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From Prerogative to Consent: Examination of Monopolies in Early Stuart England

Hope Brown



In 1571, Parliament boldly raised the issue of royal trade privileges for the first time. The response of Queen Elizabeth I was to instruct the House of Commons not to concern themselves with such matters.¹ The issue rested for twenty seven years until, in 1598, Parliament sent a message to the Queen asking her to abolish "abuses practiced by Monopolies and Patents of Priviledge."² This time, Elizabeth asked Parliament not to undermine her prerogative and promised them she would look into eliminating³ monopolies. When Parliament met again three years later, the monopolies remained in place.⁴

Parliamentary checks on abuses of the royal prerogative of granting monopolies began at the end of the sixteenth century with Elizabeth I's royal proclamation. It was so strongly supported, however, that within a century, precedent was established that Parliament alone could grant a monopoly, and that even it could not, as the monarch had traditionally done, arbitrarily sell or give away a patent.⁵ I intend to examine the early seventeenth century anti-monopoly movement as it relates to the evolution of Parliament as guardian and interpreter of English constitutionality. In examining the period from the "Golden Speech" of Elizabeth I in 1601 to the 1624 Parliamentary Statute of Monopolies during the reign of James I, I hope to illuminate the legal shift that took place in England from royal prerogative to Parliamentary consent.

A lively discussion of monopolies in the Parliament of 1601 led to the drafting of a bill that abolished them altogether. Individual members of Parliament vehemently opposed specific monopolies they thought

adversely affected their constituencies. The only problem was that no one was comfortable challenging the royal prerogative. Parliament's authority would be undermined if Elizabeth decided to grant exemptions to the bill and consequently it was never passed.⁶ The debate was cut short by Elizabeth herself. In her famous "Golden Speech", the Queen addressed the foremost concern of the legislators:

Mr. Speaker, you give me thanks, but I am more to thank you, and I charge you, thanke them of the Lower-House from Me, for had I not received knowledge from you, I might a fallen into lapse of an Error, only for want of true information. Since I was Queene yet did I neuer put my Pen to any Grant but upon pretext and semblance made Me, that it was for the good and availle of my Subjects generally, though a private profit to some of my ancient Servants who had deserved well: But that my Grants shall be made Grievances to my People, and Oppressions, to bee priviledged under colour of Our Patents, Our Princely Dignitie shall not suffer it. When I heard it, I could give no rest vnto my thoughts vntill I had reformed it, and those Varlets, lewd persons, abusers of my bountie, shall know that I will not svffer it.⁷

It was the last speech ever made by Elizabeth to Parliament and in it she proclaimed she would do away with the most contentious monopolies. The rest would be subject to review in common-law courts.⁸ In a genius political move, the prerogative remained intact, she avoided total elimination of all monopolies and her right to issue them in the future had been preserved.

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Patents might never have come before the House of Commons had the queen not extended her prerogative in a way that Members of Parliament (MPs) considered dangerous. Patents had been granted by English monarchs as early as 1331.⁹ They were not an unpopular custom and if Elizabeth had been content to issue patents in encouragement of new trade and manufacturing, the status quo may have been maintained. However, Elizabeth faced difficult financial straits in the later part of her rule and was unable to adequately compensate favored supporters.

Instead of paying them outright, she granted her trusted servants exclusive privilege to the export, import, manufacture, or sale of a specific product. Often the product or manufacture awarded as patronage was already an established trade that provided a livelihood for many English subjects.¹⁰ In attacking the dispensation of patents, the House of Commons was attempting to preserve the rightful property of "freeborn Englishman" against tyranny.

Queen Elizabeth's proclamation on monopolies was first tested in *Darcy v. Allen* or *The Case of Monopolies* decided in the common law Court of Queen's Bench in 1603. Edward Darcy had been granted a patent by the Queen for the manufacture and import of playing cards. When a competitor, Allen, manufactured and sold cards, Darcy brought a suit of infringement against him. The court held that the Queen's grant was invalid because it damaged skilled card manufacturers by restraining them from practicing their trade and promoted their idleness. Furthermore, they claimed that it raised prices and lowered quality of playing cards, and set a dangerous precedent in allowing the unskilled manufacture of a product.¹¹ In short, the patent was held void because it violated the right of others to carry on the trade.

Sir Edward Coke's detail of *The Case of Monopolies* has prevailed as the original anti-trust judgment. However, in examining an opinion, it is important to also examine the jurist. Sir Edward Coke was a staunch believer in the unwritten English constitution. He asserted that Parliament's rights do not flow from the monarchy, but rather, they exist parallel to it. Furthermore, an MP's rights were innate.¹² Coke was fundamentally against Crown-sanctioned privilege; in the form of exclusive patent or otherwise if it violated liberty or property. His opinion described the playing card monopoly as "against the common law, and the benefit and liberty of the subject."¹³ In other words, Coke saw in Darcy the attempt by a Monarch to widen royal control over an established trade which was a private interest and therefore a protected liberty of the Englishman.¹⁴ In *The Case of Monopolies*, the question of sovereignty found expression in common-law precedent.

In addition to the common-law question concerning monopolies, another issue was raised which had broader implications for English governmental authority. Patents also ushered in the possibility of a

Crown independent of the taxing powers of Parliament. With the ability to draw revenue from patentees, a Monarch might be able circumvent the need to ask Parliament for subsidies. Stripped of its power of the purse, Parliament's role in government would be uncertain.¹⁵ This question would have broad implications by middle of the seventeenth century.

It must be understood, however, that MPs bore no ill will for the crown in their examination of monopolies. They respected the ancestral power of the monarch and did not wish to remove the royal prerogative all together. Parliament simply wanted to achieve consensus by defining the limits of the prerogative in a way that would prevent future abuses of their liberties.¹⁶

A prime example of the Common's deference to the Crown is *Bate's Case* (1606). John Bate, a London merchant, brought suit over the imposition of a tax on red currants from Turkey.¹⁷ The Court of the Exchequer decided that it was the prerogative of the Crown to levy payments on imports and exports by natives or foreigners as a matter foreign policy, citing that the king was acting in the public interest.¹⁸

One year later, the House of Commons held a debate on the legality of impositions. Suprisingly, James I agreed to accept a bill against outlawing them. However, it only applied to future increases of customs levels without Parliamentary consent.¹⁹ Essentially, the Commons made a concession to the king but seized the opportunity to further define a limit on the prerogative.

24 | *Bate's Case* offered a fitting backdrop for the reign of James I. Shortly after his accession, the James found himself in debt. His lavish spending and a declining economy necessitated innovation in order to secure revenue. The ingenious Lord Treasurer Robert Cecil, Earl of Salisbury, managed to make royal ends meet. First, he sold the right to collect revenues on Crown lands to the highest bidder. Then, he issued a new Book of Rates without Parliamentary consent. Next, he proposed the Great Contract which would have provided the King with annual revenue in exchange for his rights to feudal dues from wardship, knightage, and purveyance.²⁰ Despite Cecil's enormous effort, the Great Contract failed to pass in Parliament. Parliament was insistent on further definition of prerogative limits but understood the need for finesse in achieving those limits.²¹

The House of Commons next sought to clarify its constitutional argument against royal monopolies. James' use of patents again resurfaced in a general petition by the Commons in the second Parliamentary session of 1606.²² In response, the new Monarch reasserted his right to issue delegation of regulatory authority, *non obstante* grants²³, and trade monopolies. James retained the most lucrative monopolies, but promised to punish any abuses committed in the patents' execution, to subject select monopolies to common-law courts, and to retract some of them.²⁴

However, by 1610 the issue of monopolies had not been addressed to the satisfaction of the House of Commons. James had neglected to keep his earlier promise to abolish them. New patents had been granted and royal dispensation power continued to be abused.²⁵ James' response in 1610 was the same as it had been in 1606.²⁶ This time, Cecil managed to convince James to issue the *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 approaching him in pursuit of the grants that he was freely giving."²⁷ In other words, James conceded to the Commons, but remained adamant about his right to issue monopolies.

When Parliament met in 1621, James's *Book of Bounty* promises were proving increasingly empty. An anti-monopoly bill was read and passed in the Commons but failed in the House of Lords. The upper House was unwilling to oppose the prerogative with such a bill.²⁸

The anti-monopoly campaign was reopened in the next meeting of Parliament two years later. It passed three readings in the Commons and was agreed to by the Lords. James gave his assent and in 1624, the *Statute of Monopolies* became law.

In 1601, Parliament counted on Elizabeth's financial need to achieve their end. Likewise, James' need in 1610 resulted in the issue of the *Book of Bounty*. In 1624, the Crown's dependence on Parliamentary subsidy secured the new law in restraint of prerogative. The power of the purse had long been a negotiating tool for Parliament, but James I's fiscal weakness was just the break Parliament needed to restrict the royal dispensing power.²⁹ In doing this, the Commons had succeeded in

securing common law precedent for the protection of English property.

While the *Statute of Monopolies* had put an end to the ability of the monarch to arbitrarily grant monopolies, it did not eliminate customary corporate monopolies. The common law continued to protect certain monopolies in order to exclude foreigners from specific trades.³⁰ As was stated before, this category of monopoly was not unpopular as it sought to preserve trade privileges on a local level. Rather, the aim of the *Statute* was to stop the King from using his prerogative in a manner that was considered to be abusive to the people. The *Statute* states:

BE IT ENACTED, that all monopolies and all commissions, grants, licenses, charters, and letters patents heretofore made or granted...are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect...

This portion of the law was pertinent to the Monarch. The ninth section describes circumstances which are excluded:

Provided also, that this act or anything therein shall not in any wise extend to be prejudicial unto the city of London, or to any city, borough, or town corporate within this realm, for or concerning any grants, charters, or letters patent to them, or any of them made or granted...shall be and continue of such force and effect as they were before the making of this act...³¹

Clearly, the *Statute of Monopolies* pertained only to the Crown and did not affect the autonomy of localities operating in their own best interest.

26 | The end of the sixteenth century saw Parliament requesting that its Queen dissolve unfair monopolies. Within two decades, the request was transformed into law. Parliament had cornered the financially inept King James I and demanded their natural rights be recognized. The politeness with which this was accomplished is striking. In addressing monopoly, Parliament was acting to preserve what it considered to be the rights of free-born Englishman. The royal dispensation of monopoly was representative of the greater issue of prerogative versus consent. In defining a limit to the prerogative, the early Stuart Parliament succeeded

in checking a power that was potentially boundless.

¹ Robert Bucholz and Newton Key, *Early Modern England, 1485-1714: A Narrative History* (Malden: Blackwell Publishing, Ltd., 2004), 146-147.

² Carolyn A. Edie, "Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power, 1597-1689", *The American Journal of Legal History* Vol. 29, No. 3, (July, 1985), 200.

³ *Ibid*, 201.

⁴ Nachbar, 1333. By the end of the seventeenth century, the issuance of a letter-patent by Parliament was justifiable only if it could be proved to be for the greater economic good.

⁵ Thomas B. Nachbar, "Monopoly, Mercantilism, and the Politics of Regulation", *Virginia Law Review* Vol. 91, No. 6, (October, 2005), 1330-1331.

⁶ "Elizabeth I's Speech to her Last Parliament (The Golden Speech)", *Renaissance Editions* (University of Oregon Libraries, 1999), transcribed from original 1602 edition, stable URL: <http://darkwing.uoregon.edu/%7Erbear/eliz1.html>, (accessed 4/7/2007).

⁷ Nachbar, "Monopoly, Mercantilism, and the Politics of Regulation", 1331.

⁸ Edie, "Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power, 1597-1689", 204.

⁹ *Ibid*, 205.

¹⁰ William L. Letwin, "The English Common Law Concerning Monopolies", *The University of Chicago Law Review*, Vol. 21, No. 3 (Spring, 1954), 356. In order to avoid a direct challenge to the royal prerogative, the court held that the Queen had been deceived by the monopolist in granting the patent.

¹¹ Bucholz and Key, *Early Modern England, 1485-1714: A Narrative History*, 209-210.

¹² Letwin, 357.

¹³ While the "liberty of the subject" argument became very popular, it only held in cases tackling privileges already in question because they relied expressly upon royal prerogative. The precedent held that Crown-sponsored restriction of trade violated the common law; however, restriction of trade through other avenues did not. *Ibid*, 360.

¹⁴ Edie, 204.

¹⁵ Letwin, 355.

¹⁶ Bucholz and Key, 213. An imposition was an additional custom charged on exports without the consent of Parliament.

¹⁷ Nachbar, 1330.

¹⁸ J.H. Hexter, "Power, Struggle, Parliament, and Liberty in Early Stuart England", *The Journal of Modern History*, Vol. 50, No. 1 (March, 1978) p.37.

¹⁹ Bucholz and Key, 213

²⁰ Edie, 211.

²¹ Nachbar, 1333.

²² Edie, 204. When a trade privilege was granted non obstante, it gave the patentee permission to carry on a trade that was otherwise restricted by law.

²³ Letwin, 355.

²⁴ Ibid.

²⁵ Edie, 205.

²⁶ Letwin, 355.

²⁷ Edie, 205.

²⁸ Letwin, 357.

²⁹ Nachbar, 1336.

³⁰ English Statute of Monopolies of 1623, 21 Jac. 1, c. 3, "The Original Source of Anglo-American Patent Law", Department for Constitutional Affairs, The UK Statute Law Database, (British government database online), <http://www.statutelaw.gov.uk/legResults.aspx?LegType=All%20Primary&PageNumber=105&NavFrom=2&activeTextDocId=1518308> (accessed April 17, 2007).