359). Although the issuance of such royal dispensations did not end until after the enactment of the Statute of Monopolies (see below), their use declined following the 1605 ruling.

Coke has a more valid claim to another key event in 17th-century monopoly policy. In 1624, Parliament enacted the Statute of

[15]During the *Darcy* proceedings, Coke asserted that "The customary rights and ordinances of the cities and corporations are legal although they oppose the common law and the liberty of the subject"; and previously, while speaking in Parliament, he said that "If Her Majesty makes a Patent or a Monopoly to any of Her Servants, That we must go and cry out against; But if she grants it to a Number of Burgesses or a Corporation, that must stand; and that, forsooth, is no Monopoly" (quoted in Heckscher 1955: 287).

[16]However, Parliament subsequently awarded a similar monopoly dispensation to import playing cards to another party, the Company of Card Players (Malament 1967: 1351). When Parliament itself decided to issue dispensations from parliamentary statutes, it encountered no objections from the common law.

[17]For example, a royal patent allowed the Merchant Adventurers to import cloth, contrary to a law banning such imports; a group of French citizens were permitted by the King to import caps in spite of the statute prohibiting such trade; and a royal dispensation allowed the curriers to manufacture leather goods, contrary to another restrictive statute (Holdsworth 1945: 358, n. 5). In 1619, King James I even set up, for a fee, a special corporation which was awarded a monopoly grant to sell dispensations to individuals from the Statute of Apprentices (Lipson 1956: 284–85).

Monopolies (21 James I, C. 3), a sweeping reform bill that severely restricted the ability of the Crown to issue monopoly grants to favored individuals. This bill was principally drafted by Coke, who at the time was the leader in the Commons of the opposition to the king; Coke had also previously chaired the Committee for Grievances, which laid the political groundwork for the legislation.[18] Malament maintains that "the statute did very nearly embody Coke's views at the most radical stage of his career" (1967: 1351). Joan Thirsk, another recent writer concludes that the statute "strengthened the tide flowing in favour of free trade and free industrial growth" (1978: 100). Coke's involvement with this legislation constitutes his primary claim to actual economic reforms.

The statute which resulted failed to eliminate monopolies, but radically altered the political production of future legal entry barriers. Section 1 of the statute seemed to void all institutions granting exclusive control of any product. A number of industries were expressly allowed to continue as monopolies, including saltpeter, gunpowder and various other products "deemed essential to the realm." New production processes, old production processes new to England, companies with exclusive trading privileges, and city corporations were permitted to retain restrictions on competition within their boundaries.[19] Holdsworth (1945: 355) comments that the privileges of chartered companies, craft guilds, and boroughs "were recognized by the common law, and saved by the Act of 1624."[20]

Further, parliamentary regulations were automatically exempt, regardless of the effect they might have on market competition. This was the most important feature of the statute, and reflected its primary

[18]Coke largely wrote the original bill in 1621 that was "substantially identical" to the Act actually enacted in 1624 (see Zaller (1971: 130).

[19]And these city corporations also granted monopolies to favored individuals, which monopolies were exempt from the Statute, too. Usually, these monopoly grants were ostensibly aimed at securing some public service, as in the case of the ten-year monopoly grant issued by the corporation of York to an individual for the making of fustians, on the grounds that this grant would supply employment for 50 poor people (Thirsk 1978: 66).

[20]Since corporations were explicitly excluded from the statute, a grant of monopoly to such an organization was a legal evasion of the law, and was frequently employed by the king later in the century (Gardiner 1965: 71). But as most such corporations had Parliamentary charters, such grants implicitly received parliamentary approval. Parliament could, and sometimes did, pull the charters of companies. Therefore, such companies had a powerful incentive to lobby for favors from both the king and Parliament. As Parliament became more involved with company charters and corporate affairs, company shareholders and officers increasingly sought membership in Parliament, where they would be well situated to defend their company's interests; Ruigh (1971: 56) offers several examples.

purpose: the reallocation of regulatory authority from the monarch to Parliament. For example, the highly anti-competitive Statute of Apprentices was unaffected by the Statute of Monopolies; and the ability of Parliament to generate protection rents for favored interest groups by means of trade barriers remained the same (see Prestwich 1966: 243–44, for examples). In other words, the Statute of Monopolies *only* restricted the ability of the king to grant monopolies to favored individuals.

The Statute of Monopolies did institute one particular reform of great interest to barristers: it established that the common law courts were to determine exactly which monopolies were legally valid (Holdsworth 1945: 353). The common law had asserted such a claim in the earlier "Case of Monopolies," but the statute granted it the explicit sanction of Parliament.[21]

Coke was personally involved, directly and indirectly, in the operations of a number of important recipients of monopoly grants who benefited from the Statute of Monopolies, as he wrote it.[22] He was intimately involved in the resolution of disputes between chartered companies and alleged interlopers while a member of the Privy Council after 1613, and was frequently retained by that body in earlier years for advice. After joining the Privy Council, Coke became involved in numerous disputes involving the exclusive privileges granted to companies and corporations. For a time, he was an enthusiastic supporter of the Project of Alderman Cockayne to obtain the monopoly right to import linen. He supported both the salt and the coal monopolies. Coke's decisions in disputes over monopoly rights consistently tended to favor the monopolists; even the apparent exceptions inspire suspicion, such as his opposition to the privileges of the Merchant Adventurers during the time he supported Cockayne, one of their principal rivals.

Conclusion

Many classical liberals have written admiringly of Coke's purported role as a dedicated advocate of free enterprise against

[21]In 1601, even before *Darcy*, Elizabeth I issued a proclamation giving the common law courts the right to determine whether a monopoly was "injurious," and subsequently invalidate it. The Statute of Monopolies gave this proclamation statutory force (Holdsworth 1945: 360).

[22]He was the Chief Justice who approved the confirmation of the Charters of the East India and the Russia Companies; he settled the Charter of the Virginia Company; and was retained as counsel by the Draper's Company, the Cutler's Company, the Cook's Company, and the Stationer's Company. Since all ordinances of all crafts and guilds required the Chief Justice's signature, he signed off on the ordinances of the Merchant Tailor's, the Salters, and the Saddlers.

governmental restriction. In fact, however, Coke only consistently opposed *royal* grants of monopoly privileges to specific individuals. (Ironically, many of these royal grants were dispensations from various statutory trade prohibitions, and hence tended to increase economic efficiency.) With equal consistency, he defended economic regulations enacted by Parliament, most of which generated entry barriers into markets which benefited specific interest groups, not specific individual persons. Common law jurists, barristers, and Coke personally all tended to benefit from the trend towards parliamentary regulation of the economy, because these legislated regulations tended to increase the demand for litigation in the common law courts. The shift towards more "modern" regulation by the legislature, from older grants of privileges to specific individuals, generated business for barristers.

Coke's selective attacks on certain kinds of monopoly grants occurred as part of his consistent efforts to secure more valuable and better enforced monopoly privileges for himself and his fellow barristers. The purported enemy of legal monopoly grants worked diligently to defend and expand the legal monopoly jurisdiction of the common law, of which he was a lifetime practitioner. He systematically fought against competition from other, non-common law courts, even in cases where those other courts provided superior service to litigants. The net impact of his activities in this connection seems to have been to make the market for adjudication in England significantly less competitive.

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