Hugo Grotius, Monopolies and the Shift in Business Morality in the Early Modern Low Countries

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ABSTRACT

As James Whitman has shown in a groundbreaking article in the *The Yale Law Journal*, subtle changes in the moral-legal treatment of business practices in the early modern Low Countries may be indicative of a wider tendency to lend normative support to the rise of a modern commercial society. Expanding on this insight, this article shows that with regards to the treatment of the problem of "monopolies", a similar such change occurs. In a passage from his influential work *On the Law of War and Peace* (1625), Hugo Grotius argued that "not all monopolies are against nature", thereby creating space for a more lenient treatment of chartered companies and dominant positions acquired through commercial industry in comparison to the Roman legal tradition and scholastic morality. Moreover, drawing on Max Weber's intuition about the spiritual sources of Western legal culture, this paper argues that a fresh look at Grotius's moral theological sources, especially Leonardus Lessius's *On Justice and Law* (1621), may provide us an explanation as to the why this subtle shift in his normative assessment of certain monopolistic practices occurred in the first place.

1. INTRODUCTION

In a groundbreaking article published in the "Yale Law Journal" in 1996, James Q. Whitman has revealed important shifts in market morality in the Low Countries in the early modern period.[1] Encouraged by a renewed interest in Roman law, Dutch jurists and moralists have offered new

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1. James Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 YALE L.J. 1841 (1996).

perspectives on the doctrine of just pricing and traditional shame sanctions applied to bankrupts. In this manner, they contributed to laying the normative foundations of modern commercial society. This article wishes to expand the evidence provided by James Q. Whitman about the changing attitude to commercial life in the early modern Netherlands by concentrating on debates about monopolies. At the same, it wishes to hint at a paradox. Against the background of global, state-backed trade with the Dutch East Indies, one can observe a subtle change in the way the topic "monopolies" was dealt with in the Low Countries. From the outright rejection and punishment of trust and monopolies in ancient Roman law (C. 4,59), we move to a much more nuanced account, allowing for important exceptions. Hence, while in some cases, a return to ancient Roman law has allowed jurists and theologians from the Low Coutnries to justify modern commercial society, in the case of the debate on monopolies, it was probably the downplaying rather than a renewed emphasis on Roman law which made it possible for them to justify important forms of early modern commercial capitalism.

The scope of this contribution is limited. It will concentrate on the treatment of monopolies in the work of the well-known Dutch jurist and theologian Hugo Grotius (1583-1645). I will argue that a subtle change in attitude towards monopolies occurred in Grotius' treatment of the subject, making it possible for him to justify the commercial activities of the Dutch East India Company more easily. Moreover, I will argue that one of the reasons behind this subtle shift is Grotius' skillfully ignoring the Roman law on monopolies – an argumentative strategy which, I will further argue, Grotius adopted from Catholic moral theologians. Grotius may have proceeded that way precisely because he was drawing on the insights of Leonardus Lessius (1554-1623), a scholastic moralist from the Southern Netherlands whose work he was imbued with.[2] He is one of the many authors of moral literature on the *forum internum* which, following Max Weber's advice, we should consult to improve our insights into the making of the modern economic mind. As far as discussions on monopolies are concerned, Lessius neutralized certain passages from the Roman law on monopolies in order to justify state-backed monopolies that formed the backbone of early modern trade while stimulating, more broadly, a culture of hard work and industry.

2. GROTIUS AND MONOPOLIES

Grotius is a jurist who is well-known for his commitment to defending

2. R. Feenstra, *Quelques remarques sur les sources utilisées par Grotius dans ses travaux de droit naturel*, *in* THE WORLD OF HUGO GROTIUS (1583-1645) 65-81 (1984); *see also* Wim Decock, THEOLOGIANS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE IUS COMMUNE (C. 1500-1650) 208-12, 272-74, 321-25, 598-601 (2013).

the commercial interests of the Dutch Republic and the Dutch East India Company (VOC), founded in 1602, in particular.[3] His manuscript "On the Law of Prize and Booty" (*De iure praedae*), the twelfth chapter of which became famous (*Mare Liberum*)[4], contains an unashamed legitimation of the young Dutch Republic's conquest of territories in East Asia which had initially been attributed to the Portuguese crown by the Treaty of Tordesillas. Grotius was also close to the leaders of the Dutch East India Company, which, as a chartered company, was a monopolistic organization.[5] So how did Grotius think about chartered companies and economic privileges granted by the authorities? How did Grotius view concentration of economic power at a time when there were no modern institutions to combat trusts or dominant positions, but where, quite on the conrary, state power contributed to the rise of strong global trade companies and conversely?[6] In "On the Law of War and Peace" (*De iure belli ac pacis*), Grotius answers these questions in a short section on "monopolies" (*monopolia*) - the term that was used in the late middle ages and the early modern period as a starting point for discussions about dominant positions, cartels and state-privileged companies.[7]

Grotius' discussion of monopolies in paragraph 16 of the twelfth chapter (on contracts) of the second book of *De iure belli ac pacis* begins with a short but forceful sentence: "*Monopolia non omnia cum iure naturae pugnant*", that is, "not all monopolies are contrary to natural law".[8] In other words, he does not start from the idea that, in principle, all monopolies are a violation of natural law. This clear statement right at the beginning of his brief discussion of the monopoly question may come as a surprise. Instead of relying on a supposed principle of natural law, Grotius, who is known to have been well acquainted with the Roman legal tradition,[9] could have taken as his starting point a number of influential Roman legal texts, such as the prohibition of monopoly by the Emperor Zeno (Cod. 4,59,2) and the

3. M.J. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615), in*BRILL'S STUDIES IN INTELLECTUAL HISTORY 139 359-480 (2006.

4. M. Somos, *Open and Closed Seas: The Grotius-Selden Dialogue at the Heart of Liberal Imperialism, in* EMPIRE AND LEGAL THOUGHT 322-61 (E. Cavanagh ed., 2020).

5. J. Wang, *The Western Governments in the Transition from Chartered Companies to Multinationals in the 19th Century*, 3 REVUE FRANÇAISE D'HISTOIRE ÉCONOMIQUE28-39 (2015).

6. On the (positive) relationship between state-building processes and the rise of major (chartered) business corporations, see also T. Zhang & J.D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 YALE L.J. 1970 (2023).

7. W. Vandermeulen, *Modest Building Blocks: The State of the Art of Monopoly Thinking at the Turn of the Middle Ages and the Early Modern Period in the Works of Lawyers and Theologians*, 91 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 427 (2023).

8. H. Grotius, *De iure belli ac pacis* 2,12,16. The edition used here is Grotius, *De iure belli ac pacis libri tres, curavit B.J.A. De Kanter - Van Hettinga Tromp, additions novas addiderunt R. Feenstra et C.E. Persenaire adiuvante E. Arps-De Wilde*, Die Aalen, Scientia Verlag, 350 (1993).

9. B. STRAUMANN, ROMAN LAW IN THE STATE OF NATURE. THE CLASSICAL FOUNDATIONS OF HUGO GROTIUS' NATURAL LAW (2015).

condemnation of artificial scarcity (Dig. 48,12,2). He could also have relied on the condemnation of the creation of artificial scarcity in the canon *Quicumque* from the *Decretum Gratiani* (C.14 q.4 c.9) – after all, he was well-acquainted with the medieval canon law tradition.[10] Also, at the outset of the sixteenth century, these Roman and canon legal texts had been taken by Emperor Charles V as the starting point for a harsh condemnation of various forms of concentration of economic power, in particular dominant positions and cartels.[11]

It should be emphasized that from the outset Grotius does not start from the position that all monopolies are by nature illegitimate. The first argument Grotius gives for his general view that not all monopolies violate natural law runs as follows:[12] "they can sometimes be authorized by the sovereign power for a legitimate reason (*justa de causa*) and at a fixed price (*pretio constituto*)." Furthermore, Grotius argues that private individuals can legitimately create a monopoly, at least if they do not cheat and do not charge usurious prices. He claims that dominant positions created by sellers having bought all the goods and then selling them at a fair price are legitimate. He literally says:[13] "strictly speaking, they do not violate the right of another" (*proprie ius alterius non violant*). But with reference to Ambrose, the Church Father, he adds that these undoubtedly very industrious merchants, who have acquired a monopoly position, violate the rules of charity (*adversus caritatis normam*).

Grotius' analysis of the economic behavior known in the Anglo-Saxon world as "cornering the market", i.e. gaining in-depth control over a market, is brief but fascinating. He seems to both legitimize and condemn this practice, which today could quite quickly be described as a form of market abuse. Or rather, he looks at this practice from two different angles. On the one hand, he uses legal criteria (*ius*), on the other hand, he makes charity (*caritas*) the basis of his consideration. Should we read this as an anticipation of the modern difference between law and morality? A morality that can, perhaps, be translated into public policy? We would like Grotius to explain his extremely concise positions, but he does not do so in *De iure belli ac pacis*.

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10. For an example taken from international law, see O. Condorelli, *Grotius's Doctrine of Alliances with Infidels and the Idea of Respublica Christiana*, 41 GROTIANA 13-39 (2020).

11. For further discussions of these texts, and their reception in the early modern age, see B. Mertens, *Im Kampf gegen die Monopole: Reichtstagsverhandlungen und Monopolprozesse im frühen 16. Jahrhundert*, Tübingen, Mohr, 1996; *cf.* J. STRIEDLER, STUDIEN ZUR GESCHICHTE KAPITALISTISCHER ORGANISATIONSFORMEN: MONOPOLE, KARTELLE UND AKTIENGESELLSCHAFTEN IM MITTELALTER UND ZU BEGINN DER NEUZEIT (2014) (1925); D. von Mayenburg, *Wörter für Wucher: Ius commune and the Sixteenth Century Debate on the Legitimacy of South German Trading Houses*, *in* MIGRATING WORDS, MIGRATING MERCHANTS, MIGRATING LAW TRADING ROUTES AND THE DEVELOPMENT OF COMMERCIAL LAW 176-231 (S. Gialdroni et al. eds., 2019).

12. Grotius, *De iure belli ac pacis* 2,12,16.

13. Grotius, *De iure belli ac pacis* 2,12,16.

3. WEBER AND THE SPIRIT OF EUROPEAN LEGAL HISTORY

The hypothesis put forward here is that we can better understand Grotius' position on monopolies if we take an interest in what has been named in the title of this contribution as "the spirit of European legal history". This is, of course, a direct reference to the work of the great jurist, sociologist and economist Max Weber (1864-1920), whom, we should not forget, started his career as a legal historian.[14] In 1920, the final version of his famous "Protestant Ethics and the Spirit of Capitalism" was published. Although it cannot be the intention of this article to discuss this fascinating work, it is helpful to address some of Max Weber's fundamental methodological intuitions.[15] They not only help us to better understand Hugo Grotius, but also, on a more general level, to better grasp the theological roots of legal thought in the European tradition.

The starting point of Max Weber's methodological intuition was that the best way to better understand the spiritual foundations of the Western legal and economic order was to analyze the early modern literature on cases of conscience (*casus conscientiae*). In order to understand the relationship between religious convictions and economic ideas, Weber considered it necessary "to draw above all on those theological writings that can be recognized as having grown out of pastoral practice."[16] The question of the correctness of Weber's so-called thesis on the Protestant roots of capitalism will not be addressed in this short article. Irrespective of the validity of the conclusions Weber reached, attention should be focused here on Max Weber's basic methodological intuition.

Weber insists that pastoral practice, the fruit of pre-modern man's preoccupation with the afterlife, has left a lasting mark on Western culture.[17] To this observation he adds, often in a somewhat disillusioned way, that modern man's reason lacks the power to grasp the enormous influence that religious beliefs have been able to exert on daily life. Even with the best will in the world, he concludes at the end of "Protestant Ethics and the Spirit of Capitalism", modern man is generally incapable of "imagining the importance that religious consciousness has had on the conduct of life, culture and the character of the people to be as great as it actually has been."[18] This is an observation that he also formulated in 1906 in an article

14. A.T. KRONMAN, MAX WEBER , (1983).

15. For more detail, see W. DECOCK, LE MARCHE DU MERITE : PENSER LE DROIT ET L'ECONOMIE AVEC LEONARD LESSIUS 27-38 (2019) (an English version is forthcoming in the series OXFORD STUDIES IN THE HISTORY OF ECONOMICS).

16. MAX WEBER, DIE PROTESTANTISCHE ETHIK UND DER GEIST DES KAPITALISMUS 411 (W. Schluchter & U. Bube eds., 2016) (1905).

17. It should be recalled that, in more recent times, this point has been made with regards to the history of criminal law, too. *See* JAMES WHITMAN, THE ORIGINS OF REASONABLE DOUBT. THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL (2008).

18. Weber, *supra* note 16, at 490.

on "Churches and Sects in North America" in the magazine "Die Christliche Welt":[19] "We modern, religiously 'unmusical' people find it difficult to imagine, or even simply to believe, what a tremendous role was played by these religious moments in those epochs when the characters of modern nations were formed, which overshadowed everything in those days when concern for the 'hereafter' was the most real thing there was."

Weber describes the literature of conscience as a privileged witness to this great concern for the soul and the great impact of pastors as experts and advisors. The literature of conscience is thus at the center of Weber's methodology. He accuses a critic such as Karl Fischer of not having understood the results of his study due to a lack of understanding of this methodological basis. In fact, the methodology proposed by Weber leads the modern reader away from his familiar world, which, in the words of Pierre Legendre, "has been purged of religious references, so to speak."[20] Weber's methodology, however, has the merit of bringing us as close as possible to the soul, to the spirit, that has shaped the conceptions of law for centuries, not only in Europe itself, but also in the world conquered by European countries in the early modern period. The extensive literature on cases of conscience - from the medieval manuals for confessors to the legal-theological treatises of the Salamanca School to Puritan casuistry - reveals what the American law professor Harold Berman would call the *belief systems* that underpinned legal and economic life in the pre-modern era.[21]

Moreover, Max Weber was well aware that his *Protestant Ethics and the Spirit of Capitalism* only lifted a corner of the veil that hides the hundreds of thousands of pages that this preoccupation with conscience has bequeathed to us in terms of source material. Instead of exploiting the enormous potential of his methodology, he confines himself to a preliminary investigation based on a small selection of authors belonging to Protestant sects of a puritanical orientation. The immense Lutheran and Catholic literature on cases of conscience is not discussed in *Protestant Ethics*. According to Weber himself, he was primarily influenced by reading the *Christian Directory* from 1673 by the Puritan pastor Richard Baxter (1615-1691).[22] He later admitted in a letter to Felix Rachfahl, one of his critics, that rationalized asceticism had found its maximum strength in the Jesuit order.[23] Furthermore, in his study *On the Psychophysics of Industrial*

19. Max Weber, *Kirchen und Sekten in Nordamerika: eine kirchen- und sozialpolitische Skizze , in* MAX WEBER.: ASCETIC PROTESTANTISM AND CAPITALISM:. SCHRIFTEN UND REDEN 1904-1911 457 e(W. Schluchter & U. Bube eds., 2014).

20. P. Legendre, *Note marginale: L'étranger proche: Pour le public français, la leçon d'une recherche*, preface to H.J. BERMAN, DROIT ET REVOLUTION: L'IMPACT DES REFORMES PROTESTANTES SUR LA TRADITION JURIDIQUE OCCIDENTALE 9 (Alain Wijffels & Paris Fayard trans., 2010).

21. H. Berman, *Law and Belief in Three Revolutions*, 18 VALPARAISO U. L. REV. 569 (1984).

22. Weber, *supra* note 16, at 414.

23. Max Weber, *Anti-critical remarks on the "spirit" of capitalism, in* ASCETIC PROTESTANTISM AND CAPITALISM: SCHRIFTEN UND REDEN 1904-1911 583(W. Schluchter & U. Bube eds., 2014) .

Work, which is based on his empirical observations of the operation of his family-in-law's textile company, he concedes that modern Catholicism, in contrast to medieval forms of Christianity, can have very similar effects on lifestyle as Protestant asceticism.[24]

Weber's thesis was therefore more nuanced than the caricature suggests. Even the main source of his *Protestant Ethics*, Baxter's *Christian Directory*, bears the marks of Jesuit casuistry, that is the quintessence of Catholic moral theology in the early modern age. In his list of recommended authors at the end of the third part of the *Christian Directory*, Baxter included both Juan Azor (1536-1603), a Spanish Jesuit who published a very influential manual of moral theology (*Institutiones morales*)[25], and Martín de Azpilcueta (1492-1586), author of arguably the most influential manual of confessors, the *Enchiridion seu manuale confessariorum et poenitentium*, which had a global impact.[26] Furthermore, Baxter openly admits in his book that the rules of his own ascetic life were directly inspired by the advice of a Jesuit from the Southern Netherlands. The name of this Jesuit is familiar to economists and lawyers: Leonardus Lessius.[27]

Lessius was a Jesuit theologian and moralist who is known for his fundamental contribution to business morality and various doctrines of private law.[28] In his day, he was considered "the oracle of the Netherlands" because the merchants in Antwerp and the political elite constantly appealed to his advice.[29] In addition to works on law and commercial morality, he wrote influential works on fundamental theological issues such as the relationship between grace and free will, as well as a treatise on the hygiene of life, the *Hygiasticon*, which Richard Baxter referred to as his preferred manual for ascetic living, as mentioned above. Lessius is also generally regarded as a bridge between the so-called "School of Salamanca" and the natural lawyers of the seventeenth century, including Grotius.[30] His

24. MAX WEBER, ZUR PSYCHOPHYSIK DER INDUSTRIELLEN ARBEIT 362 n.95 (W. Schluchter & S. Frommer eds., 1995).

25. J. THEINER, DIE ENTWICKLUNG DER MORALTHEOLOGIE ZUR EIGENSTÄNDIGEN DISZIPLIN (1970).

26. THE PRODUCTION OF KNOWLEDGE OF NORMATIVITY IN THE AGE OF THE PRINTING PRESS: MARTÍN DE AZPILCUETA'S MANUAL DE CONFESSORES FROM A GLOBAL PERSPECTIVE (M. Bragagnolo ed., 2024).

27. LEONARDUS LESSIUS: DE IUSTITIA ET IURE CAETERISQUE VIRTUTIBUS CARDINALIBUS, ON JUSTICE AND LAW AND THE OTHER CARDINAL VIRTUES (N. Jansen ed., K. Wille trans., 2020); LEONARDUS LESSIUS' DE IUSTITIA ET IURE: VADEMECUM ZU EINEM KLASSIKER DER SPÄTSCHOLASTISCHEN WIRTSCHAFTSANALYSE (B. Schefold ed., T. Van Houdt trans., 1999).

28. J. A. SCHUMPETER, HISTORY OF ECONOMIC ANALYSIS 99 (Elizabeth Boody Schumpeter ed., 1954); ; B. GORDON, ECONOMIC ANALYSIS BEFORE ADAM SMITH: HESIOD TO LESSIUS (1975); J. GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE (1991).

29. *See also* LEONARDUS LESSIUS ON SALE, SECURITIES AND INSURANCE (W. Decock & N. De Sutter trans., 2016).

30. R. Feenstra, *L'influence de la scolastique espagnole sur Grotius en droit privé: Quelques expériences dans des questions de fond et de forme, concernant notamment les doctrines de l'erreur et de l'enrichissement sans cause*, *in* LA SECONDA SCOLASTICA NELLA FORMAZIONE DEL DIRITTO PRIVATO MODERNO 377-402 (P. Grossi ed., 1973).

complete works and the full context of his thoughts and actions cannot be discussed here. However, three observations are important.

Firstly, Lessius is a textbook example of the fascinating interweaving of legal, ethical and economic thought in the literature of conscience in the early modern period. But besides him, there were hundreds of Catholic theologians and jurists who dealt with topics related to law and the economy.[31] They give us an insight into the "spirit of European legal history" à la Weber. A second remark concerns the general tenor of Lessius' thought. Both in the field of fundamental theology, which deals among other things with the question of grace and free will, and in the field of business ethics, Lessius' opinions can be characterized as "meritocratic" in the etymological sense of the word. For Lessius, hard work (*industria*), perseverance and willpower must be rewarded, both on earth and in heaven.[32] In other words, on a theological level, he believes that those who do many good works (such as works of charity, prayer, asceticism) should be able to hope for paradise with a probability bordering on certainty, although of course the grace of God is still necessary. And on the level of business ethics, he believes that the conscientious businessman who understands the mechanism of the market and speculates and trades on this basis will make a legitimate profit.[33] Effort must be rewarded. This leads to a third observation, particularly with regard to Lessius' views on monopolies. These are of great importance, not only because they illustrate his meritocratic tendencies in concrete terms, but also because they form the background for Grotius' reflections on dominant positions and state monopolies.

4. LESSIUS' DIFFERENTIATED ANALYSIS OF MONOPOLIES

Lessius' view of monopolies can be found in the last chapter of his discussion of the contract of sale in his treatise *On Justice and Law* (book 2, chapter 21). Curiously, the specific *dubitatio* dealing with monopolies in this chapter was still missing in the first edition of his work from 1605, although is present in all subsequent editions.[34] The way in which Lessius formulates the title of this question is significant: "Are all kinds of monopoly unjust?". It is a rhetorical question. Lessius puts the answer in

31. J. BARRIENTOS GARCÍA, REPERTORIO DE MORAL ECONÓMICA, 1526-1670: LA ESCUELA DE SALAMANCA Y SU PROYECCIÓN (2011).

32. Decock, *supra* note 15.

33. W. Decock, *Lessius and the Breakdown of the Scholastic Paradigm*, 31 J. HIST. ECON. THOUGHT 57-78 (2009).

34. For an overview of the many editions of Lessius' *De iustitia et iure*, which attest to its enduring popularity across the centuries, see T. VAN HOUDT, LEONARDUS LESSIUS OVER LENING, INTREST EN WOEKER, DE IUSTITIA ET IURE, LIB. 2, CAP. 20. EDITIE, VERTALING EN COMMENTAAR (Verhandelingen van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België, Klasse der Letteren, Jg. 60, nr. 162) (1998).

the reader's mouth simply by the way he formulates his question. Of course, the answer is: "no, not all types of monopoly are illegal". Thus, the first sentence of Grotius' treatment of the monopoly question sounds like an answer to the question posed by Lessius: *"Monopolia non omnia cum jure naturae pugnant"* - not all monopolies are contrary to natural law. In Lessius' chapter on monopolies we find no reference to Emperor Zeno's decree of 483 (C. 4,59,2), despite the fact that, firstly, in the scholastic tradition it had served as the starting point for a strict condemnation of monopolies for many centuries, and that, secondly, in the 1520s Emperor Charles V referred to this decree in order to curb the concentration of economic power in the hands of the major German bankers and captains of industry - the Fuggers and Welsers[35] - and the large import and export companies trading in goods from the New World.[36] In Lessius' chapter, we do not find sharp moral condemnations of monopolies either, contrary to what is the case in the work *On Contracts* by Pedro de Oñate (1567-1646), a Jesuit moral theologians whose teachings were usually quite in line with those of Lessius.[37] In Oñate's treatment of monopolies, we find, alongside strong legal arguments, purely moral condemnations of monopolistic practices, the evil effects of which are repeatedly referred to. For instance, Onãte compares monopolies to pandemics, the deleterious effects of which must be combatted by means of strong medicine.[38] Nothing of the kind can be read in Lessius, or, for that matter, Grotius.

But let's start at the beginning. Lessius suggests, in good scholastic fashion, to set out by giving a definition of the phenomenon of "monopolies", before evaluating it from a moral perspective. In addition to a narrow definition of monopoly, he distinguishes a broader definition. According to a narrow definition, the term refers to a situation in which goods are sold by a single trader or, conversely, to a situation in which several sellers deal with a single buyer - the latter situation is more precisely referred to as "monopsony". Of greater importance, however, is the more general definition of monopoly formulated by Lessius:[39] "Any machination or diligence (*industria*) set in motion by merchants to secure for themselves alone either the sale of a particular product or its sale at a particular price must be regarded as a monopoly." Lessius then bases his analysis on this definition, so that he can ultimately distinguish four different types of

35. M. HÄBERLEIN, DIE FUGGER: GESCHICHTE EINER AUGSBURGER FAMILIE (1367-1650) (2006); DIE WELSER: NEUE FORSCHUNGEN ZUR GESCHICHTE UND KULTUR DES OBERDEUTSCHEN HANDELSHAUSES (M. Häberlein & J. Burkhardt eds., 2014).

36. Mertens, *supra* note 11.

37. W. Decock, *Monopolies and Moral Regulation of the Market in Pedro de Oñate's* De Contractibus, 90 LEGAL HIST. REV. 462 (2022).

38. *Id.* at 490.

39. LESSIUS, *supra* note 27, at 126.

monopoly according to the way in which they arise:[40]

> "A monopoly can be established in four different ways: (1) the sellers conspire to make sure that no one sells a certain commodity at a lower price, or (2) they make sure that they are the only ones who can sell a certain commodity, either (2.1) by obtaining the privilege of a prince, or (2.2.) by using their diligence (*industria*) to buy up all the goods of a certain kind at the same time in order to take them out of circulation until the prices rise; (2.3.) or by preventing competitors who want to import these goods from elsewhere."

This definition is remarkable in several respects. It is of course difficult for today's lawyers in Europe not to immediately think of modern EU competition law with its fundamental ban on cartels and conditional ban on unjustified dominant market positions, which are enshrined in Articles 101 and 102 of the Treaty on the Functioning of the European Union.[41] For the legal historian and the historian of economic thought, on the other hand, it is impossible not to see in Lessius' definition the reflection of the anti-cartel attitude of the scholastics. This profoundly anti-trust attitude in the scholastic tradition has already been emphasized by Joseph Höffner, Raymond de Roover and Odd Inge Langholm.[42] No exceptions are possible in this respect. The harsh condemnation of barriers to market entry is also typically scholastic - exceptions are not possible.

5. LEGAL MONOPOLIES

However, Lessius' discussion of the other two forms of monopoly - on the basis of princely privilege (*privilegio principis*) or on the basis of industriousness (*industria*) - deserves further explanation, as he does not want to condemn them across the board. These are precisely the forms of monopoly that Hugo Grotius does not necessarily describe as unlawful. As already mentioned, he said that monopoly privileges – the legal basis of chartered companies such as the VOC – are permitted if they are authorized by the authorities for a legitimate reason (*justa causa*) and at a fixed price (*pretio constituto).* Furthermore, Grotius argues that private individuals create a dominant position without violating the rights of another (*ius alterius non violant*) if they have bought all goods at a fair price and then sell them at a fair price without fraud. With reference to Ambrose, however, he believes that these undoubtedly very industrious merchants, who have

40. *Id.* at 126-27.

41. *Cf.* https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=celex%3A12012E%2FTXT.

42. J. HÖFFNER, WIRTSCHAFTSETHIK UND MONOPOLE IM FÜNFZEHNTEN UND SECHZEHNTEN JAHRHUNDERT (1941); R. De Roover, *Monopoly Theory Prior to Adam Smith: A Revision*, 65 Q. J. Econ. 492 (1955); O.I. Langholm, *Monopoly and Market Irregularities in Medieval Economic Thought: Traditions and Texts to AD 1500*, 28 J. HIST. ECON. THOUGHT 395 (2006).

acquired a monopoly position, violate the rules of charity (*adversus caritatis normam*). As will be shown below, these opinions of Grotius come very close to Lessius' more detailed discussion, of which they appear to be a succinct summary.

In fact, Lessius agrees with other scholastic theologians that the authorities may have good reasons (*justae causae)* for granting a special privilege to certain merchants. This is especially the case, he says, "when the prince decides to sell a privilege because he sees that otherwise no one would want to import this special kind of goods in sufficiently large quantities because of the costs involved, which cannot easily be covered unless a privilege is granted for a certain time, or because he urgently needs money to use for the common good."[43] He adds, however, that "if the prince grants a privilege for the import and sale of goods that are essential for the maintenance of the political community, he is obliged to fix the price of the goods."[44] Monopoly privileges are therefore permitted, but only at a fixed price - *constituto pretio* - as Grotius puts it. This is indeed traditional scholastic thinking on monopoly privileges, but Grotius undoubtedly incorporated it into his *De iure belli ac pacis* via Lessius.

Incidentally, no word is mentioned either in Grotius or in Lessius about the frequent abuses of legal monopolies. The contrast with the treatment of monopolistic privileges in Oñate's work is remarkable. Oñate warns repeatedly against rent-seeking practices, cronyism and collusion between state officials and chartered companies is remarkable.[45] Nothing of the kind can be found in Lessius or Grotius.

6. DOMINANT POSITIONS, JUSTICE AND CHARITY

The similarities between Lessius' and Grotius' treatment of the question of creating a dominant position through diligence and hard work (*industria*) are even more striking. It is precisely here that Lessius contradicts the traditional scholastic views. He himself dares to admit this. If one or more people buy up all the goods of a certain type (e.g. grain at harvest time, before or after) in order to sell them later at their own discretion, these people are sinning against justice according to some moral experts. Lessius considers this view to be very likely (*probabilis*), but then develops the opposite opinion, which does not seem improbable to him. With his characteristic respect for diligence and hard work (*industria*), he states that the process of acquiring a dominant position does not in itself undermine the justice of exchange. Unless the businessman has resorted to fraudulent maneuvers, it can be assumed that he has acquired his dominant position

43. LESSIUS, *supra* note 27, at 127.

44. *Id.* at 127.

45. One of the examples given by Oñate concerns the usurpation of statutory monopolies for the wine and il trade by local Peruvian administrators. *See* Decock, *supra* note 37, at 473-74.

through several contracts that in themselves respect contractual justice. In addition, the acquired right of ownership of the goods must be equated to the right of ownership of any other property. This right includes the power to dispose of the goods in an absolute manner. In other words, with Lessius, it can be argued that the businessman even has the right, in principle, to destroy the goods of which he is the perfect master.

Consequently, his respect for private property and the diligence of the merchant (*industria*) forced Lessius to judge practices of artificial scarcity more leniently than other scholastic moral experts. One of his predecessors, Juan de Medina (1490-1546), professor of theology at the University of Alcalá de Henares and author of an influential treatise *On Penance, Restitution and Contracts,* had categorically rejected any form of artificial scarcity. He had done so on the basis of Roman law, viz. the imperial constitution of Zeno in C. 4,59,2, and canon law, viz. canon *Quicumque* – standard sources in scholastic treatments of monopolies. Lessius, however, turned against Juan de Medina on the basis of his fundamentally meritocratic view of trade and law. He does not quote the passages from the Roman and canon legal tradition mentioned above. Furthermore, he hides behind the authority of his counterpart Luis de Molina (5135-1600), a Jesuit moral theologian who claimed that traders who benefit from a justly acquired dominant position cannot be obliged to pay any compensation on the basis of the *iustitia commutativa.*

According to Lessius, a dominant position, however strong its effect on prices, cannot be so easily dismissed on the basis of the rules of private law:[46] "The conduct that has caused the price to rise is not contrary to justice. Nor do the merchants violate justice by withholding or not selling the goods, because justice did not compel them to sell the goods at a certain time and they did not in any way obligate themselves to do so. They could have withheld the goods for another occasion, moved them to another place or even destroyed them without doing injustice to anyone because the goods were entirely their property. And so the citizens would not have had a right in the strict sense to buy the goods if the sellers had not wanted to sell them." In contrast, Oñate argued that dominant positions radically violated the principles of freedom and justice in exchange, because they submitted the other party to coercion, taking away the liberty with which the other party to the contract should consent to the bargain.[47]

Lessius' assessment of dominant positions and the creation of artificial scarcity from the perspective of exchange justice is therefore quite radical. However, this does not mean that in the end he simply approves of all dominant positions. On the contrary, Lessius is of the opinion that this economic situation cannot be viewed solely from a purely private law

46. LESSIUS, *supra* note 27, at 127.
47. Decock, *supra* note 37, at 476-77.

perspective and by means of concepts such as the right to individual property. An assessment from the perspective of the so-called *iustitia particularis*, i.e. justice in the sense of private law, is not sufficient. There should also be an evaluation from the perspective of *iustitia legalis.* In the scholastic tradition, *iustitia legalis*, as opposed to *iustitia particularis*, referred to justice as a virtue protecting the common good.[48] A violation of this justice of the common good can be sanctioned by criminal law. According to Lessius, it is precisely because the wider community suffers from a situation of concentrated economic power that the authorities have the right and the power to intervene.

The conclusion is therefore not so much that Lessius simply accepts dominant positions, but rather that he draws a subtle distinction between the assessment of this phenomenon from the perspective of private law on the one hand and from the perspective of public law on the other. In the scholastic language that is his own, it sounds like this:[49] "It may be argued that such people are not obliged to pay compensation for reasons of strict justice, and they have not violated the principle of particular justice, but only charity (*charitas proximorum*) and legal justice (*iustitia legalis*), namely public utility (*utilitas publica)*."

And so we have come back to Hugo Grotius. On the one hand, from a legal point of view in the strict sense of the word (*ius*), he defends dominant market positions resulting from fair contracts concluded by conscientious traders. No one's rights are violated in these transactions. On the other hand, he points out that these practices are contrary to charity (*caritas*). Grotius thus provides an excellent summary of the detailed discussion that we find in Lessius' *De iustitia et iure*.[50] At the same time, he also assumes the subtle change of attitude towards monopolies initiated by Lessius, saying that "not all monopolies are necessarily contrary to natural law", instead of simply starting from the general principle that all kinds of monopoly are unlawful.

7. FINAL REMARKS

The change of perspective in the moral-legal assessment of monopolies in the work of Lessius and Grotius is subtle, but it cannot be denied and it most probably reflects a significant change in context. It contrasts with the treatment of monopolies in the work of earlier moralists. For example, Conrad Summenhart (c. 1455-1502), author of an impressive work on Contracts (*Opus septipertitum de contractibus*), made a seminal contribution to scholastic discussions on monopolies at the turn of the

48. A. GRIMM, FRIEDEN UND RUHE DES GEMEINWESENS BEI DOMINGO DE SOTO 87-88 (2017).

49. Lessius, *supra* note 27, at 127.

50. This is a repeated finding. *See* W. DECOCK, THEOLOGIANS AND CONTRACT LAW: THE MORAL TRANSFORMATION OF THE IUS COMMUNE (C. 1500-1650) 208-12, 272-74, 321-25, 494-96, 598-601 (2013).

sixteenth century. However, he still maintained that monopolies were forbidden as a matter of a natural law.[51] Compared to that outright rejecton, on grounds of the law of nature, of different types of monopoly, Lessius' and Grotius' nuanced account of different types of monopoly gains significance. Echoing Lessius' question, Grotius' held that "not all monopolies are necessarily contrary to natural law". In Lessius' and Grotius' analysis, the Roman and canon law provisions that were often cited to argue the contrary, disappeared. A litte more than a century after Summenhart's exposition on monopolies, the economic realities had changed, especially in the Low Countries.

Lessius' and Grotius' change of view did not remain without effect. That may not come as a surprise against the background of the increasing connection between the defense of the interests of chartered companies and the affirmation of national state authority in the public economy of several European powers in the course of the seventeenth century.[52] In addition, the distinction between an evaluation from the point of view of law, on the one hand, and charity, on the other, in evaluating that kind of monopolies which are tantamount to dominant positions was taken up by later authors, even outside the Low Countries. This can be seen, for example, in the treatment of monopolies by Heinrich von Cocceji (1644-1719). After studying law in Leiden (the Netherlands) and Oxford, he became Samuel von Pufendorf's successor as Professor of Natural Law at the University of Heidelberg. He was also father of the later Prussian Grand Chancellor Samuel von Cocceji. In his commentary on Grotius' *De iure belli ac pacis*, Heinrich von Cocceji states from the outset that monopolies are fundamentally permissible under natural law: *jure naturae monopolia licita sunt*. He advocates an affirmative formulation of this principle and no longer uses a double negative, as Lessius and Grotius did. He thus goes one step further.

In other words, in less than two centuries, we have moved from an outright condemnation of all monopolies on the basis of natural law arguments (Summenhart), to the claim that not all monopolies are against natural law (Lessius and Grotius) to the statement that, by virtue of the law of nature, all monopolies are lawful. At the same time, the reference to Roman law has been effaced. Incidentally, Henry of Cocceji follows the reasoning of Lessius and Grotius when it comes to assessing dominant positions from the point of view of *iustitia particularis.* He explains that "anyone can dispose of his property at will according to his right and buy up all goods of a certain kind and then sell them at the price he wants and

51. Vandermeulen, *supra* note 7, at 467-68.

52. CONSTRUCTING EARLY MODERN EMPIRES: PROPRIETARY VENTURES IN THE ATLANTIC WORLD, 1500-1750 (L.H. Roper & B. van Ruymbeke eds., 2007); *see also* M. KOSKENNIEMI, TO THE UTTERMOST PARTS OF THE EARTH: LEGAL IMAGINATION AND INTERNATIONAL POWER, 1300-1870 317-34 (The Netherlands), 508-15 (France), 585-603 (England) (2021).

to the buyers he wants".[53] Like Lessius and Grotius, he envisages a limitation of this freedom by the authorities. He concedes that despite the unproblematic nature of this market practice from a private law perspective, it is usually prohibited for political reasons (*ex ratione politica*). On the one hand, Henry of Cocceji thus radicalizes freedom of contract and the concept of property. On the other hand, he is also aware that this private freedom must be restricted under public law for the common good.

53. *Hugonis Grotii de jure belli ac pacis libre tres, cum annotatis auctoris, nec non J.F. Gronovii Notis, et J. Barbeyracii Animadversionibus; commentariis insuper Henr. L.B. De Cocceii, insertis quoque observationibus Samuelis L.B. De Cocceii*, Lausannae, 1751, vol. 2, p. 118 (cf. p. 710).