Submission to the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into Patent Amendment (Human Genes and Biological Materials) Bill 2010

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1. Introduction

The Senate Standing Committee on Legal and Constitutional Affairs has asked for submissions for its Inquiry into the Patent Amendment (Human Genes and Biological Materials) Bill 2010 (the Bill). I offer a summary of the results of some of my research at IPRIA in the hope that the Committee will find them useful.[1] I should note at the outset, the focus of my work in this area has been historical; as such, this submission is aimed only at the proposed amendment to s. 18(1)(a) of the *Patents Act 1990* (and by implication the amendment to s. 18(1A)(a)). In short, I do not think that the apparently expanded role of s. 6 of the *Statute of Monopolies 1624* (the Statute) will add clarity to patent practice today – on the basis that there is no evidence that there was a clear distinction between invention and discovery in the early 17th century. An exploration of the political, economic and "technological" context of the Statute, and the evidence we have of its use, will demonstrate the drafters of the Statute did not mean the same thing as the drafters of the Bill seem to think they meant.

2. Context of the Statute of Monopolies

(a) The politics

It seems accepted by most lawyers and legal academics that the patent system, prior to the passing of the Statute was dominated by nepotism; an abuse that was only stopped by the Act – a triumph of pure innovation policy over the Crown in 1624. This is a simplistic reading of a complex time in English history. It is easy, from a 21st century vantage-point, to view the politics of early modern England in superficial terms. A nuanced reading of the provisions of the Statute requires an acknowledgement of the different groups that contributed to those politics.

A survey of the available material indicates that the Statute was a political compromise. As such, it was in the interests of both sides, the Crown and Parliament, for it to pass.[2] The issue of patents had become a site of conflict within the House of

[1] Aspects of this work has been published as C. Dent, 'Patent Policy In Early Modern England: Jobs, Trade And Regulation' (2006) 10 *Legal History* 71-95; and C. Dent, '"Generally Inconvenient": The 1624 *Statute of Monopolies* as Political Compromise' (2009) 33 *Melbourne University Law Review* 415-453. The latter article is attached to this submission.

[2] For Parliament, the Act provided a restriction on the power of the Crown. That the Crown was happy to assent to the Bill implies that there was royal agreement with the key parts of it (the King could have postponed the Bill, so the benefits to him of its passage such as an end to the conflict in Parliament and

Commons and had been since the time of Elizabeth.[3] It may be noted that much of the understanding of the patents of the time being abused stems from speeches in the House, many of which were made as a result of the interests of their constituents (such as outports jealous of the power of London, gentlemen complaining about the price of starch for their ruffs or personal enmity against a particular patentee).[4]

The partisan nature of the speeches is in contrast to the overall expansion of the economy at the time. The patent system under Elizabeth and James, then, may be seen as involving a set of policy-settings (aimed at increasing employment, improving the balance of trade with the continent and regulating industries) that had been employed by the Crown to good effect.[5] This does not mean it was perfect, there were, no doubt, some grants that were not in the national interest; however, it appears that the patent system, prior to 1624, was an early form of innovation policy – a policy that was formalised with the Statute of Monopolies.

(b) The economics

When I say it was an early form of policy, the theoretical understandings that underpin policies today were not as evident back in the early modern period. An understanding of the goals of the mercantilists, however, does assist in the interpretation of one of the key phrases of s. 6 of the Statute: that grants should not be "mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient".[6] The prime policy objective of the mercantilists was wealth creation. It was the wealth of the nation as a whole, rather than of individuals,

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funds to prepare for a war with Spain, were sufficient for the Bill to become law). Further, there were a number of odd exceptions included in the Statute – the one for the 'Host-men of Newcastle' (s. 12); the licensing of taverns (s. 12); the transportation of calf-skins (s. 13); and the making of smalts (s. 14). The inclusion of these exceptions is support for the argument that the Statute was an act of political compromise and not the expression of a Parliament speaking with a single voice.

[3] It should not be forgotten that patents in early modern England were not confined to patents for inventions; patents also covered grants of privilege to particular members of society (often, but not only, members of the monarch's household).

[4] It is important to note that elections were not contested in the same way they are today – there was, for example, no universal suffrage. This meant that key interests in major regional cities such as Newcastle and Bristol were central to the election of individuals to Parliament; which, in turn, meant that MPs took their seats to represents these interests as much as to represent the interests of the broader (non-voting) population.

[5] Dent, 'Patent Policy In Early Modern England', above n 1, 93-95.

[6] Economics in the sixteenth and seventeenth century was not the developed academic discipline evident today. There were no university courses on the subject and there were no dedicated professional "theorists". However, there was a significant group of commentators who based their writings on their practical experiences as merchants. Further, given their success in overseas trade, these merchants had the ear of the corporations and some Parliamentarians.

that was important. Two of the key themes of the mercantilists are relevant to the drafting of the section; these being the desire to boost employment and the benefits of improving the balance of trade. The latter concern is evident in the phrase "hurt of trade" in s. 6;[7] it is also implied in the phrase "raising the prices of commodities at home" – the sense of the word "commodity" in the 17th century focused on quantities of goods suitable for trade.[8]

With respect to other aspects of s.6, the meanings of "mischievous to the state" and "generally inconvenient" are not, at first glance, clear. In terms of the former, it has been suggested that the test of being "mischievous to the state" focused on whether or not a grant, 'though otherwise meritorious' would have the 'effect of creating unemployment'.[9] In terms of the latter, different interpretations have been suggested in the literature. According to one commentator, the Commons found a patent inconvenient if the grant 'though clearly obnoxious or injurious to the commonwealth, could not be proved definitely illegal'.[10] An historian also considered that the test of inconveniency was viewed 'through fiscal spectacles'.[11] Further, Coke himself, in his commentary on the Statute, stated that an invention was 'inconvenient' and therefore contrary to the Act, if it turned 'many men to idleness'.[12] It is likely, then, that the tests within s. 6, taken together, were aimed to be a broad national interest test – if a patent for an invention did not contribute to the "common wealth" (such as in terms of employment), then it would be contrary to the Act and, as a result, not granted.[13]

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[7] It is also evident in the language in the patent grant documents. The 1623 (pre-Statute) grant to Gomelden for furnaces for lead said that the invention will 'increase commodity at home and increase trade'; and a 1622 grant, again lead-related, stated that the manufacture of the lead would allow export and 'employ poor subjects'.

[8] The logic, presumably, was that if patents increased the cost of manufacturing commodities in England, then it would make those goods less attractive to those in Europe, thereby impacting the balance of traded.

[9] William Holdsworth, *A History of English Law* (3rd ed, 1945) vol. 4, 354.

[10] Elizabeth Read Foster, 'The Procedure of the House of Commons against Patents and Monopolies, 1621-1624' in William Appleton Aiken and Basil Duke Henning (eds), *Conflict in Stuart England: Essays in Honour of Wallace Notestein* (1970), 74.

[11] Edward Hughes, *Studies in Administration and Finance 1558-1825* (1934), 69.

[12] *The Third Part of the Institutes of the Laws of England* (1628/1979), 184. Encouraging employment was of particular importance to the English Parliament in the 1620s as there was significant unemployment and poverty that resulted from the bad harvests and declining trade of 1621 and 1622.

[13] One final point may be made about the construction of s. 6. The drafting style of the writers of the Statute was to ensure coverage by listing all possible alternatives. Section 1 of the Statute, for example, lists every version of royal grant to ensure that none are omitted – despite the fact that there is significant overlap between the categories. It is arguable, at least, that a similar approach was adopted in s. 6. That is, it is not clear that, as a matter of statutory construction, that the categories "not contrary to the law", "mischievous to the state" and "generally inconvenient" should be read to operate

(c) The technology

It may be noted, in addition, that there was support amongst the mercantilists for the ideal of patents for invention. This support did not equate to a specific desire for the development of all new technology. For example, there is evidence that patents for previously unknown inventions for a stocking knitting machine, a water-closet and armour plates were not granted to their inventors – with reasons for rejection including the impact it would have on employment. So, only particular types of innovation were encouraged.

An exploration of 16th century case law gives a limited perspective of the type of technology that was protectable prior to the passing of the Statute. A survey produces four decisions: *Hasting's Case* (1569), *Bircot's Case* (1572), *Mathey's Case* (1571) and *Humphrey's Case* (no date is provided). There are no surviving reports for any of these; three are described in Noy's report of *Darcy v Allen*[14] and the fourth, *Bircot's* Case, is considered in Coke's Institutes.[15] It is likely, however, that *Bircot's Case* and *Humphrey's Case* relates to the same patent.[16] Two of the three cases (*Hasting's* and *Mathey's*) are said to relate to patents for inventions allegedly brought in from overseas with the finding of the court reported to be that, as the technology was already in England, the patents were invalid. The third patent (*Humphrey's*/*Bircot's*) related to an alleged invention of Humphrey – this was held invalid because the technology was already in use in Derbyshire.[17] The only conclusion, then, that can be drawn from case law is that a "new manufacture" had to be a form of technology that did not exist in England prior to the grant of the patent. In other words, the term "invention" did not have the same connotations in early modern England as it does

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exclusively. This would support a reading of the test for patents for invention as focusing on the national interest or, at least, the interests of furthering the common wealth.

[14] Noy 173, 183, 74 ER 1131, 1139-40.

[15] *The Third Part of the Institutes of the Laws of England* (1628/1979), 181.

[16] Hulme refers to Coke's writings on the patent of Humphrey (E. Hulme, 'The History of the Patent System under the Prerogative and at Common Law (1896) 12 *Law Quarterly Review* 141,148), whereas the only pre-*Darcy v Allen* case relating to patents for invention referred to by Coke is *Bircot's Case*. Both *Humphrey's Case* and *Bircot's Case* relate to a patent for smelting lead ore. The grants could, therefore, have been for the same invention and the grant may have been transferred from one to the other.

[17] It is from Coke's writing on this decision that the phrase 'to put a new button on an old coat' entered the patent literature – suggesting that the patent involved a small improvement on the existing technology. The mention by Noy, and the reference to Coke in Hulme, of the case seem to indicate that it was only a matter of prior use of the same technology.

now – specifically, the term "invention" included the introduction of a new technology from a foreign country.[18]

This is not surprising when one key aspect of early modern society is considered – the intellectual environment. It should not be forgotten that the Elizabethan and Jacobean patent system predated the Enlightenment in England (whether this is measure from the publication of Newton's *Principia Mathematica* in 1687 or even the establishment of the Royal Society in 1660). The idea of the dedicated scientist or technologist who pursued new knowledge for its own sake, therefore, was not central to the thinking of technological advancement. That is, patents may not have been seen as "carrots" for technological innovators; it is perhaps more likely that the key target of the incentive was merchants – those who had contacts on the continent and the capacity to bring new technologies back to England.

In short, patents were granted to reward the "discovering" of technologies on the continent with grants being seen, and described in the documents, as rewards for the travel and endeavours of those who imported the inventions. The importance of this discussion is that it is not clear that the drafters of the Statute did hold that there was a key difference between discovery and invention. It may be noted that there is no record of the debates of 1624 and no evidence that the Parliamentarians considered there to be a distinction between discovery and invention. Their eyes were not on advances in the sciences or technological development but simply on increasing employment and reducing the level of imported goods from the continent.

3. Use of Statute of Monopolies in the 17th Centuries

Insight into the understandings that fuelled the passing of the Statute can be gained from the evidence we have about the use of the patent system after 1624. A survey of the approximately 100 patents granted in the first 18 years after the "new" system shows that innovation may not have been central despite the new enactment. There was, for example, a patent for "planting carrot roots and seeds" (to Worsley in 1638), one for ploughing land (to Brouncker in 1627 and one to Parham in 1634 – it may be

[18] The attraction of this form of technology transfer to the mercantilists is obvious when it is considered that the importation of technology from the continent would mean that more English workers would be employed in order to work the technology. Also, if the goods that resulted from the technology were now produced in England, there would no longer be a need to import these goods from Europe, thereby improving the balance of trade.

noted that neither patent was obviously for a new form of manufactured plough) and one for "transporting cattle" (to Wyott in 1628). Further, there were multiple patents for draining land or mines (a total of 12) and four for the manufacture of salt (patents for the production of salt were some of those complained about in Parliament prior to the Statute of Monopolies). The fact that in 1630, three patents were granted to Ramseye – one for raising water, one for the manufacture of saltpetre[19] and one for "separating metals" – may look particularly suspect when it is known that Ramseye was a Groom of the Privy Chamber.

A second source of information may be examined for the use of the patent system post-1624. That is the case law that developed around challenges to patents granted after the Statute. It should be noted that very few cases could be seen to relate to patents for invention.[20] One decision (*Administors of Calthorp v Waymans* (1676) 3 Keble 710; 84 ER 966) held that as long as the invention was new to England, then it was allowed under the Statute (the machine in question was known in Holland before it was used in England).[21] Another decision (*Colt v Woollaston* (1723) 2 P Wms 154; 24 ER 679) focused on a "project" that was supported by a patent for extracting oil out of English radishes (a project that, according to the court, succeeded only in enriching the projector). One other decision states, as *obiter* (the decision involved the printing of books), that a 'small variation of the invention would not entitle the defendant to break in upon the patent' (*Gibbs v Cole* (1734) 3 P Wms 255; 24 ER 1051). Finally, a patent for soap-making was held to be good on the grounds that was aimed at the regulation and ordering of the trade and was granted to a corporation rather than an individual – though it did not involve a new method of manufacture (*Hays v Harding* (1656) Hardres 53; 145 ER 376).

This is not to say no patents were granted for technological advancement. I am not an expert in the history of metal production to know whether the grant for the production of steel in 1626 reflected an advance in the technology, or the 1627 patent for manufacture of iron was a development or just the creation of a monopoly over a previously known and used process. The point here is that it is not evident from the

[19] Patents for the production of saltpetre were also problematic prior to 1624 – in many cases because the patent gave the patentee the right to dig up the land of other people in the search for manure.
[20] This conclusion is the result of a search of the English Reports and Hayward's Patent Cases for the period 1624 to 1750. Most of the 17th century patent decisions focus on the printing patents and the control that the Company of Stationers (and others) had in the reproduction of books.
[21] This interpretation was affirmed in *Edgeberry v Stephens* Holt KB 475; 90 ER 1162.

primary material available that only truly innovative techniques and products were granted patents. In other words, there is nothing to prove that the purpose of the Statute was to invent new manufactures in the way the term invention is used today.

4. Conclusion

The explanatory memorandum for the Bill states that the distinction between discoveries and inventions 'is in keeping with the original intent of the English Parliament'. This survey of the historical material available today (summarised in this submission and article) shows no evidence of such a distinction being drawn.[22] The policies that underpinned the exceptions in the Statute focused in jobs, foreign trade and the regulation of industries and not about the advancement of knowledge.

The question is: does this historical detail matter? At one level no; an erroneous claim in the explanatory memorandum is not likely to impact on the application and interpretation of an amended Patents Act. However, if the purpose of the amendment is to reinforce the distinction between the two concepts, then there may be more effective ways of doing it.[23] The language of s.18(1)(a) is already 'obscure',[24] to import the whole of s. 6 of the Statute of Monopolies would only make the issue of interpretation more challenging. The Stuart Parliament, and later judges, used contemporary understandings of economics and the law to find a (partial) solution, that made sense at them, to a problem that was very much of its time. Why would we use a 17th century fix for a very modern public welfare issue when we wouldn't use early modern understandings of medicine to fix a current public health problem?

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[22] The lack of distinction is emphasised by a statements in a later case. Justice Buller, in *Boulton v Bull*, referred to previous decision relating to "Dollond's patent" (there is no record of the full decision relating to this patent). Buller J's reference to this earlier case included the statements: 'Mechanical and chemical discoveries all come within the description of manufactures; and it is no objection to either of them that the articles of which they were composed were known and were in use before, provided the compound article which is the object of the invention, is new': (1795) 2 H Bl 463, 487; 126 ER 651, 663. If judges were using invention and discovery interchangeably in the eighteenth century, it is less likely that there were would have been a clear legal distinction between them in the seventeenth century.

[23] Whether the distinction needs any further reinforcing beyond the case law and commentary that exists currently is beyond the scope of this submission.

[24] Advisory Council on Intellectual Property, *Patentable Subject Matter*, Report, 2010, 8.

"GENERALLY INCONVENIENT": THE 1624 *STATUTE OF MONOPOLIES* AS POLITICAL COMPROMISE

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ABSTRACT

The *Statute of Monopolies* is central to one of the tests for patentability of inventions in the *Patents Act 1990*. The continued reference to the statute, almost 400 years after it was enacted, accords it an almost idealised status within patent law. Such a status does not acknowledge the political context of its passage through the Jacobean Parliament. This article addresses key aspects of the early modern period – including economic depression, issues of succession and the rivalry between the City of London and the outports – to argue that the *Statute of Monopolies* is best seen as a compromise; a political deal done between the Crown, the House of Lords and individuals and groups within the House of Commons.

I. INTRODUCTION

The current law of patents in Australia is underpinned by the *Patents Act 1990* (Cth). One of the tests for the patentability of inventions in the Act is that the invention is a 'manner of manufacture within the meaning of s. 6 of the *Statute of Monopolies*'[25] – a statute that was passed by the English Parliament in 1624.[26] It would surprise many to hear that the law regulating the latest technical innovations is, in part, based on words written almost four centuries ago. This state of affairs is even more surprising given the acknowledgement that the terms of the provision are 'ambiguous and obscure'.[27] This article provides a background, and discussion, of this historical requirement and the *Statute of Monopolies* generally in order to reduce that ambiguity.

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[25] *Patents Act 1990* s. 18(1)(a).

[26] The dating of the *Statute of Monopolies* is not consistent in the secondary literature. Some cases, judgments and texts refer to it as a 1623 Act and others as a 1624 Act. As the Statute was passed during the Parliament of 1624 and assented to on 29 May 1624, it shall be referred to here as the 1624 Act.

[27] Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, Report 99 (2004) [6.56]. What also may be seen as ambiguous and obscure is the High Court's reference to the granting of some patents of the time as 'excitingly unpredictable': *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252, 271.

The common understanding, amongst lawyers and legal academics, of the granting of patents by Elizabeth I and James I is of a tale of nepotism and abuse resulting in the 1624 triumph of Parliament. One prominent legal historian goes so far as to state 'of the magnitude of the evils caused by these inconsiderate grants to all classes of the community there can be no question'.[28] The research presented here counters this assessment and argues that the assent of James, and so the content of the *Statute of Monopolies*, may not be the act of a contrite monarch – but of an old man who is one part of a weaving of political compromise out of the economic and social troubles of the time.[29] Evidence of the other rapacious actions of the Crown and its favourites of the time – such as the sale of ward-ships[30] and the abuse of customs duties[31] – suggests the political protest that gave rise to the Act cannot be explained solely on the basis of the alleged abuses by patentees and their agents.

Few would argue now that the 1624 Act is not a key moment in the history of patent law. This universal acknowledgement runs the risk that it is ascribed a degree of ideological purity as the broader context of its passing is forgotten. The purpose here is to highlight the factors that gave rise to the 'crisis' of the 1620s;[32] a crisis for which the *Statute of Monopolies* was a (political) solution.[33] This recognition of the

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[28] William Holdsworth, *A History of English Law* (3rd ed, 1945) vol. 4, 347. It is acknowledged that non-legal historians do not have such a bleak view of the operation of the early patent system: See, for example, Joan Thirsk, *Economic Policy and Projects: The Development of a Consumer Society in Early Modern England* (1978); and Julian Martin, *Francis Bacon, the State and the Reform of Natural Philosophy* (1992).

[29] It has already been ascertained, but not widely recognised, that James supported the passage of the Bill: Chris Kyle, '"But a Button to an Old Coat"': The Enactment of the Statute of Monopolies, 21 James 1 Cap. 3' (1998) 19 *Legal History* 203, 218. There were, for example, a number of Bills from the 1624 Parliament that were 'spurned or deferred by James': G A Harrison, 'Innovation and Precedent: A Procedural Reappraisal of the 1625 Parliament' (1987) 102 *English Historical Review* 31, 42. If it was not in his political interests, it is likely that James would have, at least, deferred the Statute of Monopolies too.

[30] See, for example, J Hurstfield, 'Lord Burghley as Master of the Court of Wards, 1561-1598' (1949) 31 *Transactions of the Royal Historical Society* 95.

[31] See, for example, Lawrence Stone, 'The Fruits of Office: The Case of Robert Cecil, First Earl of Salisbury, 1596-1612' in F J Fisher (ed), *Essays in the Economic and Social History of Tudor and Stuart England* (1961) 94ff. For another commentator, 'worse' than the 'storms' caused by patents was the 'Stuarts' resort to the imposition of new (and higher) customs duties': Derek Hirst, *The Representative of the People? Voters and Voting in England under the Early Stuarts* (1975) 7.

[32] The circumstances that gave rise to the Statute was, for one commentator, the second of three crises in the patent system. The first was in 1601 (discussed below) and the third was in the 1640s 'when the Long Parliament cleared up some abuses which had recurred under the personal government of Charles': G N Clark, 'Early Capitalism and Invention' (1936) 6 *The Economic History Review* 143, 150.

[33] The exploration of this crisis, in this article, requires the examination of the time from legal, economic, political and social perspectives. To paraphrase the words of Russell, a legal historian runs an 'acute risk of becoming a prisoner of his documents': Conrad Russell, *Parliaments and English*

politically-constituted nature of the Act and its clauses may, in turn, allow for a more flexible approach to its continued use and interpretation in Australian jurisprudence;[34] alternatively, it may permit a realisation that the tests in the Act are but phrases of compromise and therefore of little intrinsic value.

II. PATENTS IN EARLY MODERN ENGLAND

To understand the context of the passage of the *Statute of Monopolies*, there needs to be an understanding of the patent system of the time. There are many histories of the system as it existed in the early modern period.[35] There is no need, therefore, to describe it, in great detail, here. It is, however, important to highlight key differences between patents then and patents now; and to emphasise the policies that justified the granting of many of the patents of the time.[36]

The term "patent", at least when applied to grants of limited monopolies, is used more restrictively now than it was in early modern England. The term is limited, now, to new inventions or innovations. Patents then were applied more broadly. Others have considered these early patents to fall into three categories.[37] The first is closely related to the current style of patent: patents for invention.[38] Examples under Elizabeth and James include patents for the manufacture of sulphur, oil, sail-cloths, glass and mills for grinding corn.[39] The secondary category includes the *non obstante* grants. These

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Politics 1621-1629 (1979) 2. It is important, then, to step outside texts from the legal tradition in order to achieve a wider perspective on the politics and decisions of the time.

[34] The interpretation of s. 6 of the *Statute of Monopolies* is currently the focus of a review by the Advisory Council on Intellectual Property, see Advisory Council on Intellectual Property, *Patentable Subject Matter*, Issues Paper (2008) 11.

[35] See, for example, Harold Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (1947); William Hyde Price, *The English Patents of Monopoly* (1913); E. Wyndham Hulme, 'The History of the Patent System under the Prerogative and at Common Law' (1896) 12 *Law Quarterly Review* 141; Arthur Gomme, *Patents of Invention: Origin and Growth of the Patent System in Britain* (1946); Christine MacLeod, *Inventing the Industrial Revolution: The English Patent System, 1660-1800* (1988); Adam Mossoff, 'Rethinking the Development of Patents: An Intellectual History, 1550 – 1800' (2001) 52 *Hastings Law Journal* 1255; and William Letwin, 'The English Common Law Concerning Monopolies' (1953) 21 *University of Chicago Law Review* 355.

[36] Much of the description in this Part is taken from Chris Dent, 'Patent Policy In Early Modern England: Jobs, Trade And Regulation' (2006) 10 *Legal History* 71.

[37] At the time, however, patents were not understood in terms of separate categories. Further, as has been recognised, these categories are 'not mutually exclusive': D. Seaborne Davies, 'Further Light on the Case of Monopolies' (1932) 49 *Law Quarterly Review* 394, 398.

[38] "Invention", or "to invent", in early modern England carried additional meanings to the single sense of creation that it does now. Invention, then, also referred to the bringing to England of technologies that were already in use in Europe.

[39] The details are taken from Hulme, above n 11, 145-150 and E. Wyndham Hulme, The History of the Patent System under the Prerogative and at Common Law – A Sequel' (1900) 16 *Law Quarterly*

allowed the recipients to operate particular industries or businesses notwithstanding the existing of a statute that banned the activity.[40] The regulatory grants of the time, the third category, included patents that permitted the regulation of specific trades and trade-routes (such as by the Society of Merchant Adventurers[41]) and patents to ensure other Acts were complied with. An example of the first form included Sir Edward Dyer's control over the tanning industry. Examples of the second group included a patent to John Martin 'as informer and prosecutor for the Crown on all past and future penal laws'[42] and a patent to ensure that the statute against gig-mills (a labour-saving device used in cloth production) was enforced. Under this style of grant, patentees had the capacity to levy fines where the statute was being breached.

The style and number of patents granted did not differ greatly between the Jacobean and Elizabethan periods. One particular way in which they conformed was their tendency to further particular policy aims, such as 'for the solution of fiscal and administrative problems'.[43] Early modern patents can be seen to contribute to the fulfilment of three policy goals – the increase in the level of employment of the English, the improvement of the balance of trade between England and the nation's trading partners, and that of delegated governance.[44] It is arguable that, while the patents were granted by the Crown, the other branches of government concurred in the policy positions adopted by the executive.[45] If the congruence of the granting of

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Review 44, 45-51. Hulme, in turn, sourced his information directly from the Patent Rolls and Calendars.

[40] An example is the patent for the sowing of woad. Woad was a very profitable crop, so farmers were keen to plant it. Unrestricted freedom to sow the crop meant that, in some years, there was insufficient food grain planted, leading to hunger in the population. A number of proclamations had been issued by Elizabeth limiting the farming of woad. *Non obstante* patents were sometimes granted, then, to ensure there was some woad for the cloth industry. For a discussion of the proclamations and patents on woad, see Frederic Youngs, Jr, *The Proclamations of the Tudor Queens* (1976) 151-4.

[41] The Merchant Adventurers, during Elizabethan times at least, 'supplied the only authorised channel for the largest and most lucrative part of the foreign commerce of England. It enjoyed a monopoly of the trade carried on by English subjects with the Low Countries and Germany': George Unwin, *Studies in Economic History* (1927) 133. While the first charter was granted to the Merchant Adventurers in 1296, it was during the period 1553-64 that the Company 'achieved a fully authorised and exclusive position as a staple for the export of cloth': ibid, 138.

[42] Margaret Davies, *The Enforcement of English Apprenticeship: A Study in Applied Mercantilism 1563-1642* (1956) 35. This grant gave him 'unrestricted powers of entry and search, of seizure, arrest and pleading; he was to take the informer's customary half of the forfeitures': ibid.

[43] Unwin, above n 17, 184. Macleod also recognised that the introduction of the patent system into England was policy-based, above n 11, 11-3.

[44] It is uncontroversial to state that the Tudor monopolies reflected a 'laudable government intention to foster product innovation and import substitution': David Palliser, *The Age of Elizabeth: England under the Later Tudors 1547-1603* (2nd ed, 1992) 376. It is less accepted to say that the goal of delegated governance was a positive policy goal of the Crown of the time.

[45] See Dent, above n 12, for a discussion of the case law of the time in terms of these policy goals.

the patents and the ruling on the grants by the courts are any indication, the broad policies of the time could be more likened to specific goals shared by the elites.[46]

For the purposes of this article, the two most relevant policy goals are that of employment and regulation.[47] Ensuring jobs for the masses is a significant policy goal of current governments. This policy was particularly important for Elizabeth as the population had been dramatically affected by an event earlier in the sixteenth century – the enclosing of land for the exclusive use of particular landowners. Broadly, there were a couple of ways in which the grants of patents were used to improve the employment prospects of the itinerant English workers. Patentees were supposed 'work the patent' and 'train apprentices' in return for the monopoly grant[48] while other grants included conditions that required the employment of English workers.[49]

Three forms of patents contributed to the policy goal of regulation. The first to be considered is the class of monopoly that controlled particular trades and trade-routes – such as the one that gave the Merchant Adventurers its role in the cloth trade[50] – a set of grants that also contributed to the trade policy. The more common form of regulation through the use of patents was the granting of licences to monitor particular industries. Examples of this include the oversight of ale-houses and card-manufacture. This form of governance had a positive public policy aspect. The maintenance of the quality of manufactured goods was one outcome of these grants.[51] In argument during

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[46] That the elites shared particular goals does not, however, mean that all of society agreed. The work of Andrew McRae, *God Speed the Plough: The Representation of Agrarian England, 1500-1660* (1996); and Laura Brace, *The Idea of Property in Seventeenth-Century England: Tithes and the Individual* (1998) has demonstrated that claims of the early modern elites were contested.

[47] In terms of trade policy, Hulme considers that 'Elizabethan policy aimed beyond question, as a perusal of the grants will amply testify, at the introduction of those industries the products of which had hitherto figured most prominently in the list of imports': 'History of the Patent System', above n 11, 152.

[48] Mossoff, above n 11, 1261.

[49] For example, the 1561 grant for the making of white soap stipulated that 'at least two of the servants of the patentees shall be of native birth': Hulme, 'History of the Patent System', above n 11, 145. It has also been suggested that grants covering the 'manufacture of soap, salt and starch' were an attempt to 'encourage the influx of new capital into old industries': Barry Supple, *Commercial Crisis and Change in England 1600-42: A Study in the Instability of a Mercantile Economy* (1959) 248.

[50] The patents that covered the monopolist trading corporations were further split into those for regulated stock companies and those for joint-stock companies. This distinction was important for some of the free trade debates in the seventeenth century and will be discussed below.

[51] Fox, above n 11, 182. Further, the regulation of ale-houses, for example, was seen as a necessity because of 'constant complaints of drunkenness and the resort of undesirable characters to the ale-houses': ibid, 175. For a more complete understanding of the role of ale-houses, and the motives of those who attacked their place in society, see Keith Wrightson, 'Alehouses, Order and Reformation in Rural England, 1590-1660' in Eileen Yeo and Stephen Yeo (eds), *Popular Culture and Class Conflict 1590-1914: Explorations in the History of Labour and Leisure* (1981).

Darcy v. *Allen*[52] the regulatory nature of the grant was emphasised – the monopoly on playing cards was, in part, aimed at limiting the playing of cards by workers.[53] Whilst this patent was held to be illegal by the court, others were not and grants for the regulation of ale-houses were exempted under the *Statute of Monopolies*.[54]

A significant number of the patents relating to the regulation of behaviour focused on the enforcement of particular statutes. Examples of patents associated with such enforcement include the grant for the statute against gig-mills and a grant to collect fines for breach of an Act requiring all owners of 60 or more acres to grow hemp. Given the lack of public agencies in the early modern period, those in charge of executing the economic and social policies of the time had to 'rely, in the absence of paid public inspectors, on creating sufficient incentives for private interests to take part in enforcing the laws'.[55] The provision of industry regulation through the granting of licensing patents did provide for the monitoring of participants in a society where the State was not large enough to police all aspects of public life.[56] The beneficial aspects of the patent system, however, did not prevent the occasional abuse of the system by patentees and their servants. It was the political reaction to such abuses, and alleged abuses, that provided one of the factors that, in the end, led to the passing of the 1624 Act.

III. Role of Parliament in Compromise

The *Statute of Monopolies* is a significant marker in the history of patents. Patent law did not start with its passage[57] and the Act did not represent the end of complaints about monopolies granted by the English Crown.[58] The reference to the statute in the

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[52] (1602) 11 Co Rep 84b, 77 ER 1260; Noy 173, 74 ER 1131. It should be noted that there is no record of the judgments in the case; the reports only deal with the arguments of counsel. For a detailed discussion of the case, see Jacob Corré, 'The Argument, Decision and Reports of *Darcy v Allen*' (1996) 45 *Emory Law Journal* 1261.

[53] One justification for the disputed patent for playing cards in *Darcy v Allen* was 'to stem the tide of skilled subjects who were wasting their labour in the production of playing cards and to suppress a perceived excess of card playing that was diverting the labouring classes from useful work': ibid 1273.

[54] This will be discussed in more detail below.

[55] Davies, above n 18, 25. It has been suggested that one of the results of Elizabethan practice was akin to the establishment of a "Public Service": Unwin, above n 17, 326.

[56] For a more detailed discussion of the role of informers in the nation's governance see M W Beresford, 'The Common Informer, the Penal Statutes and Economic Regulation' (1957) 10 *Economic History Review* 221.

[57] Seaborne Davies argues that it was under Elizabeth I that the *system* of patents began in England in 1561: above n 13, 396.

[58] Raffield, for example, refers to masques in which members of the Inns of Court paraded as 'projectors of ridiculous inventions' , a 'controversial political issue', during the reign of Charles I:

current Patents Act does, nonetheless, demonstrate its continuing importance. This connection to the seventeenth century does not, however, require that patent law be seen as teleological – that this area of regulation is evolving towards the perfect incarnation of protection. The *ad hoc* nature of the development of law is evident in the factors, the conditions of possibility,[59] that gave rise to the passing of the 1624 statute.

The Act is an artefact of the Jacobean Parliament. It is necessary, though, to consider the circumstances and concerns surrounding the grant of patents in Elizabethan times, as well as during the reign of James, because number of the actions in both periods are relevant to the crisis of the 1620s. More specifically, given the circumstances of the 1590s, patents became an ongoing "grievance" that gave structure to the developing relationship between the Commons and the Crown. After the accession of James, patents continued as an "allowed" point of conflict (and a useful policy device) throughout his reign until the circumstances of the 1620s produced the *Statute of Monopolies* itself.

A. *Parliament and its Constituencies*

The Parliament in early modern times was not like Parliaments of more recent vintages. One aspect of the nascent democracy that should be borne in mind is that Parliaments were called, and prorogued, by the monarch almost at their leisure.[60] This capacity of the Crown mean that the freedoms enjoyed by the Parliamentarians of the time were not as formalised as those of today.[61] Further, it has been argued that Parliaments of the time were 'not called to make policy but to applaud whatever

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Paul Raffield, *Images and Cultures of Law in Early Modern England: Justice and Political Power, 1558-1660* (2004) 215. 'Fierce rioting' also occurred when areas of Dean Forest were enclosed, in part, to further the working of patents for mining and manufacturing in the area – again during the reign of Charles I: Leah Marcus, *The Politics of Mirth: Jonson, Herrick, Milton, Marvell and the Defence of Old Holiday Pastimes* (1978) 193. Monopolies, as grievances, were also discussed in Parliament in 1640: Robert Ashton, *The English Civil War: Conservatism and Revolution 1603-1649* (1978) 73.

[59] The phrase "conditions of possibility" is used in order to reduce inferences of causation between studied events: see, for example, Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994) 6-7. In other words, the factors considered in this article should not be seen to have, necessarily, caused the passing of the *Statute of Monopolies*, however, the Act's passage may be seen to be contingent on the existence of the factors.

[60] There were, for example, only ten Parliaments in Elizabeth's reign. These were the Parliaments of 1559; 1563-67; 1571; 1572; 1584-86; 1586-87; 1588-89; 1593; 1597-98; and 1601: J E Neale, *The Elizabethan House of Commons* (1949) 433.

[61] The freedom of speech, for example, was not formalised until the 1689 Bill of Rights. In late Tudor times, freedom of speech was requested by every Speaker of the House at the 'beginning of the session and recognised in some sort by Elizabeth, but it was as yet an undefined and a little-regarded right': Wallace Notestein, *The Winning of the Initiative by the House of Commons* (1924) 21.

policy was decided on'.[62] Parliament under Elizabeth, for example, has been characterised as a 'somewhat raw and amateurish body'.[63] While Parliament was divided into the Houses of the Commons and the Lords, it is the lower house that is of more interest in development of the patents crisis.[64] A particular sub-set of the Commons were those members who also sat on the Privy Council.[65] The Privy Council, formally, acted to provide advice to the monarch; in practice, its members acted as a conduit between Parliament and the Crown.[66] This meant that, during the reign of Elizabeth at least, the Privy Council played a central role in the execution of Crown policy and an active role in the relationship between the Parliament and the monarch. The attitudes of the time, in terms of that relationship, have been summarised by Edie:

> No doubt members of the House of Commons had little thought of what today is called opposition; they believed in consensus and the Crown. But they believed as well in themselves, in the rights, privileges and future of their own rank and in the importance of advancing their own share of influence in matters of policy and affairs of government. No monarch could be simple enough to grant such a share unless he saw either the necessity or the advantage. This meant attack upon the King's powers and prerogatives, if not upon the King himself. It meant challenge and defence, debate and argument, a sharpened sense of difference, the strategies and tactics of political encounter.[67]

To understand this assessment, attention must be paid to the composition of the Commons and the interests that the Parliamentarians represented.

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[62] Sheila Lambert, 'Committees, Religion and Parliamentary Encroachment on Royal Authority in Early Stuart England' (1990) 105 *English Historical Review* 60, 60. Pocock, has further argued that 'Post-Reformation England was still a princely society, and the social microcosm around the prince was the milieu in which men became most conscious of themselves as actively governing beings': J G A Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (1975) 350.

[63] David Keir, *The Constitutional History of Modern Britain – Since 1485* (9th ed, 1969) 136. According to Russell, a 'Parliament was an event, not an institution': above n 9, 3.

[64] It has been suggested that the 'Lords were quite as subservient to the Crown in the time of Elizabeth as in that of Henry VIII. Many of the peers owed their all to Tudor generosity and knew it': Notestein, *Winning the Initiative*, above n 37, 24.

[65] It has been suggested that, in Tudor times, the 'Crown in Council was the Government and the Crown in Parliament was the maker of laws': Notestein, *Winning the Initiative*, above n 37, 24, citing Pollard as the origin of this aphorism.

[66] The Privy Council during the reign of Elizabeth had wide responsibilities. For Elton, 'nothing that happened within the realm appeared to fall outside its competence': G R Elton, *The Tudor Constitution* (1960) 101. Councillors also had a hands-on role in the functioning of the House. They would, for example, 'prepare a program of legislation to be laid before the Commons … they introduced many bills … [and guided] the Commons in selecting the bills to be pushed and in discarding others': David Willson, *The Privy Councillors in the House of Commons 1604-1629* (1971) 8-9.

[67] Carolyn Edie, 'Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597-1689' (1985) 29 *American Journal of Legal History* 197, 197.

In the seventeenth century, the 'House of Commons was, in terms of numbers, directly representative of perhaps one-third of the adult male population'.[68] The election of these representatives, however, would not be considered an open and fair process by 21st century standards. During Tudor times, for example, the government did 'influence elections',[69] though not to the extent that the Crown exercised total control over the Parliamentarians. That is, while the Parliaments of the time can be seen as a 'propaganda justification' for the policies of the Crown, they were also the 'symbol of legitimate government'.[70] One example of this is that members of Parliament were 'often subject to close pressures from their constituencies when they acted as local spokesmen'[71] – they 'were not free agents, voting at their own whim'.[72]

A key constituency of some of the Parliamentarians was the corporations such as the City of London and companies that traded with Europe and the Levant.[73] It has been suggested that the 'great trading companies were the most powerful economic organisations of the time [with] much influence in Parliament'.[74] This influence, however, was not conclusive. It has also been argued that:

> Parliament and the City's overseas traders tended to be natural opponents. This was because … Parliament was an amalgam of grower, manufacturing and outport interests, and because each of these interests had an understandable desire for freer trade and thus for the weakening of the London merchants' companies privileges … It was hardly an accident that during the early seventeenth century, the House of Commons launched attack after attack on every aspect of the City merchants' commercial privileges...[75]

Evidence of the tension between trading companies and outports may be found as early as 1570 – political strategies were employed by those against trading companies, such as the Society of Merchant Adventurers, with the aim of getting 'favourable representation for their position' in the 1571 Parliament.[76] In other words, just as a

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[68] Hirst, above n 7, 157.
[69] Neale, *Elizabethan House of Commons*, above n 36, 282. This influence included letters from the Privy Council to 'sheriffs declaring that candidates must be well affected to the government, letters to local magnates supporting certain candidates and deprecating others, letters to town corporations [and] letters to troublesome persons suggesting that they withdraw from election contests': Willson, above n 42, 8.
[70] Lambert, above n 38, 60.
[71] Hirst, above n 7, 158.
[72] Russell, above n 9, 18.
[73] It has been suggested that Parliamentarians 'represented' the 'whole realm': David Harris Sacks, 'Parliament, Liberty and the Commonweal' in J. Hexter (ed), *Parliament and Liberty – From the Reign of Elizabeth to the English Civil War* (1992) 89. This characterisation, however, was contrasted with the representation, by MPs, of specific geographical areas.
[74] Clark, above n 8, 152.
[75] Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict and London's Overseas Traders, 1550-1653* (1993) 203.
[76] David Harris Sacks, *The Widening Gate: Bristol and the Atlantic Economy, 1450-1700* (1991), 198.

number of Parliamentarians were in the House to further the interests of the trading companies, there were others who were elected to promote the interests of the outports and the competitors to the trading corporations.

The reliance on the royal prerogative and their role in executing the Crown's trade policy meant that corporations like the Merchant Adventurers were linked with the reigning monarch. The Crown was also seen to be connected to the City of London because of the monarch's continuing need to borrow money.[77] The importance of the City is, in part, a result of the 'expansion of credit and an extension of credit facilities' during the reign of Elizabeth.[78] This development, however, provided another schism in the constituencies of Parliamentarians as the 'capitalist' of the time 'was not a merchant'.[79] This meant that some in the Commons reflected the interests of the joint stock monopolies, some the new financiers and others spoke for constituencies from other areas of England – such as the outports of Bristol and Newcastle.

Both the trading companies and the City of London had a strong interest in the financial health of the country. The state of the economy was a key factor in the attitudes of the financiers, merchants and their competitors and therefore in the complaints made in Parliament on their behalf. In early modern England, the economy was tied, fundamentally, to the agricultural sector. Without crops, there was insufficient food and little surplus to trade with. During the reigns of Elizabeth and James, there were four major harvest failures;[80] further, by the 1620s, there was a 'profound bullion shortage' in England that 'helped precipitate a more general business depression'.[81] This, combined with the 'decay of trade',[82] caused difficulties

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[77] See generally, Robert Ashton, *The Crown and the Money Market -1603-1640* (1960).
[78] A L Rowse, *The England of Elizabeth* (2nd ed, 2003) 136.
[79] William Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720* (1912) vol 1, 110.
[80] These took place in the years 1557-1559, 1586, 1596-1597 and 1622: Paul Slack, *Poverty and Policy in Tudor and Stuart England* (1988) 49. Hoskins, however, considers only the harvests of 1596 and 1597 were bad enough, in Elizabeth's reign, to give rise to a dearth of food in England: W G Hoskins, 'Harvest Fluctuations and English Economic History, 1480-1619' (1964) 12 *Agricultural History Review* 28, 38. Hoskins also considered the harvest of 1622 to be bad enough to produce famine, but not so bad that it gave rise to dearth of food: 'Harvest Fluctuations and English Economic History, 1620-1759' (1968) 16 *Agricultural History Review* 15, 19. In addition, there was a plague in 1592 that contributed to the economic troubles: Scott, above n 56, 102.
[81] Jonathan Gil Harris, *Sick Economies: Drama, Mercantilism and Disease in Shakespeare's England* (2004) 138.
[82] Notestein, *Winning the Initiative*, above n 37, 31. England's exports relied heavily on cloth: Harris, above n 57, 138. The agricultural conditions that hampered food production also impacted on cloth production.

for the finances of the Crown in the periods that featured significant debate in Parliament about the validity of patents and their role in the economic troubles.

What must not be forgotten in this understanding of Parliament is the self-interest of those who are elected. One extreme of this is the suggestion from Neale that corruption amongst politicians and courtiers grew in the 1590s.[83] More generally though, the interest of many Parliamentarians was either the furtherance of the interests of their constituencies or their own promotion – up until the reign of Charles I, 'being a member of Parliament was not a career but a stepping stone to one'.[84] While some members of the House may have been altruistic, the words of others have to be considered in light of the audiences to which they were speaking. What is not clear, however, is which of the Parliamentarians exaggerated their claims for personal gain and who did not.[85] The words of all, therefore, may have to be treated with a degree of scepticism.

B. *Relationship between Crown and Parliament*

There is some evidence that statements against monopolies in the House of Commons were the result of the interests that individual Parliamentarians represented. Their complaints may, however, be as much a function of the relationship between Parliament and the Crown as it was to do with hatred of abuses of the royal prerogative. This section will consider that relationship through a focus on the nature of the debates in Parliament, the responses of the Crown to those debates and a consideration of one of the underlying factors to the debates – the issue of succession.

By way of introduction, it is said that James believed in the notion of the absolute power of the monarch.[86] This is likely to not have sat well with Parliamentarians who were more used to the style of Elizabeth. The belief of the members of the House of Commons is important to the development of the relationship between the Crown and

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[83] J E Neale, *Essays in Elizabethan History* (1958) 76-79.

[84] Russell, above n 9, 32. It has also been suggested that for lawyers (the 'most powerful group in the House of Commons' at least late in the reign of James: William Holdsworth, 'The Commons Debates 1621' (1936) 52 *Law Quarterly Review* 481, 487-8), Parliament was frequently a forum for the display of their talents, a way station on the high road to promotion in their chosen profession': Robert Ruigh, *The Parliament of 1624: Politics and Foreign Policy* (1971) 55.

[85] It has been suggested, for example, that 'some of those who were loudest in their denunciations of individual patentees would have been far from willing to renounce their share in the corporate monopoly enjoyed by the company of merchants or body of manufacturers to which they belonged': George Unwin, *The Gilds and Companies of London* (1938) 318.

[86] Louis Knafla, *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (1977) 65. Further, the relationship between Parliament and James was not always smooth, 'three of James' four Parliaments we dissolved by the king in fits of anger': Willson, above n 42, 15.

Parliament; for it was during the reign of Elizabeth that there began to be evidence of a political 'party' within Parliament – one that sat in opposition to the Crown.[87] As early as 1566, the Queen had to 'cope' with a 'very persistent opposition';[88] though, 'even at the end of Elizabeth's reign, the Opposition was a small and uninfluential lot'.[89] The lack of cohesion amongst Parliamentarians in both the late sixteenth and early seventeenth centuries suggests that the complaints about monopolies in Parliament were not the result of a coordinated attack on the Crown but more an expression of particular interests.

1. *Parliamentary Debates*

Patents were the subject of debate late in decade before Elizabeth's death and throughout the reign of James. The most vigorous session on this topic in Elizabethan times was in 1601.[90] Unnamed monopolies were, however, challenged in the both the 1566[91] and 1571 Parliaments.[92] Given the few patents granted by that time, it is likely that the monopolies complained of relating to a mining commission;[93] a commission that gave rise to the *Case of Mines*[94] and may be seen as battle between the rights of land-owners and those of the Crown.[95]

In terms of the 1597 debate, there is little evidence of what was said in Parliament.[96] It is known, though, that the Lord Keeper of the Privy Seal, speaking for Elizabeth, said

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[87] Elton, *Tudor Constitution*, above n 42, 302.
[88] Notestein, *Winning the Initiative*, above n 37, 13.
[89] Ibid., 23. This opposition did not amount to an opposition 'party': William Mitchell, *The Rise of the Revolutionary Part in the English House of Commons* (1957) 25. According to Mitchell, such a party would develop in the seventeenth century. For a discussion of the academic debates around the existence of an opposition party at the time, see Robert Zaller, 'The Concept of Opposition in Early Stuart England' (1980) 12 *Albion* 211.
[90] For a detailed recitation of the debate see J E Neale, *Elizabeth I and Her Parliaments – 1584-1601* (1971) 376-93.
[91] Keir, above n 39, 144.
[92] Neale, *Elizabeth and Her Parliaments*, above n 66, 352.
[93] It is possible that the complaints in the 1571 Parliament related to the grants that gave rise to the decisions of *Hasting's Case* (1569), *Bircot's Case* (1572) and *Mathey's Case* (1571). These decisions, referred to below, related to patents for improvements on previous products. All were successfully challenged through the courts, therefore, it is not clear why they would be raised in Parliament. There is no discussion in the literature of the possibility that patents for innovation, however minor, were the subject of complaint in early modern England.
[94] (1568) 1 Plowden 310, 75 ER 472.
[95] For a discussion of this battle, see Eric Ash. 'Queen v Northumberland, and Control of Technical Expertise' (2001) 39 *History of Science* 215; and Carolyn Sale, '"The King is a Thing": The King's Prerogative and the Treasure of the Realm in Plowden's Report of the *Case of Mines* and Shakespeare's *Hamlet*' in Paul Raffield and Gary Watt (eds), *Shakespeare and the Law* (2008).
[96] In the words of Neale, 'obscurity dogs us in this story': *Elizabeth and Her Parliaments*, above n 66, 354.

> touching the monopolies, her Majesty hoped that her dutiful and loving subjects would not take away her prerogative, which is the chiefest flower of her garden and the principal and head pearl of her crown and diadem; but that they will rather leave that to her disposition and as her Majesty has proceeded to trial of them already, so she promises to continue that they shall all be examined to abide the trial and true touchstone of the law.[97]

This passage suggests a recognition on her part of the capacity of the Parliament to curtail her use of patent grants. More important, though, is the language used to describe the prerogative. The power to grant seems to be considered to be central to her role as monarch, though this may have been an attempt to emphasise the sacrifice she appears to be making in submitting patents 'to the test of the common law'.[98]

There is much more source material available for the 1601 debates. The motivations, and aims, of those who spoke against them, however, is not always clear. It has been suggested, for example, that the economic problems of the late years of Elizabeth's reign meant that 'all politicians complained of the drying up of the flow of official gifts and rewards'.[99] Another commentator argues that the complaints in 1601 were the result in a decline in prosperity in the last decade of the sixteenth century and the 'first impulse was to seek for real or imaginary abuses to be remedied by Parliament' with monopolistic patents being the 'line of least resistance'.[100]

The uncertainty of the grounds of complaint is more obvious if specific patents are considered. The complaint about drinking glasses in 1601, for example, was based on the rise in price of the commodity. The evidence, however, was based on the difference between the low cost of an imported glass and the higher cost of one that was made by a local 'infant industry'.[101] The protection of such an industry was sound policy and not counter to the interests of the nation. Another complaint focused on a patent for the manufacture of salt[102] – it has been suggested that the salt in question was not the 'common commodity', but 'white salt' the product of a 'new industry'.[103] Others highlighted problems with the actions of agents of the patentees, rather than

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[97] Quoted in P J Federico, 'Origin and Early History of Patents' (1929) 11 *Journal of the Patent Office Society* 292, 300.
[98] Neale, *Elizabeth and Her Parliaments*, above n 66, 354.
[99] Stone, above n 7, 91. This raises the possibility that some of the complaints in Parliament may have been motivated, in part, by jealousy rather than an ideological concern with the grant of patents by the Crown.
[100] Scott, above n 55, 107.
[101] Ibid, 117. It is worth noting that it was only the 'finest' of drinking vessels that were made out of glass; wood, horn and pewter vessels were much more common: Jeffrey Singman, *Daily Life in Elizabethan England* (1995) 138. This means it would only have been the upper echelons of English society that were adversely impacted by the price of drinking glasses.
[102] Neale, *Elizabeth and Her Parliaments*, above n 66, 380.
[103] Scott, above n 55, 119.

the patents themselves,[104] and with the monopolies of trading corporations.[105] In short, 'many of the complaints' in the 1601 Parliament were 'utterly irrelevant',[106] or at least, they did not directly address problems with monopolies *per se* but with the impact of specific grants on specific sectors of the community.[107]

One set of complaints may, however, be considered separately. A number of the patent grants at the time were *non obstante*, those grants that allowed the patentee to carry out a particular activity notwithstanding the statutes in place prohibiting the activity. Bacon described, during the Parliamentary debates on monopolies, these grants as 'hateful'.[108] With the growth of the independence of Parliament ('Elizabeth had in her last years found Parliament refractory and critical'[109]), it may have been that the delegation of licensing powers to individuals offended a sense that it was Parliament's role to govern.[110] Further, it is this class of patents that was most affected by the *Statute of Monopolies*.[111]

During the 1601 Parliament, in an apparent attempt to at least assuage some of the anger of Parliamentarians, Elizabeth issued a Proclamation and addressed the House in November. This address became known as her Golden Speech and has been

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[104] Thirsk, above n 4, 60. This supports the claim that the 'greatest antagonism displayed [in Parliament] against monopolies was not so much in respect to their existence but … to the manner in which they were supervised': Fox, above n 11, 186

[105] There was, for example, a pamphlet published in 1601 that touched the granting of monopolies. This was written by the Secretary of the Society of Merchant Adventurers: John Wheeler, *A Treatise of Commerce*, George Hotchkiss (ed), (1931) 60. It may have been published, in part, to sway the minds of Parliamentarians.

[106] Scott, above n 55, 118.

[107] It has also been suggested that the complaints of some of the patents in the 1601 debates were motivated by the personality of one of the patentees – Raleigh. Raleigh was said to have been, at that time, the 'most unpopular man in England': Scott, above n 55, 111.

[108] Quoted in George Prothero, *Select Statutes and other Constitutional Documents Illustrative of the Reign of Elizabeth and James I* (4th ed, 1913) 112.

[109] Keir, above n 39, 156-7.

[110] For a discussion of the Parliaments' actions with respect to these grants, see Edie, above n 43.

[111] A Bill was brought before Parliament in 1601: 'every man which had or could invent any art or trade, should for his life monopolise the same to his own use, or he that could add to or refine the same should do the like': Simonds D'Ewes, *A Compleat Journal of the Votes, Speeches and Debates, Both of the House of Lords and House of Commons Throughout the Whole Reign of Queen Elizabeth*, 1693, 678. The Bill failed to pass. That there were arguments for and against monopolies of invention suggests that the tension was not simply between the Crown and Parliament. That the debate was over a Bill that allowed for such monopolies also suggests that the preceding debate may not have been only about one sort of grant – whether it be *non obstante* or those relating to trading corporations. That the prominent speakers recorded in the previous debate were not reported by D'Ewes suggests that it may not simply have been about power struggles either. The best conclusion that may be drawn from the arguments in the Elizabethan Parliaments is that there is no single story that explains the problems, the concerns and the failed solutions of the time.

roundly praised as a 'brilliant and decisive' tactical move on her part.[112] The relevant sections of the speech are the following:

> since I was queen, yet did I never put my pen to any grant but that, upon pretext and semblance made unto me, it was both good and beneficial to the subject in general, though a private profit to some of my ancient servants who had deserved well at my hands. But the contrary being found by experience, I am exceedingly beholding to such subjects as would move the same at the first. And I am not so simple to suppose, but that there be some of the Lower House whom these grievances never touched: and for them, I think they spake out of zeal to their countries, and not out of spleen or malevolent affection as being parties grieved; and I take it exceeding gratefully from them, because it give us to know that no respects or interest had moved them … that my grants should be grievous to my people and oppressions privileged under colour of our patents, our kingly dignity shall not suffer it.[113]

This extract indicates two matters of interest. First, there was acknowledgement that some of the patents granted had produced private, rather than public, gain. The text does not, however, suggest that all grants were bad or abused. The second point that may be drawn from the speech is understanding of the role of Parliamentarians as representatives of their constituencies. Elizabeth spoke of those who "grievances never touched … [and] spake out of zeal for their countries". The Queen suggested that this meant that "no respects or interest had moved them" – arguably implying that those who complained in Parliament were against specific injustices which were occurring in specific locations, rather than protesting against patents generally.

As early as 1604, at the beginning of the reign of James, there were more complaints in Parliament about the trading monopolies.[114] Importantly, these complaints were on behalf of provincial merchants who were against the 'companies whose restrictive membership was a factor ensuring the continued domination of London'[115] and may have been prompted by the decline in trade that followed the plague year of 1603.[116] Complaints such as these have been described as 'little more than the envious rantings

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[112] See for example, Edward Walterscheid, 'The Early Evolution of the United States Patent Law: Antecedents (Part 2)' (1994) 76 *Journal of the Patent and Trademark Society* 849, 866.
[113] Neale, *Elizabeth and Her Parliaments*, above n 66, 389-90.
[114] See, for example, Robert Ashton, *The City and the Court – 1603-1643* (1979) 85. See also, W. Notestein, *The House of Commons – 1604-1610* (1971) 106-25.
[115] Ibid., 86. 'Provincial jealousy' was also behind complaints against the monopolist Muscovy Company because its whaling activities stepped on the toes of a number of 'east-coast ports': ibid., 89. It has also been suggested that the 1604 complaints arose, in part, from the exclusionary nature of regulated companies (in contrast to joint-stock companies) and the monopolies they controlled; see Theodore Rabb, *Jacobean Gentleman: Sir Edwin Sandys, 1561-1629* (1998) 88ff.
[116] Supple, above n 25, 26. More than 30,000 people died in the plague – a figure, in part, achieved through the influx of people into London for the coronation of James: ibid, 25.

of the disgruntled and declining outports'.[117] These, therefore, may be an example of where a 'welter of vested interests came together and cancelled one another out'.[118]

Following the grievances expressed in, and by, Parliament, there was another regal statement made concerning monopolies. James issued a declaration in 1610 that came to be known as the *Book of Bounty*. Its purpose was to "clarify" the granting of patents. The declaration 'stated that monopolies, grants of dispensation from penal laws, and forfeitures thereof, were contrary to the common law'.[119] One 'permissible class was "projects of new invention so they be not contrary to law nor mischievous to the State by raising prices of commodities at home, or hurt of trade, or otherwise inconvenient"'.[120] Aside from these well-meant patents, James 'solemnly renounced all intention of granting fresh patents of monopoly or privilege and forbade any to approach him with projects'.[121] This declaration was despite his previous "publication", the *True Law of Free Monarchies* that inclined him 'towards a conception of enlightened absolutism'.[122]

This neither satisfied the Members of Parliament nor stopped the granting of monopolies. The good intentions of the King did not mean that there were not specific complaints that had sound (if partisan) grounds. One class of these were the grants for the enforcement of penal statutes.[123] 'One of the reasons that Parliament disliked [this] system was that it put effective enforcement of some of the legislation which it had passed into the hands of private individuals'.[124] These patents were considered by the

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[117] Ashton, *Crown and the Money Market*, above n 53, 17. Similarly, it has been suggested that the Parliamentary attacks on the trading monopolies, in particular, 'look suspiciously like attempt[s] by those outside the ring, not to destroy the system, but to force an opening just sufficiently wide for themselves to enter into a share of the profits': Stone, above n 7, 118. This continued in the depression of the 1620s, where the restrictions to trade imposed by the monopolist corporations such as the Merchant Adventurers were resented 'more bitterly' by those excluded by the grants" Russell, above n 9, 61.

[118] Lambert, above n 38, 64. This has been put, somewhat harshly, on terms of Commons' debates, during the reign of James, were 'frequently little more than shadow-boxing': ibid, 76.

[119] Kyle, above n 5, 205.

[120] Thomas Hill, 'Origin and Development of Letters Patent for Invention' (1923-4) 6 *Journal of the Patent Office Society* 405, 408. It may be noted, however, that, according to one commentator, there were examples of patents being suspended in times of dearth, in order to increase the supply of the monopolised good and to reduce the price of the good: Hyde Price, above n 11, 29.

[121] Hyde Price, above n 11, 28. The Book, however, maintained a number of rights for the King that assisted his finances – including 'customs, impositions and seizures of the same; licences to import and export commodities prohibited by law or any other items without customs charges; [and] profits from tenures and alienations or from the use of seals': Kyle, above n 5, 205.

[122] Keir, above n 39, 157.

[123] It may be noted that this class of patents was also complained of in the Parliament of 1593: A Hassell Smith, *County and Court: Government and Politics in Norfolk, 1558-1603* (1974) 124.

[124] Ashton, *English Civil War*, above n 34, 46.

Committee for Grievances,[125] where it was further alleged that patentees had the power to dispense with the penalty.[126] In other words, as the patentees could profit from failing to enforce the statutes, this was a direct challenge to the authority of the legislature.[127]

In the 1621 Parliament, the 'hostility of the Commons to privileged economic concessionaires was greatly exacerbated by severe economic depression',[128] 'no concessionary interest, monopolist, customs farmers, licensee or member of a privileged trading company was safe from attack'.[129] It has been suggested, in particular, that 'some of the more vocal attacks on the restrictions of trade' by the monopolist corporations in the 1620s were 'fiscal, rather than economic, in origin'[130] – that is, Parliament wanted these receivers of royal benefit to pay more for the privilege, thereby reducing the size of the supply sought by the Crown. Also, 'vested interests, including the [Company of] Staplers, excluded from normal trade were quick to seize the opportunity afforded by the depression'.[131] The stench attached to

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[125] Other patents attacked in the Committee included those where licensees extracted payments 'for commodities not within the scope of the patent' and the granting of licences to 'sell wines in villages and towns where wine had not been sold before, as well as to unruly alehouse-keepers "to the great increase of drunkenness"': Notestein, *House of Commons*, above n 90, 167. It should be noted that not all grievances before the Committee arose from patents. Others included the payment of fees by sheriffs, the 'exportation of iron ordinance' and the impositions levied on currants: ibid., 169.

[126] Ibid, 165. According to one commentator, the 'common lawyers, who were so important in the House, were outraged at the grant of the right of dispensing with penal statutes': Elizabeth Read Foster, 'The Procedure of the House of Commons against Patents and Monopolies, 1621-1624' in William Appleton Aiken and Basil Duke Henning (eds), *Conflict in Stuart England: Essays in Honour of Wallace Notestein* (1970) 60. It should not be forgotten, however, that 'Parliament was called only infrequently; exceptions could not wait five or ten years. Statute was respected, but the effective remedy against its inconveniences and injustices lay in the discretionary power of the Crown': Edie, above n 43, 199.

[127] These patents were also a threat to the justices of the peace because, in some cases the patentees could enforce statute that the justices chose to ignore and in others, the patent allowed the justices to be ignored altogether in terms of the enforcement of statutes: Hassell Smith, above n 99, 122-3. According to Russell, 'when the JPs, as was admitted in the Commons, were often unable to make effective use of this power, their protests at having it taken away from them perhaps savour of the dog in the manger': above n 9, 70.

[128] Ashton, *English Civil War*, above n 34, 88. It has been argued that the 'effective and immediate cause of the depression … during the early 1620s was a series of currency manipulations in some of the principal European markets for English textiles, which priced the cloth out of those markets': Supple, above n 25, 80. The economic troubles, though linked to trade, could not be blamed on the existence or structure of the trading companies.

[129] Ashton, *City and the Court*, above n 90, 107. One of the first class to be attacked were those relating to bullion: Robert Zaller, *The Parliament of 1621: A Study in Constitutional Conflict* (1971) 55. Read Foster acknowledges, however, that it was unclear which of these 'Members of Parliament were moved by their own initiative to present grievances, and how often they spoke as the representatives of special interests': above n 102, 65.

[130] Russell, above n 9, 60.

[131] Supple, above n 25, 62. It has also been suggested that foreigners, such as the Venetian ambassador with a desire to trade in muscatel, encouraged MPs to protest against regulated trade: Read Foster,

the label "monopoly" meant that, in 1621, any proposal put forward to regulate an industry would be objected to on the basis it was a monopoly – examples include a Bill to 'conserve fish by prohibiting fishing with fine mesh nets' and a Bill 'giving Trinity House power to supervise lighthouses'.[132]

Patents were put to another use in the 1621 Parliament – patents provided an opportunity by which 'ambitious men at court could hope to discredit each other'.[133] One of the "successes" of 1621 was the impeachment of Sir Giles Mompesson.[134] He is now known as a monopolist who abused the privileges he was granted;[135] he was also, however, 'one of the most notorious' players in the system by which "concealed" Crown lands were found and profited from.[136] The hunt for such concealed Crown lands was a 'subject of bitter Parliamentary complaint'.[137] The relative importance of Mompesson's actions as a licensor of ale-houses and his actions as a seeker of concealed lands to his impeachment is not clear.[138] Legal histories written in the last century tend to focus on his role as patentee, however, that over-simplifies the complexity of interests in the Parliamentary debates. More detail on the events in the 1621 and 1624 Parliaments, and negotiations around the different interests evident there, will be provided below in the context of the background to the *Statute of Monopolies* itself.

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above n 102, 65 n36. Read Foster also emphasised the role of other 'lobbying interests' in the Parliamentary debates: ibid, 66-66.

[132] Russell, above n 9, 93-94. The term monopoly had also been applied derisively to the College of Physicians in the sixteenth century: Christopher Hill, *Intellectual Origins of the English Revolution Revisited* (1997) 68.

[133] Russell, above n 9, 87. Russell later provides the example of an attack, aimed at other courtiers, by Alford and Sackville on the gold and silver thread making patent. The two were 'asking the King for his support in this attack'. One of the grounds of attack was the depression, as the use of bullion in the manufacture of thread was said to contribute to the 'shortage of coin': ibid., 100. This, then, is an example of a political attack that takes advantage of the circumstances of the time and that was not against the principle of monopoly patents.

[134] It has been argued that the impeachment of Mompesson has been considered 'politically unimportant': John Eusden, *Puritans, Lawyers and Politics in Early Seventeenth Century England* (1968) 151; others have argued that the impeachments in the 1620s 'reflected factional politics at court': Linda Levy Peck, *Court Patronage and Corruption in Early Stuart England* (1990) 186. The process is, nonetheless, noteworthy as it was the first time such proceedings had been used since the mid-fifteenth century. The action against Mompesson may, therefore, be seen as indicative of a shift in the attitude and intention of Parliament itself – the 'attack on patents was just part of a much broader criticism of the structure of office and of fees': W J Jones, *Politics and the Bench: The Judges and Origins of the English Civil War* (1971) 56-7.

[135] Keir, above n 39, 167. His patents included one for the licensing of ale-houses.

[136] Russell, above n 9, 66. See generally, C J Kitching, 'The Quest for Concealed Lands in the Reign of Elizabeth I' (1974) 24 *Transactions of the Royal Historical Society* 63.

[137] Russell, above n 9, 66.

[138] The issue of concealment of Crown lands was subject to statute in 1624 – 21 Jac. I, c.2: Kitching, above n 112, 77.

2. *Succession*

In addition to the economic problems in both the 1590s and 1620s, there was another commonality between the two periods. They were both known to be the end of the reign of the monarch. Elizabeth died in 1603 and James in 1625. It was no secret in the years preceding their deaths that their respective healths were ailing. This meant that the politics of succession were to the fore. There was also another succession issue – that relating to changes in the power-brokers of the time. It is, therefore, likely that one factor in the complaints against specific patentees was the jockeying for position, or attention, in readiness of the change of regime.

Succession had also been a point of conflict between the Parliament and Elizabeth for much of her reign.[139] A significant contributor to this was her reluctance to name the person who would succeed her. That she had no children mean that the field of prospective successors was unusually wide. Sir William Cecil (Lord Burghley), for example, was concentrated, near the end of his life, 'on securing the succession' for his son.[140] Essex was another who sought advancement but was prone to indiscretion; his final mistake, the raising of a rebellion (a significant form of succession), caused his execution.[141] The ambitions, and practices, of those in power and at the court meant that Parliament was 'restive'.[142] The 'Queen's loosening grip in her last years which allowed the Court to become riven by the faction dispute of Essex and [Robert] Cecil and patronage to become exercised in an increasingly self-interested fashion'.[143]

The disappearance from the scene of Lord Burghley is also an important factor in the development of the patent crisis. He died in 1598, after having enjoyed an 'immense concentration of power [over] four momentous decades'.[144] Cecil had been central to Elizabeth's approach to industrial development: he had wanted to make the 'realm

[139] This was, in part, fuelled by 'fears of a popish succession': Elton, *Tudor Constitution*, above n 42, 302. The importance of the issue to the wider community is demonstrated in the perception that the work of Shakespeare has also been said to 'return continually to the question of succession': Clare Asquith, *Shadowplay: The Hidden Beliefs and Coded Politics of William Shakespeare* (2005) 81.
[140] Neale, *Essays in Elizabethan History*, above n 59, 80.
[141] See, for example, J E Neale, *Elizabeth I* (2005) Ch. 21.
[142] Mitchell, above n 65, xiv.
[143] Hirst, above n 7, 10. For a discussion of the difficulties of defining the "Court" and therefore its influence, see G R Elton, 'Tudor Government: The Points of Contact – The Court' (1976) 26 *Transactions of the Royal Historical Society* 211
[144] Joel Hurstfield, 'The Succession Struggle in Late Elizabethan England' in Stanley Bindoff, Joel Hurstfield and Charles Williams (eds), *Elizabethan Government and Society* (1961) 369.

self-sufficient … he desired to develop English industry of every kind'.[145] Not only would his death have meant a loosening of control of what was said in Parliament, there would also have been power-plays to replace him – with this in mind, it is unsurprising that the debates in 1601 (the first Parliament after his death) were more vigorous than in 1597. It is likely that, given the allegations of favouritism and nepotism that stalk discussions of late Elizabethan patent grants, the targets were the recipients of the grants, rather than the grants themselves. The machinations that would have been occurring for the replacements of both the Queen and Lord Burghley may have been significantly affected by allegations of impropriety and abuse.

There was a smoother transition of power at the end of James' reign as he had a son who was his obvious successor. As will be noted below, Charles had a significant role in the compromise of 1624; attacks on, and defences of, particular patentees for political purposes, nonetheless, still persisted. More importantly, the profile that the political jockeying gave to monopolies at the end of the sixteenth century gave many in Parliament a weapon to wield in debates. As will be seen next, this "patent problem" was not necessarily something that troubled the average English citizen.

IV. ROLE OF THE PUBLIC

While the trading companies, and other corporations such as the City of London, had a significant impact on the opinions of Parliamentarians, another group did not. That group included the average members of the public. As stated above, most of the men and all of the women were not, in effect, represented in the Commons in the early modern period. The voices of these disenfranchised folk are, however, given significant weight in the standard legal histories of patents. It is often said that the patents were unpopular and this was an important factor in the passing of *Statute of Monopolies*.[146] This section considers the possible existence of any public anger with

[145] Fox, above n 11, 67.

[146] Seaborne Davies, for example, claimed that the patent that gave rise to the case of *Darcy v Allen* was 'widely resisted and opposed throughout the country': above n 13, 400. His evidence for this was the records of the Privy Council and the State Papers Domestic. All these show, however, is claims by the patentee that his patent was being infringed. Another historian refers to a 'riot' that resulted from a patent granted to Edward Darcy over the manufacture of gloves: Unwin, *Gilds*, above n 61, 299. Earlier in the same text, however, Unwin describes the "riot" as a gathering of 'city apprentices' from the leather-working trade (who had a commercial interest in the failing of the competing glove makers) resulting from Darcy striking an alderman (ibid, 257). The riot therefore seems to be more akin to industrial unrest as a result of competition than widespread dissatisfaction amongst the general population.

patents, outside Parliament, to see if the debates in the House reflected such anger or whether the statements in the Commons described the position of other constituencies.

Despite the assertions in the traditional histories of patents, there is little evidence of anti-monopolist public opinion.[147] The sole, specific, comment found is that of Sir Robert Cecil. He is quoted as saying in 1601, 'Parliament matters are ordinarily talked of in the streets. I have heard, myself, being in my coach, these words spoken aloud: "God prosper those that further the overthrow of these monopolies"'.[148] This does not describe 'public outcry'[149] and it is not clear which monopolies are being complained of.[150] It is possible the overheard complaint focused on those that regulated trade (if they contributed to a rise in prices), the actions of licensees of particular monopolies such as the one for the mining of saltpetre[151] or ale-houses,[152] or it could be they did

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[147] I have seen no discussion in the literature of specific petitions to the Parliament or any details of pamphlets circulated at the time that indicate a general protest about monopolies. For a discussion of the role of pamphlets, including those going to matters political, see Joad Raymond, *Pamphlets and Pamphleteering in Early Modern Britain* (2003). There are reproductions of hand-bills with an illustration lampooning patentees in the literature (Unwin, *Gilds*, above n 61, 298, 322), these, most likely, were published in the 1640s. There was the pamphlet, *A Treatise of Commerce*, that touched the granting of monopolies. This was written by the Secretary of the Society of Merchant Adventurers in 1601, the time of the tension in Parliament. That the corporation chose to engage with certain members of the public directly suggests a desire to at least "sell" the benefits of monopolistic trade to a wider audience. This may have been to encourage readers to pressure their Parliamentarian directly, rather than necessarily trying to quell any public outcry. It may be difficult to consider a 163 page pamphlet as targeting a mass market of public opinion. It has also been suggested that the pamphlet was a response to another leaflet that attacked, amongst other things the practices of the Company. This pamphlet was written by a customs officer about the problems facing those in his position and only distributed to the Lords of the Privy Council: Wheeler, above n 81, 60.

[148] Quoted in Hirst, above n 7, 178. Notestein, however, suggests that 'Parliament and its daily goings-on were matter for gossip in the streets and in the alehouses' in the 1590s and does not indicate that it was limited to discussions of monopolies: *Winning the Initiative*, above n 37, 22.

[149] Edith Penrose, *The Economics of the International Patent System* (1951) 5. Another commentator described the level of protest as a 'national outburst': E F Churchill, 'Monopolies' (1925) 41 *Law Quarterly Review* 275, 289. Neither author provided evidence for these claims. The detail added by one commentator is enlightening. There were allegedly complaints about the patent granted for starch manufacture. The grant was an attempt to limit starch in order for the corn to be eaten rather than used on cloth. One of the reasons for an increased demand for starch was the increase in the size of the ruffs worn for the sake of fashion – 'the bigger the ruff, the more it rubbed your neck, the dirtier it became, the more often it had to be starched' and the more starch was needed: Thirsk, above n 4, 88. Complaints about the starch monopoly may have been from gentlemen who wanted to follow fashion, rather than from the general populace complaining about abuse by the monarch.

[150] It is arguable that the actions of the Stationers Company in the sixteenth century may have been sufficient to attract protest. The enforcement of the printing licences and the regulations that governed them 'lay first and foremost' with the company. Their enforcement included 'weekly searches' and the Stationers' 'Court of Assistants destroyed illicit books, defaced illegal type, fined, excluded and occasionally imprisoned offending printers on its own authority': D M Loades, 'The Theory and Practice of Censorship in Sixteenth-Century England' (1974) 24 *Transactions of the Royal Historical Society* 141, 155. This possibility has not been raised, however, in the patent literature.

[151] Such licensees were permitted to enter private property to dig for saltpetre. At the time, saltpetre was made from manure (Mick Hamer, 'Blast from the Past' (2005) *New Scientist*, 5 November, 33, 34) and so it has to be sourced from animal waste. Limitations were placed on the manner of mining – such as, it had to be between sun-rising and sun-setting and there could be no digging in the floors of houses

not like those that encouraged the importation of expertise, and experts, from the continent.[153] It is also possible that the words heard by Cecil were the result of attempts to spread, more widely, the concerns of the commercial constituencies of Parliamentarians.[154]

It is, therefore, necessary to look elsewhere for evidence of public anger.[155] The record of unrest is similarly weak if artefacts of popular culture are examined.[156] There is reference in the literature to reports in the news publications, such as existed in 1621, describing the 'misdeeds of monopolists and the imprisonment of MPs'.[157] These reports most likely refer to the 'impeachment of two notorious monopolists, Michell and Mompesson'[158] rather than concerns over patents generally.[159] Another example of alleged public complaint is the poem of Spenser, *Prosopopoia, or Mother Hubbard's Tale*, that has been said to 'bitterly describe' the activities of courtiers in

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or barns: *Case of the King's Prerogative in Saltpetre* 12 Co Rep 12, 12; 77 ER 1294, 1294-5. It was alleged, in the Committee for Grievances, that the 'saltpetre men … "enter the houses of … subjects, use them continuously, [and] dig up their dove-houses at unseasonable times': Notestein, *House of Commons*, above n 90, 168. It has also been suggested that the reason for the complaints was the need for the licensees to dig in the 'grounds of the better sort' of citizens due to the increase in demand at the time: Scott, above n 55, 114. This, again, would impute a more selfish motivation on the part of the Parliamentarians, or others, who raised concerns about them.

[152] 'Severe fines were stipulated for unlicensed brewing': Steve Hindle, *The State and Social Change in Early Modern England, 1550-1640* (2002) 152. This, certainly, could generate public complaint.

[153] There were riots against 'foreign artisans' in London in the 1590s: Palliser, above n 20, 363. One of the ancillary issues is the terminology that may be used to describe protests. A description of a "riot" (for example, above n 34 and n 122), with respect to activities in Dean Forest, may suggest significant complaint; the definition of "riot" in early modern England was, however, limited to 'three or more persons committing, with force, an unlawful act'. This could include large scale protests; though it could also include 'petty acts of neighbourly malice': John Walter and Keith Wrightson, 'Dearth and the Social Order in Early Modern England' (1976) 71 *Past and Present* 22, 26.

[154] According to Cecil, some Parliamentarians 'have desired to be popular without the House for speaking against monopolies': quoted in Hirst, above n 7, 178.

[155] One commentator suggests the reverse, that Elizabeth's use of monopolies reduced her need to seek money from Parliament and therefore 'greatly increased her popularity': Theodore Plucknett, *Taswell-Langmeid's English Constitutional History* (11th ed, 1960) 310. Another, that the granting of patents to courtiers to regulate industries meant that 'public opinion was gratified': Unwin, *Gilds*, above n 61, 256.

[156] For a discussion of the use of propaganda in Elizabethan England, with particular mention of plays, see Gladys Jenkins, 'Ways and Means in Elizabethan Propaganda' (1926) 26 *History* 105.

[157] Richard Cust, 'News and Politics in Early Seventeenth-Century England' (1986) 112 *Past and Present* 60, 74.

[158] Keir, above n 39, 167.

[159] Levy Peck asserts that 'satirical prints' of Mompesson 'circulated after his impeachment in 1621 and contemporary tracts attacked official venality': above n 110, 189. Further, as has been noted, complaints about Mompesson may not have been focused on his role as patentee: above nn 110-114 and surrounding text.

their pursuit of monopolies.[160] This work, however, was written in 1591 – well before the bulk of complaints about patents in Parliament.[161]

If *Prosopopoia* is, however, a statement against courtiers generally, it is possible that any public unrest was directed at the arbitrary powers of the Crown, rather than monopolies specifically.[162] There have, for example, been suggestions that there were public reactions to other shows of arbitrary power.[163] Shakespeare, in *The Winter's Tale*, considered the prerogative powers of the monarchs and described them in terms of the merchant role[164] – an analogy that is not overly flattering of the Crown. Further, Slack writes of 'opposition' to the various Books of Order that included the regulation of the sales of grain to protect food sources and processes of the better management of infectious diseases.[165] Such opposition suggests resistance to a particular form of social control (and therefore offering insights into the sentiments of those governed by it); it is less clear that such resistance has anything to say about patents and monopolies.

There is one final example of the public perception of power that is worth noting. If taken at face value, the suggestion that Elizabeth is known to be identified, in the public mind, with Richard II – a tyrant – may support an anti-Crown and perhaps an anti-monopoly perspective.[166] This symbolic connection, however, lasted throughout

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[160] Rowse, above n 54, 185.

[161] Further, another commentator has argued that the poem 'speaks most directly to the relations between the court and the monarch' and is connected to Spenser's desire that Elizabeth seek appropriate counsel: Richard Hardin, *Civil Idolatry: Desacralising and Monarchy in Spenser, Shakespeare and Milton* (1992) 97-8. The critique of courtiers in popular culture was continued in the seventeenth century, for example in John Milton's *Comus*: Christopher Hill, *Liberty Against the Law: Some Seventeenth Century Controversies* (1996) 11.

[162] It is suggested that Ben Jonson's 1616 play, *The Devil is an Ass*, includes reference to a patent relating to the sale of *aqua vitae* that was complained of in the 1601 debates: Scott, above n 55, 116. This suggests that the creative class at the time were willing to raise the issue of monopolies, however, the few mentions, in turn, does not imply a groundswell of public opposition. It has also been asserted, however, that the reference by Jonson was a 'jibe' at a friend of his, rather than as a protest over patents: M Frumkin, 'The Origin of Patents' (1945) 27 *Journal of the Patent Office Society* 143, 146-7.

[163] There is also a suggestion that there were reactions to corruption linked to monopolies. According to Hotchkiss, there was a play published in 1607 that implied that a 'closely allied group of merchants control the export of cloth and maintain their monopoly by heavy bribes': 'Introduction' in Wheeler, above n 81, 87. This is understood to be suggesting that the Society for Merchant Adventurers paid bribes to members of the House of Lords to block passage of a Free Trade Bill in 1604. This Bill, however, is not best seen as an anti-monopoly Bill, but an anti-regulated corporation Bill – that is, the attack was based on the restricted access to the benefits of its monopoly rather than an attack on the monopoly it held over certain types of trade.

[164] Constance Jordan, *Shakespeare's Monarchies: Ruler and Subject in the Romances* (1997) 123.

[165] Slack, above n 56, 139ff.

[166] It has been reported that she said, to her Keeper of the Rolls, 'I am Richard II, know ye not that?': Frank Kermode, 'The Age of Shakespeare', Weidenfeld & Nicolson, London, 2004, 45. It has been

her reign; which raises the question as to the reason for the link.[167] It is possible that the association arose as a result of questions of the legitimacy of Elizabeth as monarch.[168] If this is the case it is, in all probabilities, a function of the religious division in England at the time.[169] Elizabeth was a Protestant and many felt that a Catholic should have been on the throne.[170] This would explain why she was equated with the deposed king;[171] if the connection arose through specific improper *exercises* of power (such as monopolies) then it is likely the link would have been established later in her reign. In other words, claims of dissatisfaction with her rule may have developed from initial problems with her receiving the crown to begin with.[172] Whilst

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suggested, however, that Shakespeare himself avoided direct reference to the Queen in his plays: Lisa Hopkins, *Writing Renaissance Queens* (2002) Ch. 6.

[167] See, generally, Lily Campbell, *Shakespeare's Histories: Mirrors of Elizabethan Policy* (1968) Ch. 13.

[168] Mary Ann McGrail, *Tyranny in Shakespeare* (2001) 2 For a discussion of Elizabeth in terms of the reign of King John and his improper seizure of power see Campbell, above n 143, Ch. 12.

[169] It has been observed that 'religion permeated every aspect of English society in the sixteenth and seventeenth century': David Cressy and Lori Anne Ferrell (eds), *Religion and Society in Early Modern England* (1996) 1.

[170] According to Plucknett, the 'natural prejudice of most of the Roman Catholics in favour of a monarch of their own religion, and the impossibility of a catholic admitting that Elizabeth was legitimate, coupled with the preference felt by many for a strictly hereditary over a purely parliamentary title, led them to regard the Queen of Scots, granddaughter of Henry VIII's elder sister Margaret, as having a prior right to the throne': above n 131, 297.

[171] A side issue of this is the promotion of the idea of the "King's Two Bodies" in the contest of the legitimacy of Elizabeth's rule and her succession. This doctrine, popularised by Kantorowicz (Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (1997)), holds that the Crown has a "body natural" and a "body politic". Kantorowicz opens his book, and bases much of his argument, on the idea as expressed in Plowden's Reports. Others, however, have argued that such an approach ignores the context of Plowden's writing. Rolls, for example, argues that Kantorowicz does not take account of the 'particularities of the theory in Elizabethan England [and had] disregarded, simplified and occasionally misrepresented the elements of the theory': Albert Rolls, *The Theory of the King's Two Bodies in the Age of Shakespeare* (2000) 55. Further, Hardin argues that Kantorowicz 'moves dubiously for the legal fiction of the immortality of corporate bodies to the claim that medieval and Tudor England subscribed to a sacred or mystical theory of kingship': above n 137, 24. Another questions the basis of the argument. Axton offers a more political view: Plowden, as a Catholic, 'personally suffered from the demise of Queen Mary and from the political and religious innovations of her successor. It is understandable that [he] should seek to minimise the personal impact of the new sovereign and should emphasise the continuity of the monarchy in their professional work': Marie Axton, *The Queen's Two Bodies: Drama and the Elizabethan Succession* (1977) 16. Shakespeare's *Richard II* may be understood from the perspective of the doctrine: Calvin Thayer, *Shakespearean Politics: Government and Mismanagement in the Great Histories* (1983) Ch. 1. Further, not all jurists agreed with the concept of the two bodies; Lord Ellesmere, the Chancellor, for example, 'believed in a concept of the King's single, natural body': Knafla, above n 62, 66. This debate shows the complexity of understandings of political life and the nature of the political state. Simplistic characterisations of any facet of public life at the time, therefore, may not be particularly useful.

[172] Also, if the work of Shakespeare is considered, then it is not clear that he would write his *Richard II* and intend it to highlight concerns about the use of prerogative powers and yet not referencing 'Caesar's unlawful appropriation of royal powers and prerogatives' in his *Julius Caesar*: James Shapiro, *1599 – A Year in the Life of William Shakespeare* (2005) 147.

it is difficult to prove a negative, that there was no public outcry, there is little to indicate widespread antagonism to monopolies amongst the general public.[173]

V. 1624 STATUTE AS COMPROMISE

Others have noted that the *Statute of Monopolies* was a compromise, however, this perspective is limited to a conception of James compromising his power to grant patents to gain funds from Parliament.[174] Such a conception acknowledges the defining need of the monarch to achieve supply; it does not, however, recognise that there were other politics at play. It is argued here, for example, that the Act represented not only a compromise between the Crown and Parliament but also between different groups within Parliament – for as early as the first Parliament of James, the 'self-centred' nature of the individual Members and the focus on their own 'political advancement' had been noticed.[175] The importance of this acknowledgement is that the Act itself, when taken as a whole, is not an expression of idealism; but it is best characterised as a statement of political appeasement.

A. *Background*

The drafting of statute has a lengthy history, much of which is detailed elsewhere.[176] For the purposes of this article, the detailing of its past may start with preparations for the 1621 Parliament. James established a commission to examine the patents and monopolies that were "grievous to the commonwealth". The report of the

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[173] Indeed, another historian who quoted Cecil and his overheard words on the street appended another statement – 'The time was never more apt to disorder': Neale, *Elizabeth I and Her Parliaments*, above n 66, 386. Cecil was not reporting protests in the street but the potential for them to happen. For Supple, the 'Tudor and Stuart governments directed their regulatory efforts to the maintenance of *social order, public peace, national security* and the achievement of economic prosperity': Supple, above n 25, 226 (emphasis added). This suggests that Cecil's comment reflected an ever-present fear of unrest rather than a prediction that a riot may happen. See also Lawrence Stone, 'State Control in Sixteenth Century England' (1947) 17 *Economic History Review* 103.

[174] 'In accepting this Act … James secured the supply necessary for English participation in the [Thirty Years] war': Paul Hughes and Robert Fries, *Crown and Parliament in Tudor-Stuart England: A Documentary Constitutional History, 1485-1714* (1959) 182. This is supported by the discussion in Hirst, above n 7, 169-171.

[175] Knafla, above n 62, 84. In Tudor times, according to Elton, the politics in the Court 'always contributed [to any action], was usually ideological, and gave a purposeful back-bone to those groupings of generally very self-seeking men (and women)': 'Tudor Government: Points of Contact', above n 119, 227. This self-seeking politics gave attacks in Parliament a personal aspect. A number of targets were those high profile people who acted as referees for the grants of patents. A Bill against patents, for example, included the declaration that all the 'certifiers' be 'damned to posterity'; Sir Hamon L'Estrange raged against the 'Jezebels that lie in the ears of kings, worms that breed of the crudities of ill digestions … the king needs not their counsel' Zaller, *Parliament of 1621*, above n 105, 64-65.

[176] For example, Read Foster, above n 102; and Kyle, above n 5.

commissioners was considered by the Privy Council. Its conclusions were based on a strategic engagement with the wishes, and expected actions, of the Commons. In the end, the Council decided to allow the lower House to choose the patents to be challenged.[177] It should not be forgotten that throughout the period in which monopolies were complained of, the monarch and Council periodically revoked a number of patents. This continued into the 1621 Parliament.[178] It is possible that these revocations were an admission of fault; it is also possible that the revocations were, in part, one aspect of the political power-plays that took place around patents at the time.

Central to the negotiations is the fact that, in early modern England, the 'Crown had very circumscribed powers of taxation'.[179] This meant that there was a degree of political power that rested with Parliament.[180] It also gave rise to the use of patents to supplement the royal income[181] – though there are questions as to the financial success of the practice.[182] The expense of government was one of the key factors in the relationship between James and the Parliament (government for him being more expensive than for Elizabeth[183]); this, when coupled with the economic troubles of the 1620s, gave the Commons ample clout to negotiate with the monarch.[184]

One commentator even speaks of the 'new partnership between [the Royal] Court and Commons' that existed in the 1624 Parliament that meant that over 100 statutes were

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[177] Willson, above n 42, 41.
[178] See, for example, Willson, ibid, 43. Arguably, the only practical result that came out of the 1621 Parliament, with respect to grants and the future granting of patents, was a proclamation by James. The proclamation cancelled eighteen monopolies and another 'seventeen were offered to the test of the common law': Hyde Price, above n 11, 32. For a list of the affected grants see Appendix O of Hyde Price. Others were 'earmarked' by the Privy Council, 'for further examination': Zaller, *Parliament of 1621*, above n 105, 138
[179] Hirst, above n 7, 7.
[180] It has been suggested that the friction in the later Parliaments of Elizabeth was as much about the 'increased financial demands of the Crown' as it was about the unpopular monopolies: Palliser, above n 20, 33.
[181] Other streams of royal income include the indirect taxation relating to customs (this relied on fluctuating overseas trade and was prone to abuse, rents and feudal dues from royal land: Hurstfield, 'Lord Burghley', above n 6, 97.
[182] The grants 'brought him little income as their aristocratic holders milked the tenants for small fees which were not always paid to the Crown': Knafla, above n 62, 99. This accords with Fox – the 'financial returns to the Crown were at the most negligible': Fox, above n 11, 188. Figures have been provided, however, for significant sums earned from monopolies by Charles I – such as £30,000 for the soap monopoly and a similar figure for wine licences: Churchill, above n 125, 291.
[183] Notestein, *Winning the Initiative*, above n 37, 31.
[184] It has been suggested that one of the reasons for the strengthened independence of the Commons in the seventeenth century was the 'neglect of James to keep a sufficient number' of Privy Councillors in the lower house: Notestein, *Winning the Initiative*, above n 37, 26.

successfully passed at a 'rate of over 70 per cent'.[185] Another argued that 'not very much was wrong with relations between Crown and Parliament'.[186] Further, it may be noted that, in the 1620s, the 'division was not the central institution of Parliament. Divisions were disliked, and the putting of the question was many times postponed until the emergence of a consensus enabled resolutions to be carried without a division'.[187] The focus, then, was on compromise and negotiation. Regardless of the relationships between MPs of the time, what is more important for this argument is that 'one of the most striking features of the Commons' attack on patents [in the 1620s] is the absence of any royal resistance to it, or even of any sign of royal displeasure at it'.[188]

One reason for this is that in the first half of that decade, power was shifting from James to Charles; and, in 1624, the son was 'ready to concede many points in domestic policy if only money was voted to be used against the Spaniards'.[189] It is 'easily forgotten' now according to Russell, 'that the 1620s were a war decade'.[190] The compromises that are evident in the Act, the exceptions for example, may have been a worthwhile sacrifice to Coke (one of the prime movers against monopolies and drafter of the Monopolies Bill[191]) because 'he shared to the full the Commons hatred for Spain'.[192] The fear of war also impacted on the negotiations around the calling of the Parliament that year. James did not want to summon Parliament because he feared that its purpose was to declare war on Spain (the apparent desire of Charles and the

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[185] Rabb, above n 91, 273. It may be that James' declining mental faculties meant that he was less obstructive than in earlier Parliaments: Willson, above n 42, 16. Alternatively, it may have been the 'domination of James by the prince and Buckingham' that encouraged compromise: Ashton, *City and the Court*, above n 90, 110.

[186] Russell, above n 9, 419. David Hume, the Scottish philosopher, economist and historian, also considered that 'advantage was also taken of the present good agreement betwixt the King and Parliament, in order to pass the Bill against monopolies': *The History of Great Britain: The Reigns of James I and Charles I*, Duncan Forbes (ed), (1754, 1970), 204.

[187] Russell, above n 9, 5.

[188] Ibid, 100.

[189] Willson, above n 42, 161.

[190] Russell, above n 9, 72.

[191] Kyle, above n 5, 206.

[192] Willson, above n 42, 90. Two exceptions to the Act (both contained in s. 10) are particularly relevant to the potential war with Spain. The first is that for the manufacture of saltpetre: saltpetre was a necessary ingredient for gunpowder, therefore, a native manufacturing industry would improve the nation's self-sufficiency in times of war (in part due to the use of patents, English 'ordnance became the best in Europe by 1600': Ramon Klitzke, 'Historical Background of the English Patent Law' (1959) 41 *Journal of the Patent Office Society* 615, 632). In the sixteenth century at least, much of the trade in gunpowder was through Antwerp – a city controlled by the King of Spain. Removing potential Spanish control of saltpetre imports would have been an important strategic move. The ordinance exception was included after the House of Lords had looked at the Bill and was included as it was 'essential to the defence of the realm': Kyle, above n 5, 214.

Duke of Buckingham). He acceded only if certain members of Parliament, including Coke and Sandys, were first sent to Ireland. This was opposed by members of the Council and Parliament was called with those members present.[193] It was these changing power relationships that facilitated the passing of the *Statute of Monopolies*.

B. *Relation of Statute of Monopolies to Law of the Time*

The first point to be made about the Act itself is that it has been considered to be 'nothing more than a declaration of what the common law had always been';[194] this perspective is, however, limited to the regulation of patents for invention. As discussed above, the monopolies of the time may be best considered to fall into three categories – those for inventions, the *non obstante* grants and those that regulated industries, trade routes and the dispensation of penal laws.[195] This section will show how the *Statute of Monopolies* impacted on each type of grant in a different manner.

Section 1 of the Act stated, in part, that

> all monopolies and all commissions, grants, licenses, charters, and letters patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, of or for the sole buying, selling, making, working, or using of anything within this realm or the dominion of Wales, or of any other monopolies, or of power, liberty, or faculty, to dispense with any others, or to give licence or toleration to do, use, or exercise anything against the tenor or purport of any law or statute … and all proclamations, inhibitions, restraints, warrants of assistance, and all other matters and things whatsoever, any way tending to the instituting, erecting, strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void and of none effect, and in no wise to be put in use or execution.

This, therefore, may be seen to cover, amongst other things, all three categories of patents. As a basis for this law, the section referred explicitly to the Book of Bounty of James himself and the claim "that all grants of monopolies and of the benefit of any penal laws, or of power to dispense with the law, or to compound for the forfeiture,

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[193] See Willson, above n 42, 160-167.

[194] Fox, above n 11, 125; Macleod, above n 11, 17-18. There has been significant academic debate about whether the bill and statute were simply declaratory of the common law as it existed at the time, or whether they represented a departure from the previous law; see Walterscheid, above n 88, 874 n104, for a discussion of the debates. Read Foster argues that the 'purpose of the statute was not to introduce new law but simply to fix what the Commons regarded as the proper interpretation of the common law in its application to patents and monopolies': above n 102, 76-77. On the other hand, 'from a constitutional perspective, the *Statute of Monopolies* represents an incredible assertion of parliamentarian order and rule by common law – as opposed to rule by royal prerogative': Mossoff, above n 11, 1272. Kyle responds to the question 'Did the Monopolies Act thus invade, attack or limit the royal prerogative?' with a direct 'No': above n 5, 216.

[195] It is worth noting that the Act, unusually for the debates during the reign of James, differentiated between the monopolies that regulated trading companies and those that devolved the enforcement of penal statutes to private individuals: Ashton, *English Civil War*, above n 34, 89.

are contrary to your Majesty's laws". This, however, raises an important issue – what, exactly, constitutes a monopoly for the purposes of the Act? This point is considered below in context of s. 6.[196]

The most obvious change to the law of the time is evident with respect to those grants that interfered with the authority of Parliament to make, and enforce, legislation. One of the key effects of the Act was the proscription of dispensations of penal laws;[197] though the legislation was not sufficient, in itself, to fully regulate this type of patent. The Act was one of three statutes passed in the 1624 Parliament aimed at the better regulation of this class of patents that gave rise, in 'almost every Parliamentary session [to] an indignant proposal for the restraint of informers' abuses'.[198] As the *non obstante* grants (tolerations against statutes) were also rendered contrary to law,[199] the *Statute of Monopolies* reinforced the legitimacy of the laws passed by Parliament and the power of JPs to enforce them.

With respect to the other two categories of patents, many of the monopolies relating to trade routes were retained through the corporations exception to be discussed below. Other regulatory patents were rendered contrary to the law[200] unless the patent was granted to a company or to an office holder (patents for the creation of offices were

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[196] There is also the side issue of whether statements such as "monopolies are contrary to the law" is a statement of law, fact, advocacy or, in modern parlance, "spin". The impact of James making the statement, in the *Book of Bounty*, is different to a statement by Parliament and different to a statement made by an individual with links to both the Parliament and the Crown – Coke. This is particularly the case when there is no agreed upon definition of what constitutes a monopoly. There is some discussion of the nature of James' Book (including whether it is a proclamation or declaration) in Kyle, above n 5; he does not, however, consider the possibility that the statements were an example of political posturing.

[197] It may be noted that the 'grants of dispensation from penal laws' were examined in Committees during the 1624 Parliament: Colin Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* (1974) 86.

[198] Beresford, above n 32, 222.

[199] This, therefore, conforms with the finding in the 1605 *Case of Penal Statutes* 7 Co Rep 36; 77 ER 465. The judges were of the opinion that the *non obstante* grant in question was 'utterly against law': 7 Co Rep 36, 36; 77 ER 465, 465. There is a risk, not often recognised by commentators, that statements about the *Statute of Monopolies* and the common law of the time are made through the lens of Coke. That is, many contemporary considerations of the common law are predicated on the writings of Coke (such as contained in his *Institutes of the Laws of England*) and, as acknowledged above, Coke was one of the prime movers behind the drafting of the Act. Coke had both undoubted influence on the law of the law of the time and his own (strong) perspective on what the law should be. Recourse to his writings alone risks accepting his perspective as the sole arbiter of the law of the time. One commentator, for example, considers that Coke's writings demonstrate a 'marked bias': Donald Wagner, 'Coke and the Rise of Economic Liberalism' (1935) 6 *Economic History Review* 30, 31; and that Coke 'completely misrepresents' precedents in the furthering of his case: ibid, 43. This is not to claim that Coke was necessarily wrong, only that caution may be required when considering his statements with respect to the law relating to monopolies.

[200] The grant at the heart of the decision of *Darcy v Allen* (1602) 11 Co Rep 84b, 77 ER 1260; Noy 173, 74 ER 1131 is an example of a regulatory patent that was found to be contrary to the law.

included in the exceptions in s. 10 of the Act). There were also a number of regulatory patents maintained elsewhere in the legislation – s. 12, for example, contained an exception for the 'licensing of the keeping of any tavern' and another for the 'selling, uttering or retailing of wines'. The final category of patents to be considered here, then, is that which covered new inventions.

C. *Patents for Invention as Exception to Act*

The exception relating to patents for invention is contained in s. 6 of the Act. The key text of that section reads:

> any declaration before mentioned shall not extend to any letters patents and grants of privileges for the term of fourteen years or under, hereafter to be made of the sole working or making of any manner of new manufactures within the realm, to the true and first inventor and inventors of such manufactures which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient.

The central argument of this article is that the passing, and content, of the Act may be best seen as a political, and policy, compromise. In this vein, there are three policy phrases contained in this excerpt: "manner of new manufacture", "contrary to the law or mischievous to the state" and "generally inconvenient".[201]

The first of these, "manner of new manufacture", is not discussed to a great depth in the literature. It appears to be seen as self-evident. Three aspects of the understanding at the time may be seen to render this phrase more problematic. The first is the acknowledgement that "invention", and by analogy "new", did not have all the same connotations in early modern England as it does now;[202] the second is that it is known that not all examples of "new manufactures" were granted a patent by either Elizabeth or James; and third, there is no case law from the time that includes a discussion of what constitutes sufficient invention to earn monopoly protection for its production. In terms of the first factor, "invention" included the introduction of a new technology from a foreign country; and with respect to the second, it is known that patents for

[201] With respect to the term "inventors", what is not clear from the literature is the impact, if any, that the relatively new intellectual tradition of Ramism had on the minds of the drafters. Central to the tradition was the precept that 'discovery was the key to knowledge': Louis Knafla, 'Ramism and the English Renaissance' in Louis Knafla, Martin Staum and T H E Travers (eds), *Science, Technology and Culture in Historical Perspective* (1976) 41. Knafla further asserts that Ramism influenced 'merchants… statesmen… and lawyers': ibid, 42. It is possible, therefore, that the new logic provided an intellectual basis for the Statute – in addition to the existing economic justifications.

[202] The interpretation of the term at the time was 'to originate, to bring into use formally or by authority, to found, establish, institute or appoint': E. Wyndham Hulme, 'On the History of Patent Law in the Seventeenth and Eighteenth Centuries' (1902) 18 *Law Quarterly Review* 280, 280.

previously unknown inventions for a stocking knitting machine,[203] a water closet[204] and armour plates were not granted to their inventors.[205] The third factor, the case law, is even more problematic. A survey of the case law relating to inventions prior to the passing of the *Statute of Monopolies* produces three decisions: *Hasting's Case* (1569), *Bircot's Case* (1572) and *Mathey's Case* (1571). There are no surviving reports for any of these; though all, apparently, rejected monopoly protection for inventions that merely improved a preceding product. What is known about these is found in subsequent decisions[206] and in the writings of Coke.[207] As a result of these three factors, the exact nature of what constituted a "new manufacture" in the collective mind of the Parliament (as opposed to just the mind of Coke) in 1624 cannot be known with any degree of certainty.[208]

The second phrase to be focused on, "contrary to the law or mischievous to the state", is similarly problematic. Traditionally, 'contrary to the law had little or no meaning in the case of grants made by prerogative';[209] the monarch, as head of state, had a degree of independence of action – at the very least, it could be seen that the 'common law favoured the Crown'.[210] Added to this bias is the statement of James that suggested that "monopolies were contrary to the common law". There is a suggestion in the literature that there was a degree of deliberate ambiguity in the language chosen for

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[203] A patent was refused for this machine, despite it being 'one of the most original and striking inventions of the age. The reason for the refusal was that many thousands occupied in making stocking by hand would be forced out of work': Federico, above n 73, 298. It may be arguable, then, that a manner of new manufacture for the 1624 Act excludes "labour-saving" inventions, particularly when read in context of the potential "public interest" qualifiers discussed below.

[204] For a discussion of Harrington's flush toilet, see Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (2002) 132ff. The inventor's name is also spelt as "Harington" in some of the literature. That the inventor of the water closet was a god-son of Elizabeth, makes its rejection all the more unclear.

[205] Hulme, 'The Patent System – A Sequel', above n 15, 53.

[206] Both *Mathey's Case* and *Hasting's Case* were referred to in Noy's report of *Darcy v Allen*. The former was mentioned at Noy 173, 183, 74 ER 1131, 1139-40 and the latter at Noy 173, 182.

[207] See, for example, Pila's discussion of the decisions in light of Coke's Institutes: Justine Pila, 'The Common Law Invention in its Original Form' [2001] *Intellectual Property Quarterly* 209, 221-3. It is worth noting that it is unlikely that Coke himself reported any of these decisions directly as he did not move to London to join the Inns of Court until 1571: Hastings Lyon and Herman Block, *Edward Coke – Oracle of Law* (1929) 24.

[208] Pila argues, however, that the term in section 6, when interpreted literally and contextually, 'permitted at the time of its enactment patents for two broad categories of subject matter: methods and products or substances. Those categories include but are not limited to trades and devices': Pila, above n 183, 220.

[209] Edward Hughes, *Studies in Administration and Finance 1558-1825* (1934) 67 citing the work of Cheyney. The decision of *Bates' Case*, dealing with the imposition of duties on currants, included the statement 'the revenue of the Crown is the very essential part of the Crown … and such great prerogatives of the Crown ought not to be disputed': (1606) Lane 22, 23; 145 ER 267, 267. This decision is discussed in Eusden, above n 110, 104.

[210] Edie, above n 43, 208.

the drafting of the statute. It has been noted that, during the Bill's passage through Parliament, the 'Lord Chief Justice complained that the bill offered no definition of a monopoly, to which Coke only replied that definitions in law were most dangerous'.[211] The use of the broad terms allowed the MPs to vote for regulation of the practices that they were against[212] and allowed greater leeway in the interpretation of the Act after it had passed. The difficulty here is that the law was comfortable with certain types of monopoly – the courts, for example, were happy with restraints of trade imposed by the City of London,[213] though at other times they were not.[214] There was also no successful legal challenge to the monopolistic trading corporations and there were judicial statements in support of patents of invention.[215] It is, therefore, possible that only illegal monopolies were contrary to law.[216] This accords with the perspective of the mercantilists. For them, if a restraint was for the public benefit, for the common wealth, it was not an abusive monopoly.[217] The lack of clarity around the phrases "new manufacture" and "monopoly" could, therefore, be intentional. The broad thrust of the Act, then, may be aimed at the general, and perhaps, too much focus on the specific limitations of words in s. 6 is counter to the intent of the drafters.

The public interest aspect of the test in the *Statute of Monopolies* is more evident in the final policy-focused phrase "generally inconvenient". Again, there is no clear

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[211] Russell, above n 9, 191.

[212] The use of the vague term "monopoly" in the Free Trade Bill of 1604 'was excellent propaganda, for the imprecision allowed all MPs to vote against a hated form of privilege': Rabb, above n 91, 93. That Bill did not make it passed the House of Lords: ibid, 96.

[213] *City of London Case* (1610) 8 Co Rep 121b, 77 ER 658.

[214] *Davenant v Hurdis* (1599) Moore Rep 576, 72 ER 769. This report is written in Law French; Fox, however, provides a detailed summary of the arguments and decision: above n 11, 311-313, as does Letwin, above n 11, 359-362.

[215] 'If a man has brought in a new invention and a new trade within the kingdom, in peril of his life and consumption of his estate or stock, or if a man has made a new discovery of any thing, in such cases the King of his grace and favour, in recompense of his costs and travail, may grant by charter unto him, that he only shall use such a trade or traffique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it': *Cloth-workers of Ipswich Case* (1614) Godbolt 252, 254; 78 ER 147, 148. This case was a restraint of trade case, and therefore, the reference to patents for invention may be seen as *obiter dicta* – it, nonetheless, indicates that the court agreed with the concept of patents for invention.

[216] Nachbar also considers the tautologous possibility that monopolies were (implicitly) defined to be those restraints that speaker considered to be illegal: Thomas Nachbar, 'Monopoly, Mercantilism and the Politics of Regulation' (2005) 91 *Virginia Law Review* 1313, 1324

[217] The mercantilists had a specific definition of the term:

> The parts then of a monopoly are twain. The restraint of the liberty of commerce to some one or few, and the setting of the price at the pleasure of described and decried monopolies as a restraint of trade involving the setting of the price at the pleasure of the monopolian to his private benefit, and the prejudice of the public.

Edward Misselden, *Free Trade or the Means to Make Trade Flourish* (1622, 1970) 57. In other words, a restraint of liberty of commerce alone was insufficient to be called a monopoly.

definition of this concept; however, different interpretations have been suggested. According to one commentator, the Commons found a patent inconvenient if the grant 'though clearly obnoxious or injurious to the commonwealth, could not be proved definitely illegal'.[218] An historian also considered that the test of inconveniency was viewed 'through fiscal spectacles'.[219] Further, Coke himself, in his commentary on the *Statute of Monopolies*, stated that an invention was 'inconvenient' and therefore contrary to the Act, if it turned 'many men to idleness'.[220] It is possible, then, that the generally inconvenient test was aimed to be a broad public benefit test[221] – if a patent for invention was not in the public interest (such as in terms of employment), then it would be contrary to the Act and, as a result, not granted.[222]

One particular aspect of the public interest is worth highlighting. It is likely that one of the underlying motivations for the Statute was to encourage employment as a major concern to the Parliament in the 1620s was the economy.[223] There was 'widespread

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[218] Read Foster, above n 102, 74.

[219] Hughes, above n 185, 69.

[220] *The Third Part of the Institutes of the Laws of England* (1979) 184. Coke was also known to have 'fully endorsed' the *Statute of Apprentices* that was aimed at encouraging greater participation in the workforce: Barbara Malament, 'The "Economic Liberalism" of Sir Edward Coke' (1967) 76 *Yale Law Journal* 1321, 1335. One aspect of Coke's life that does not seem to have been considered with respect to his attitude to monopolies relates to his personal finances. It is known that he engaged in land speculation, 'when he died he left some 99 estates and … twice that number had passed through his hands': ibid, 1324. As a result, it is possible that his position was pro-employment, rather than anti-monopoly. The Poor Laws of Elizabeth (1597, 1601) provided for the taxation of land owners by parishes to fund the relief of the poor (Plucknett, above n 131, 698), the higher the level of employment, therefore, the lower the level of taxation for poor relief. His reasoning in the monopoly cases tend to reinforce a desire for greater employment and his decision in *Rex and Allen v Tooley* (1614) 2 Bulst. 186, 80 ER 1055) may be seen as pro-employment given his position that a wool-packer who had served an apprenticeship as an upholsterer did not contravene the *Statute of Apprentices*, and therefore not subject to penalty.

[221] It has been suggested in the literature that s. 6 of the 1624 Act 'includes moral standards within its ambit': Peter Drahos, 'Biotechnology, Patents, Markets and Morality' (1999) 21 *European Intellectual Property Review* 441, 441. Others have highlighted the occasional reference to the "generally inconvenient" test by courts and delegates of the Commissioner of Patents; see, for example, Miranda Forsyth, 'Biotechnology, Patents and Public Policy: A Proposal for Reform in Australia' (2000) 11 *Australian Intellectual Property Journal* 202; and Dianne Nicol, 'Should Human Genes be Patentable Inventions under Australian Patent Law?' (1996) 3 *Journal of Law and Medicine* 231. None of the decisions cited discuss, in detail, the meaning of the phrase "generally inconvenient".

[222] The public interest test nature of the phrase is supported by the inclusion of the similar phrase, "inconvenient to the commonwealth", as a limit to validity in a number of patents granted in the early seventeenth century: Hyde Price, above n 11, 29.

[223] The focus on work, may also have been, in part, the result of a desire to encourage the spiritual development of the population; with work being seen as an essential part of living the "good life". Both Coke and Noy, in their reports of *Darcy v Allen* resorted to spiritual arguments (Coke quoted the Book of Deuteronomy – 11 Co Rep 84b, 86b; and Noy the Book of Thessalonians – Noy 173, 180) Other Bills of the late sixteenth and early seventeenth centuries that may be seen to have pastoral connotations include one against swearing (Norman Jones, *The English Reformation: Religion and Cultural Adaptation*, Blackwell, Oxford, 2002, 167-8 and one 'prohibiting fairs and markets to be holden on the Sunday': Neale, *Elizabeth and Her Parliaments*, above n 66, 395.

unemployment' and 'widening poverty' that resulted from the bad harvests and declining trade of 1621 and 1622.[224] The Act generally and s.6 specifically,[225] therefore, may be seen to fit with the edicts of the economic theory of the day – mercantilism.[226] The prime policy objective of the mercantilists was wealth creation.[227] It was the wealth of the nation as a whole – the 'preservation and augmentation of the wealth of the Realm'[228] – rather than of individuals,[229] that was important.[230] Two of the key themes of the mercantilists are relevant to the drafting of the Act; these being the desire to boost employment and the benefits of improving the balance of trade.[231] It may be noted, in addition, that there was also support amongst the mercantilists for the ideal of patents for invention.[232] It is possible then, that given this agreement among the elites, that the tests in s. 6 do not relate to a broad public

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[224] Supple, above n 25, 55.

[225] It has also been suggested that the test of being "mischievous to the state" focused on whether or not a grant, 'though otherwise meritorious' would have the 'effect of creating unemployment': Holdsworth, *A History of English Law*, above n 4, 354.

[226] Economics in the sixteenth and seventeenth century was not the developed academic discipline evident today. There were no university courses on the subject and there were no dedicated professional "theorists". However, there was a significant group of commentators who based their writings on their practical experiences as merchants. The links between the motivations of mercantilist writers and the benefits they gained has been recognised in the literature. Viner has argued, 'pleas for special interests, whether open or disguised, constituted the bulk of the mercantilist literature. The disinterested patriot or philosopher played a minor part in the development of mercantilist doctrine': quoted in L Getz, 'History of the Patentee's Obligation in Great Britain' (1964) 46 *Journal of the Patent Office Society* 62, 70 n31.

[227] There are problems with making generalisations such as this with respect to a diverse group of writers, see Joyce Appleby, *Economic Thought and Ideology in Seventeenth Century England* (1978) Ch 2. Further, there is debate as to whether there could be considered to be a school of mercantilist thought: see Lars Magnusson, *Mercantilism: The Shaping of an Economic Language* (1994) Ch 2.

[228] Gerard de Malynes, 'A Treatise of the Canker of England's Common Wealth' in Antoin Murphy (ed), *Monetary Theory: 1601-1758*, Vol. 1, (1997) 102.

[229] One writer argued that the 'great plenty we enjoy, makes us a people not only vicious and excessive, wasteful of the means we have, but also improvident and careless of much other wealth that shamefully we lose': Thomas Mun, *England's Treasure by Foreign Trade or the Balance of our Foreign Trade is the Rule of our Treasure*, Reprinted in Antoin Murphy (ed), *Monetary Theory: 1601-1758*, Vol. 1, (1997) 164.

[230] This focus on the wealth of the nation with its concomitant lack of the individual person as subject of analysis accords with Foucault's thesis as to the development of knowledge in Western culture, see Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (1989) in particular Ch 6.

[231] The fooloing is a partial prescription of how to protect the balance of trade, or to "counter the canker":

> all other artificers and workemen shall be set on work, to avoid idleness which is the root of all mischief: when through plenty of money and gains, merchants shall be encouraged to seek out new trades, whereby the Realm will more flourish through God's blessings.

Mun, above n 205, 64. For a consideration of patents and the *Statute of Monopolies* in the context of mercantilist ideas, see Nachbar, above n 192.

[232] One of the key mercantilists was Edward Misselden. He wrote:

> Also the law of the realm allows that if any man invent a new art, beneficial to the common wealth, he may have a patent to use that art solely, with restraint of all others for seven years: as well in recompense of his industry, as for the encouragement of others, to study and invent things profitable for the public symbiosis: above n 193, 60.

interest test but rather a requirement that the grants are in keeping with the policy objectives of the patent system. Apart from the patents for the trading corporations,[233] however, it is not clear whether the mercantilists would have approved of the other exceptions contained in the *Statute of Monopolies*.

D. *Other Exceptions to the Act*

A number of provisos were included in the Act as passed by the Parliament.[234] It is these exceptions to the restrictions imposed by the statute that emphasise the statute's nature as political compromise. In the words of one commentator, the House of Commons was 'unable to rise above their own selfish interests'.[235] The exceptions considered here in some detail are those relating to corporations, glass-making and printing. Others to be noted include patents relating to alum mines,[236] the Newcastle host-men[237] and the making of smalt.[238] It should also be noted that the statute also explicitly excludes judges and justices of the peace[239] – as the patents for the enforcement of penal statutes were rendered illegal by the Act there were benefits, in terms of clarity, to be had from ensuring there was no doubt that the institutions of justice could still operate.

The exceptions relating to corporations[240] was included to 'preserve the rights of the monopoly trading companies and the interests of the City of London'[241] – despite complaints being made against trading corporations in the 1624 Parliament.[242] This inclusion may not have been entirely partisan, it has also been argued that 'official

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[233] According to one:

> Those that trade without order and government, are like unto men, that makes holes in the bottom of [a] ship, wherein themselves are passengers. For want of government in trade, opens a gap and lets in all sorts of unskilful and disorderly persons: and these not only sink themselves and others with them, but also mar the merchandise of the land, both in estimation and goodness: than which there can be nothing in trade more prejudicial to the public utility: Misselden, above n 193, 84-85.

[234] Some commentators have minimized the impact of the exceptions; calling them a 'few political concessions': Malament, above n 196, 1351.

[235] Churchill, above n 125, 278.

[236] *Statute of Monopolies* s. 11.

[237] *Statute of Monopolies* s. 12.

[238] *Statute of Monopolies* s. 14.

[239] *Statute of Monopolies* s. 8.

[240] Corporations, here, are understood broadly. The provision in the Act covers the 'City of London, or to any city borough or town corporate within this realm, for or concerning any grants, charters, or letters patents to them, or any of them made or granted, or for or concerning any custom or customs used by or within them or any of them; or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies, or societies of merchants within this realm erected for the maintenance, enlargement, or ordering of any trade or merchandise': s. 9.

[241] G E Aylmer, *The Struggle for the Constitution 1603-1689* (3rd ed, 1968) 81.

[242] Russell, above n 9, 158.

protection' of companies throughout the Stuart period stemmed 'directly form an employment policy [despite bearing] the superficial marks of being concerned solely with private or strategic interests'.[243] Further, the exception for corporations may be seen to comply with the public interest test of the Act[244] through their regulatory effect[245] and the role that the trading corporations at least played in the promotion of foreign trade.[246] The corporations exception, nonetheless, gave rise to the 'rash of corporate monopolies which were such a feature of the next reign'.[247] A 'final irony' to the case of *Darcy v Allen* was that 'only a few years after Darcy's monopoly was judged void at common law, the same monopoly was given, under authority of the *Statute of Monopolies*, to the Company of Card Makers'.[248]

The glass-making exception was included as a means of ensuring the passage of the Bill through the House of Lords – according to Russell, the 'Commons consented only in order that the Bill should pass'.[249] As it was, the Lords only passed the Bill with the 'personal intervention of the Prince'.[250] It has also been noted, however, that Mansell's glass-making patent covered what was asserted to be a new manufacturing

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[243] Supple, above n 25, 243.
[244] Where those monopolies that are contrary to the law are only those that do not demonstrate a public benefit.
[245] It is possible that the regulated nature of patent industries encouraged, or at least reassured, "capitalists" to invest in these industries: John Nef, 'The Progress of Technology and the Growth of Large-scale Industry in Great Britain, 1540-1640' (1934) 5 *Economic History Review* 3, 9. The combination of the changes in social organisation and the changed economic order in early modern England meant that the 'social climate was becoming more favourable to business men and, braced by that climate, business men seized their opportunities to build up a volume of internal and overseas trade': F J Fisher, 'The Sixteenth and Seventeenth Centuries: The Dark Ages in English Economic History?' (1957) 24 *Economica* 2, 15. Further, in the late sixteenth and early seventeenth centuries, a 'good deal of the accumulating wealth of the upper and middle classes was seeking investment': Unwin, *Gilds*, above n 61, 303; which may have been a condition of possibility for the 'general movement towards incorporation': ibid., 301.
[246]It may be noted that the incorporation of bodies was not always an easy task. The City of London, for example, engaged in 'foot-dragging over their formal recognition of such grants of incorporation made by the Crown': Ashton, *City and the Court*, above n 90, 72. The reasons for the resistance included the potential interference with the civic administration of those who were unconnected with corporations and fears of an influx of potential members of the corporation to the City: ibid, 73. Even after new companies received a royal charter, there were still battles to be fought – the London Grocers' Company was 'aggrieved' by the new chartered Apothecaries' Company, a case that was 'taken up by the Commons and pursued unsuccessfully' for the latter part of the 1620s: Russell, above n 9, 62.
[247] Ashton, *City and the Court*, above n 90, 118.There had also been, in the time of James' reign, a 'weird new batch of companies' formed, including the Pinmakers (1605), Starchmakers (1607), Gold and Silver Thread Makers (1611), Brickmakers (1614) and the Tobacco-pipe Makers (1619): J H Baker, *An Introduction to English Legal History* (3rd ed, 1990) 513.
[248] Letwin, above n 11, 367.
[249] Russell, above n 9, 191.
[250] Ibid.

process 'which used coal instead of wood [and] brought down the price of glass'.[251] According to Read Foster however, the Commons, in 1621, voted the 'patent a grievance in creation' as it did not conserve wood and raised prices.[252]

The exceptions relating to alum mines, the Newcastle host-men[253] and the making of smalt[254] may also be considered in terms of political expediency. There is little discussion in the literature about the extent of the patents.[255] A complaint of the Lord Mayor of London against the Newcastle coal monopoly is reproduced by Tawney and Power,[256] though it is not clear that this 1590 complaint engages with the same patent that is excepted by the *Statute of Monopolies*.[257] The complaint itself may be best seen in terms of the above-mentioned (political and economic) tension between London and the outports. The exclusion of the host-men patent from the coverage of the Act, and by extension the other specific exclusions for smalt and alum mines, may therefore be understood to be the result of the negotiations that allowed the compromise Act to pass Parliament. There are no direct public benefits that arise from them, as in the case of the saltpetre, though they may still offer advantages in terms of the regulation of those industries.

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[251] Levy Peck, above n 110, 150. Rowse suggests that Mansell's glass-works also produced glass for windows and describes the development of the glass-making industry as a 'first step to industrial power': above n 54, 165.

[252] Above n 102, 73. A "grievance in creation" was opposed to a grievance in execution if the grant, rather than the conduct of the patentees, was counter to the law: ibid, 74.

[253] Reference to the above-mentioned exclusions for the regulation of taverns and the selling of wines is also made in s. 12.

[254] The section that includes the exception for smalt also excludes, from the penalties of the Act, patents for the melting of iron ore using sea-coals: s. 14.

[255] The only comment found is that of Russell. He asserts that the 'Newcastle hostmen obtained an exemption on Arundel's plea that they were essential to the dredging of the Tyne, although Neile, Bishop of Durham, objected that the privileges of Newcastle were hurtful to those on the south bank of the Tyne': above n 9, 191.

[256] Richard Tawney and Eileen Power (eds), *Tudor Economic Documents*, Vol. 1, (1953) 267-71. The complaint does refer to the 'freehostes' of Newcastle: ibid, 267.

[257] Section 12 of the Act states that the Act 'shall not extend or be prejudicial to any use custom prescription franchise freedom jurisdiction immunity liberty or privilege heretofore claimed used or enjoyed by the governors stewards and brethren of the fellowships of the Hoastmen of the Town of Newcastle-upon-Tyne, or by the ancient fellowship guild or fraternity commonly called Hoastmen; for or concerning the selling carrying lading disposing shipping venting or trading of for any sea-coals stone-coals or pit-coals made by the said governor and stewards and brethren of the fellowship of the said Hoastmen to the late Queen Elizabeth, of any duty or sum of money to be paid for in respect of any such coals as aforesaid'. The reference to Elizabeth suggests that it is the same, or at least a similar, grant.

The final exception to be considered here is the one for the printing monopolies. These grants, as exercises of the royal prerogative,[258] are central to the history of copyright as they were the first mechanisms that the Crown used to control the reproduction of literary and (some forms of) artistic works.[259] Under these grants, 'printing was prohibited without the consent of the owner' of the licence;[260] therefore, the patents, and their exclusion from the penalties in the *Statute of Monopolies*, are central to the licensing/censorship debates of which Milton's *Areopagitica* was a part.[261] There is, however, little consideration in the patent (or copyright) literature as to why these patents were included as exceptions to the 1624 Act.[262] It is likely that the regulation of the printing industry (via the printing patents and the Stationer's Company) both fulfilled the perceived need to maintain order amongst the population and continued the Crown's interest in a regulated economy.

VI. CONCLUSION

It is not disputed that the *Statute of Monopolies* is a major marker in the history of patent law.[263] It may, however, be best seen as a point of inflection in the development of the patent system, rather than a fresh beginning. Immediately after the 1624 Parliament adjourned, the 'Privy Council withdrew a large number of grants'.[264] Examples of complaints during the reign of Charles I were, however, detailed above,

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[258] A seventeenth century court held that the King had, since 'time out of mind' used his prerogative over printing to 'licence some with restraint to others': *Stationers v Patentees about the Printing Roll's Abridgment* (1666) Carter 89, 90; 124 ER 842, 843.

[259] For a discussion of the distinction between the stationer's copyright and the printing patents and a more complete history of the role of the Stationers' Company in the development of copyright see Lyman Ray Patterson, *Copyright in Historical Perspective* (1968).

[260] Gillian Davies, *Copyright and the Public Interest* (1994) 7-8.

[261] See, generally, Blair Hoxby, 'The Trade of Truth Advanced: Areopagitica, Economic Discourse and Libertarian Reform' (1998) 36 *Milton Studies* 177; Christopher Kendrick (1983) 'Ethics and the Orator in *Areopagitica*' 50 *English Literary History* 655; Loewenstein, above n 180, 171-191; and Sandra Sherman (1993) 'Printing the Mind: The Economics of Authorship in *Areopagitica*' 60 *English Literary History* 323. It may be noted that '*Areopagitica* has become celebrated as a universal plea for free expression … [but] Milton nowhere calls for universal freedom': David Norbrook, *Writing the English Republic: Poetry, Rhetoric and Politics, 1627-1660* (2000) 120. Milton's call, instead, was for post-publication restrictions where necessary, rather than pre-publication censorship.

[262] Kyle does note that the printing exception was re-drafted between the 1621 and 1624 Parliaments in order to satisfy concerns of the Stationer's Company: above n 5, 212. He does not, however, explain what the changes were. It is, nonetheless, another example of the negotiations that took place with respect to the passing of the Act.

[263] Bently and Sherman highlight that the Act has not always been seen as central to the history of patent law. According to these authors, the 1829 Select Committee on Patents considered the statute to be on par, in terms of importance, with the Act that contained the censure of Sir Francis Mitchell and the legislation that confirmed the annulment of a patent for drying fish: Lionel Bently and Brad Sherman, *The Making of Modern Intellectual Property Law* (1999) 208.

[264] Read Foster, above n 102, 78.

as was the "rash of corporate monopolies" granted by James' son. It has also been suggested that the Act was 'simply circumvented' through the calling of monopolies 'offices'.[265] This suggests that the Act did not "fix" the patent system; it may, therefore, be better to see that Act as a statement that dealt with the politics of the issue, rather than as a total solution. This perspective allows for the monopolies of the time to be understood as the 'standard grievance' of England under James[266] and Charles I. Patents were not the only form of fiscal abuse suffered by sectors of the economy, the farming of customs was another major abuse, yet it was the monopolies that dominated debate. These grants had become "the problem" to be solved.[267]

The solution to the problem came through a political compromise – the Crown compromised with the Parliament in order to get money to fight a war, the House of Commons compromised with the House of Lords to get the legislation passed at the expense of allowing a couple of patents to be maintained and sections within the Commons compromised in terms of the protection of interests of corporations as against the interests of outports. Other relevant conditions of possibility were the economic problems of the 1590s and 1620s and the issue of succession in the same decades. That it is a compromise is emphasised by the timing of the statute, there is little evidence to show that the abuses of monopolies were worse in the 1620s than at any other time of James' reign; it is only the sum of the factors, and the importance of key motivations, that gave rise to the legislation in 1624. This level of compromise shows that there is nothing "pure" about the statement of law contained in any section of the Act. Even the provision relating to patents for invention was loaded with the ambiguous and imprecise phrases of "mischievous to the state" and "generally inconvenient".[268]

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[265] Russell, above n 9, 115. The Jacobean Court had a history of 'openly' selling 'knighthoods, titles and offices': Levy Peck, above n 110, 20.

[266] Rabb, above n 91, 71.

[267] It may, therefore, be seen as an early "problematisation" in the Foucaultian sense of the word. For a discussion of this concept, and its application to copyright, see Chris Dent, 'Copyright, Governmentality and Problematisation: An Exploration' (2009) 18 *Griffith Law Review* 129. That patents as governmentalist "problematisation" co-existed with the continuing national "emergency" of recusancy as a threat to the "righteous" governance of England (examples include the Guy Fawkes plot and the reactions to Catholic Europe) suggests that the English "state" exhibited, simultaneously, characteristics of an administrativist state and a governmentalist one; see, generally, Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (1991).

[268] Further, the provision has to be read in conjunction with the other ambiguous compilation of "monopoly contrary to the law".

It is not unusual to see the passage of legislation through current Parliaments as a matter of compromise. It is not unusual to see included in legislation, broad statements limiting the application of the law to acts "in the public interest". In a sense, this article, therefore, continues the trend of emphasising the 'familiarity of early modern social relations to [twenty-first] century eyes'.[269] The *Statute of Monopolies* was the outcome of political negotiations,[270] the provisions contained within it allowed only those patents that were not "generally inconvenient" or "mischievous to the state" and, arguably, only rendered illegal those monopolies that did not have a public benefit. Taken together, the qualifications in s. 6 may be seen to provide for a broad "public interest" test to patents for invention (at the very least, it may impose a test that patents need to be granted in line with the policy objectives of the patent system).[271] This may have consequences for the interpretation of the current "manner of manufacture" test of patentability in the Patents Act.[272] Such analysis is behind the scope of this piece; however, this revisiting of the passage of the 1624 statute allows for a more contextualised understanding of the scope of the phrase "generally inconvenient".

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[269] Hindle, above n 128, 231.

[270] And, by implication, not the 'first and final source of authority' for the patent system as it was asserted by Hulme, 'History of the Patent System', above n 11, 141.

[271] The inclusion of multiple public interest qualifiers may be seen as an attempt to ensure the breadth of its coverage. The almost repetitive nature of the catalogue of behaviours included in s. 1 of the Act (reproduced, in part, above) suggests that a thoroughness of description was the drafting style of the time.

[272] It is noted, however, that the test in s. 18(1)(a) may no longer relate, directly, to the provision in the *Statute of Monopolies*. As the High Court has held, the 'right question' to ask with respect to the interpretation of the provision is 'is this a proper subject of letters patent according to the principles that *have been developed for the application of s. 6*': *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252, 269, emphasis added. On the matter of the relevance of public policy to the examination of patent applications: currently, 'arguments based solely on matters of ethics or social policy are not relevant in deciding whether particular subject matter is patentable. These matters are distinct from the law relating to the subject matter of a patent, in particular, the law relating to manner of manufacture': Australian Patent Office, *Manual of Practices and Procedures*, § 2.9.1.2.