

## ‘GENERALLY INCONVENIENT’: THE 1624 *STATUTE OF MONOPOLIES* AS POLITICAL COMPROMISE

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[The Statute of Monopolies 1624 is central to one of the tests for patentability of inventions in the Patents Act 1990 (Cth). 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 the individuals and groups within the House of Commons.]

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### 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 be ‘a manner of manufacture within the meaning of section 6 of the *Statute of Monopolies*’<sup>1</sup> — a statute that was passed by the English Parliament in 1624.<sup>2</sup> It would surprise many to hear that the law regulating the latest technical

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<sup>1</sup> *Patents Act 1990* (Cth) s 18(1)(a).

<sup>2</sup> The dating of the *Statute of Monopolies 1624*, 21 Jac 1, c 3 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

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’.<sup>3</sup> This article provides a background to and discussion of this historical requirement and the *Statute of Monopolies 1624*, 21 Jac 1, c 3 (*Statute of Monopolies*) generally, in order to reduce that ambiguity.

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 that ‘[o]f the magnitude of the evils caused by these inconsiderate grants to all classes of the community there can be no question.’<sup>4</sup> 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 that of an old man who plays one part of a weaving of political compromise out of the economic and social troubles of the time.<sup>5</sup> Evidence of the other rapacious actions of the Crown and its favourites of the time — such as the sale of wardships<sup>6</sup> and the abuse of customs duties<sup>7</sup> — suggests that 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 *Statute of Monopolies* is not a key moment in the history of patent law. This universal acknowledgement runs the risk of ascribing a degree of ideological purity to the Act as the broader context of its passing is forgotten. The purpose here is to highlight the factors that gave rise to

the statute was passed during the Parliament of 1624 and assented to on 29 May 1624, it shall be referred to here as a 1624 Act.

- <sup>3</sup> Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, Report No 99 (2004) 126. 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 (Dixon CJ, Kitto and Windeyer JJ).
- <sup>4</sup> Sir William Holdsworth, *A History of English Law* (3<sup>rd</sup> ed, 1945) vol 4, 347. It is acknowledged that nonlegal historians do not have such a bleak view of the operation of the early patent system: see, eg, Joan Thirsk, *Economic Policy and Projects: The Development of a Consumer Society in Early Modern England* (1978) 51–60; Julian Martin, *Francis Bacon, the State, and the Reform of Natural Philosophy* (1992) 18.
- <sup>5</sup> It has already been ascertained, but not widely recognised, that James I supported the passage of the Bill: Chris R Kyle, ‘“But a New Button to an Old Coat”: The Enactment of the *Statute of Monopolies*, 21 James I Cap 3’ (1998) 19 *Journal of 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 had not been in his political interests, it is likely that James would have, at least, deferred the *Statute of Monopolies* too.
- <sup>6</sup> See, eg, J Hurstfield, ‘Lord Burghley as Master of the Court of Wards, 1561–98’ (1949) 31 *Transactions of the Royal Historical Society* 95, 96.
- <sup>7</sup> See, eg, 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) 89, 94–8. 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.

the ‘crisis’ of the 1620s,<sup>8</sup> a crisis for which the *Statute of Monopolies* was a (political) solution.<sup>9</sup> This recognition of the 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;<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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 four categories;<sup>13</sup> however, they may also easily be seen to fall into three. The first is closely related to the current style of patent: patents for invention.<sup>14</sup> Examples under Elizabeth and James include patents for the manufacture of sulphur, oil, sailcloth,

<sup>8</sup> The circumstances that gave rise to the *Statute of Monopolies* were, for one commentator, the second of three crises in the patent system. The first was in 1601 (see below Part III(B)(1)) 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 *Economic History Review* 143, 150.

<sup>9</sup> The exploration of this crisis requires the examination of this time from legal, economic, political and social perspectives. To quote Russell, a legal historian runs an ‘acute risk of becoming the prisoner of his documents’: Conrad Russell, *Parliaments and English 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.

<sup>10</sup> The interpretation of s 6 of the *Statute of Monopolies* is currently the focus of a review: Advisory Council on Intellectual Property, *Patentable Subject Matter: Issues Paper* (2008) 65–6.

<sup>11</sup> See, eg, Harold G 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; A A 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; William L Letwin, ‘The English Common Law concerning Monopolies’ (1954) 21 *University of Chicago Law Review* 355.

<sup>12</sup> Much of the description in this Part is based on Chris Dent, ‘Patent Policy in Early Modern England: Jobs, Trade and Regulation’ (2006) 10 *Legal History* 71.

<sup>13</sup> See, eg, D Seaborne Davies, ‘Further Light on *The Case of Monopolies*’ (1932) 48 *Law Quarterly Review* 394, 397–8, quoting E Lipson, *The Economic History of England* (1931) vol III, 352–6. At the time, however, patents were not understood in terms of separate categories. Further, as has been recognised by Davies, these categories are ‘not ... mutually exclusive’: D Seaborne Davies, above n 13, 398.

<sup>14</sup> ‘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 into England of technologies that were already in use in Europe: see below Part V(C).

glass, and mills for grinding corn.<sup>15</sup> The second category includes the *non obstante* grants. These allowed the recipients to operate particular industries or businesses notwithstanding the existence of a statute that banned the activity.<sup>16</sup> The regulatory grants of the time, the third category of patents, include patents that permitted the regulation of specific trades and trade routes (by bodies such as the Society of Merchants Adventurers)<sup>17</sup> and patents to ensure that other Acts were complied with. An example of the first of these includes Sir Edward Dyer's control over the tanning industry.<sup>18</sup> An example of the second of these includes a patent to John Martin 'as "informer and prosecutor" for the Crown on all past or future penal laws'.<sup>19</sup> Under this style of grant, patentees had the capacity to levy fines where the statute was being breached.

The style of patents granted does not appear to have differed greatly between the Jacobean and Elizabethan periods.<sup>20</sup> One similarity between them was their tendency to further particular policy aims, such as 'the solution of fiscal and administrative problems'.<sup>21</sup> Early modern patents can be seen to contribute to the fulfilment of three policy goals: the increase in the level of employment in England; the improvement of the balance of trade between England and its trading partners; and the delegation of governance.<sup>22</sup> It is arguable that, while the patents were granted by the Crown, the other branches of government concurred

<sup>15</sup> These examples are taken from: Hulme, 'The History of the Patent System', above n 11, 145–50; E Wyndham Hulme, 'The History of the Patent System under the Prerogative and at Common Law: A Sequel' (1900) 16 *Law Quarterly Review* 44, 45–51. Hulme, in turn, sourced his information directly from the Patent Rolls and Calendars.

<sup>16</sup> An example is the patent for the sowing of woad. Woad was a very profitable crop, so farmers were keen to plant it. However, 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 were issued by Elizabeth I 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 A Youngs Jr, *The Proclamations of the Tudor Queens* (1976) 151–4.

<sup>17</sup> The Society of Merchants Adventurers, during Elizabethan times at least, 'supplied the only authorized 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: The Collected Papers of George Unwin* (1927) 133. While the first charter was granted to the Merchants Adventurers in 1296, it was during the period 1553–64 that they 'achieved a fully authorized and exclusive position as a staple for the export of cloth': at 138–9.

<sup>18</sup> E F Churchill, 'Monopolies' (1925) 41 *Law Quarterly Review* 275, 281.

<sup>19</sup> Margaret Gay 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'.

<sup>20</sup> This may be inferred from a comparison of the patents discussed by Hulme (Hulme, 'The History of the Patent System', above n 11; Hulme, 'The History of the Patent System: A Sequel', above n 15) and the specifications of patents from 1617 onwards, compiled in Bennet Woodcroft, *Alphabetical Index of Patentees of Inventions* (first published 1854, 1969 ed).

<sup>21</sup> Unwin, *Studies in Economic History*, above n 17, 184. MacLeod also recognised that the introduction of the patent system into England was policy-based: MacLeod, above n 11, 11–13.

<sup>22</sup> It is uncontroversial to state that the Tudor monopolies reflected a 'laudable government intention to foster product innovation and import substitution': D M Palliser, *The Age of Elizabeth: England under the Later Tudors — 1547–1603* (2<sup>nd</sup> 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.

with the policy positions adopted by the executive.<sup>23</sup> If the congruence of the granting of patents and the ruling on grants by the courts are any indication, the broad policies of the time could be more likened to specific goals shared by the elites.<sup>24</sup>

For the purposes of this article, the two most relevant policy goals are those of employment and regulation.<sup>25</sup> Ensuring jobs for the masses is a significant policy goal of current governments. This policy was also particularly important for Elizabeth as the population had been dramatically affected by an event that occurred earlier in the 16<sup>th</sup> century: the enclosure 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. Some grants required the patentees to ‘work the patent’ and ‘train apprentices’ in return for the monopoly grant,<sup>26</sup> while others included conditions that required the employment of English workers.<sup>27</sup>

Three forms of patents contributed to the policy goal of regulation. The first is the class of monopoly that controlled particular trades and trade routes — such as the one that gave the Merchants Adventurers its role in the cloth trade<sup>28</sup> — and that also contributed to the trade policy. The more common form of regulation achieved through the use of patents was the granting of licences to monitor particular industries. Examples of this second form include the oversight of alehouses and card manufacture. This form of governance had a positive public policy aspect. For example, the maintenance of the quality of manufactured goods was one outcome of these grants.<sup>29</sup> During argument in

<sup>23</sup> For a discussion of the case law of the time in terms of these policy goals, see generally Dent, ‘Patent Policy in Early Modern England’, above n 12.

<sup>24</sup> That the elites shared particular goals does not, however, mean that all of society agreed. In fact, the work of McRae and Brace has demonstrated that claims of the early modern elites were contested: see generally Andrew McRae, *God Speed the Plough: The Representation of Agrarian England, 1500–1660* (1996); Laura Brace, *The Idea of Property in Seventeenth-Century England: Tithes and the Individual* (1998) 44–6.

<sup>25</sup> 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’: Hulme, ‘The History of the Patent System’, above n 11, 152.

<sup>26</sup> Mossoff, above n 11, 1261.

<sup>27</sup> For example, the 1561 grant for the making of white soap stipulated that ‘two at the least of the servants of the patentees shall be of native birth’: Hulme, ‘The 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’: B E Supple, *Commercial Crisis and Change in England: 1600–42 — A Study in the Instability of a Mercantile Economy* (1959) 248.

<sup>28</sup> 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 17<sup>th</sup> century and will be discussed below in n 97.

<sup>29</sup> Fox, above n 11, 182. Further, the regulation of alehouses, for example, was seen as a necessity because of ‘constant complaints of drunkenness and the resort of undesirable characters to the alehouses’: at 175. For a more complete understanding of the role of alehouses 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) 1.

*Darcy v Allen*, the regulatory nature of the grant was emphasised<sup>30</sup> — the monopoly on playing cards was, in part, aimed at limiting the playing of cards by workers.<sup>31</sup> Whilst this patent was held to be invalid by the Court,<sup>32</sup> others were not, and grants for the regulation of alehouses were exempted under the *Statute of Monopolies*.<sup>33</sup>

Finally, 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 enforcement of the statute against gig-mills<sup>34</sup> (a labour-saving device used in cloth production) and a grant to collect fines for breach of an Act requiring all owners of 60 or more acres to grow hemp.<sup>35</sup> 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.’<sup>36</sup> Industry regulation through the granting of licensing patents provided for the monitoring of participants in a society where the state was not large enough to police all aspects of public life.<sup>37</sup> The beneficial aspects of the patent system, however, did not prevent its occasional abuse by patentees and their servants. It was the political reaction to such abuses, and alleged abuses, that provided one of the factors which in the end led to the passing of the *Statute of Monopolies*.

### III THE 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<sup>38</sup> and the Act did not represent the end of

<sup>30</sup> *The Case of Monopolies* (1603) 11 Co Rep 84b, 85b; 77 ER 1260, 1262–3 (commonly known as ‘*Darcy v Allen*’). 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 I Corré, ‘The Argument, Decision, and Reports of *Darcy v Allen*’ (1996) 45 *Emory Law Journal* 1261.

<sup>31</sup> 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 labor in the production of playing cards and to suppress a perceived excess of card playing that was diverting the laboring classes from useful work’: Corré, above n 30, 1273.

<sup>32</sup> While there is no record of the decision of the Court, Coke reported that the judges, unanimously, had said that the grant was ‘utterly void’ (*The Case of Monopolies* (1603) 11 Co Rep 84b, 86a; 77 ER 1260, 1263) and Noy reported that the patent was ‘contrary to the laws of the realm, contrary to the laws of God, hurtful to the commonwealth, and in no part good or allowable’ (*Darcy v Allin* (1603) Noy 173, 174; 74 ER 1131, 1133).

<sup>33</sup> For a further discussion of the exemptions to the *Statute of Monopolies*, see below Part V(D).

<sup>34</sup> M W Beresford, ‘The Common Informer, the Penal Statutes and Economic Regulation’ (1957) 10 *Economic History Review* 221, 233 fn 1.

<sup>35</sup> See *ibid* 228.

<sup>36</sup> Margaret Gay Davies, above n 19, 25. It has been suggested that one of the results of this Elizabethan practice was akin to the establishment of a ‘Civil Service’: Unwin, *Studies in Economic History*, above n 17, 326.

<sup>37</sup> For a more detailed discussion of the role of informers in the nation’s governance, see generally Beresford, above n 34.

<sup>38</sup> D Seaborne Davies argues that it was under Elizabeth, in 1561, that patent law was introduced into England ‘as a system’: D Seaborne Davies, above n 13, 397 (emphasis in original).

complaints about monopolies granted by the English Crown.<sup>39</sup> The reference to the statute in the *Patents Act 1990* (Cth) does, nonetheless, demonstrate its continuing importance. This connection to the 17<sup>th</sup> century does not, however, require that patent law be seen as teleological — that is, as an area of regulation 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,<sup>40</sup> that gave rise to the passing of the *Statute of Monopolies*.

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 a number of events in both periods are relevant to the crisis of the 1620s. More specifically, following 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.<sup>41</sup> This capacity of the Crown meant that the freedoms enjoyed by the parliamentarians of the time were not as formalised as those of today.<sup>42</sup> Further, it has been argued that Parliaments of the time were ‘not called to make policy but to applaud whatever policy was decided on’.<sup>43</sup> Parliament under Elizabeth, for example, has been characterised as a ‘somewhat raw and amateurish body’.<sup>44</sup>

<sup>39</sup> Raffield, for example, refers to a masque in which members of the Inns of Court paraded as “projectors” of ridiculous inventions’, a ‘controversial political issue’ during the reign of Charles I: Paul Raffield, *Images and Cultures of Law in Early Modern England: Justice and Political Power, 1558–1660* (2004) 215. ‘[F]ierce 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: Leah S Marcus, *The Politics of Mirth: Jonson, Herrick, Milton, Marvell, and the Defense of Old Holiday Pastimes* (1986) 193. Monopolies, as grievances, were also discussed in Parliament in 1640: Robert Ashton, *The English Civil War: Conservatism and Revolution 1603–1649* (1978) 73.

<sup>40</sup> The phrase ‘conditions of possibility’ is used in order to reduce inferences of causation between studied events: see, eg, 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 these factors.

<sup>41</sup> There were, for example, only ten Parliaments during 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.

<sup>42</sup> The freedom of speech, for example, was not formalised until the *Bill of Rights Act 1689*, 1 Wm & M sess 2, c 2. In late Tudor times, freedom of speech was requested by every Speaker of the House ‘at the beginning of the session and recognized 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.

<sup>43</sup> 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

While Parliament was divided into the House of Commons and the House of Lords, it is the Commons that is of more interest in the development of the patents crisis.<sup>45</sup> A particular subset of the Commons was those Members who also sat on the Privy Council.<sup>46</sup> The Privy Council, formally, acted to provide advice to the monarch; in practice, its members acted as a conduit between Parliament and the Crown.<sup>47</sup> This meant that, at least during the reign of Elizabeth, 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 Carolyn 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 defense, debate and argument, a sharpened sense of difference, the strategies and tactics of political encounter.<sup>48</sup>

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

In the 17<sup>th</sup> century, the 'House of Commons was, in terms of numbers, directly representative of perhaps one-third of the adult male population.'<sup>49</sup> The election of these representatives, however, would not be considered an open and fair process by 21<sup>st</sup> century standards. During Tudor times, for example, the government 'influence[d] elections',<sup>50</sup> though not to the extent that the Crown

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.

<sup>44</sup> Sir David Lindsay Keir, *The Constitutional History of Modern Britain since 1485* (9<sup>th</sup> ed, 1969) 136. According to Russell, above n 9, 3, 'Parliament was an event and not an institution.'

<sup>45</sup> It has been suggested that the 'Lords were quite as subservient to the Crown in the time of Elizabeth I as in that of Henry VIII. Many of the peers owed their all to Tudor generosity and knew it': Notestein, *The Winning of the Initiative by the House of Commons*, above n 42, 24.

<sup>46</sup> 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': *ibid.*, attributing this aphorism to Pollard. See A F Pollard, *The Evolution of Parliament* (2<sup>nd</sup> ed, 1926) 276.

<sup>47</sup> 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: Documents and Commentary* (1960) 101. Councillors also had a hands-on role in the functioning of the House. They would, for example, 'prepar[e] 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 Harris Willson, *The Privy Councillors in the House of Commons: 1604–1629* (1971) 8–9.

<sup>48</sup> Carolyn A Edie, 'Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597–1689' (1985) 29 *American Journal of Legal History* 197, 197.

<sup>49</sup> Hirst, above n 7, 157.

<sup>50</sup> Neale, *The Elizabethan House of Commons*, above n 41, 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,



exercised total control over the parliamentarians. That is, while the Parliaments of the time could be seen as a ‘propaganda justification’ for the policies of the Crown, they were also the ‘symbol of legitimate government’.<sup>51</sup> One example of this is that Members of Parliament were ‘often subject to close pressures from their constituencies when they acted as local spokesmen’<sup>52</sup> — they ‘were not free agents, voting at their own whim’.<sup>53</sup>

A key constituency of some of the parliamentarians was the corporations such as the City of London and the companies that traded with Europe and the Levant.<sup>54</sup> It has been suggested that ‘the great trading companies were the most powerful economic organisations of the time, [with] much influence in parliament’.<sup>55</sup> 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 and 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.<sup>56</sup>

Evidence of the tension between trading companies and outports may be found as early as 1570 — political strategies were employed by the opponents of trading companies such as the Merchants Adventurers with the aim of getting ‘favorable representation for their position’ in the 1571 Parliament.<sup>57</sup> In other words, just as a 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 of the trading corporations.

The reliance on the royal prerogative, together with their role in executing the Crown’s trade policy, meant that corporations like the Merchants 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.<sup>58</sup> The importance of the City of London is, in part, a result of the

letters to town corporations, [and] letters to troublesome persons suggesting that they withdraw from election contests’: Willson, above n 47, 8.

<sup>51</sup> Lambert, above n 43, 60.

<sup>52</sup> Hirst, above n 7, 158.

<sup>53</sup> Russell, above n 9, 18.

<sup>54</sup> It has been suggested that parliamentarians ‘represented’ the ‘whole realm, not just particular places’: David Harris Sacks, ‘Parliament, Liberty, and the Commonwealth’ in J H Hexter (ed), *Parliament and Liberty: From the Reign of Elizabeth to the English Civil War* (1992) 85, 89. This characterisation, however, may be contrasted with the representation by parliamentarians of specific geographical areas.

<sup>55</sup> Clark, above n 8, 152.

<sup>56</sup> Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict, and London’s Overseas Traders, 1550–1653* (1993) 203.

<sup>57</sup> David Harris Sacks, *The Widening Gate: Bristol and the Atlantic Economy, 1450–1700* (1991) 198.

<sup>58</sup> See generally Robert Ashton, *The Crown and the Money Market: 1603–1640* (1960).

‘expansion of credit and an extension of credit facilities’ during the reign of Elizabeth.<sup>59</sup> This development, however, gave rise to another schism in the constituencies of parliamentarians, as the ‘capitalist’ of the time ‘was not a merchant.’<sup>60</sup> This meant that some in the Commons reflected the interests of the joint-stock monopolies, some represented 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 affecting the attitudes of the financiers, merchants and their competitors and, therefore, 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 three major harvest failures,<sup>61</sup> further, by the 1620s there was a ‘profound bullion shortage’ in England that ‘helped precipitate a more general business depression.’<sup>62</sup> These, combined with the ‘decay of trade’,<sup>63</sup> caused difficulties 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. John Neale goes so far as to suggest that corruption amongst politicians and courtiers grew in the 1590s.<sup>64</sup> 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, ‘[b]eing a member of Parliament was not a career but at best a stepping-stone to one.’<sup>65</sup> While some Members of the Commons may have been

<sup>59</sup> A L Rowse, *The England of Elizabeth* (2<sup>nd</sup> ed, 2003) 136.

<sup>60</sup> William Robert Scott, *The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720* (1912) vol 1, 110.

<sup>61</sup> These took place in the years 1586, 1596–97 and 1622: Paul Slack, *Poverty and Policy in Tudor and Stuart England* (1988) 48–9. Hoskins, however, considers only the harvests of 1596 and 1597 as bad enough to give rise to a dearth of food in England during Elizabeth’s reign (where dearth is defined by Hoskins as a harvest resulting in a 50 per cent rise in the price of wheat above the average price for the surrounding 30 years): W G Hoskins, ‘Harvest Fluctuations and English Economic History, 1480–1619’ (1964) 12 *Agricultural History Review* 28, 43, 46. Hoskins also considered the harvest of 1622 to be bad enough to produce famine, but not so bad that it gave rise to a dearth of food: W G Hoskins, ‘Harvest Fluctuations and English Economic History, 1620–1759’ (1968) 16 *Agricultural History Review* 15, 19, 28. In addition, there was a plague in 1592 that contributed to the economic troubles: *ibid* vol 1, 102.

<sup>62</sup> Jonathan Gil Harris, *Sick Economies: Drama, Mercantilism, and Disease in Shakespeare’s England* (2004) 138.

<sup>63</sup> Notestein, *The Winning of the Initiative by the House of Commons*, above n 42, 31. England’s exports relied heavily on cloth: Harris, above n 62, 138. The agricultural conditions that hampered food production also impacted on cloth production.

<sup>64</sup> J E Neale, *Essays in Elizabethan History* (1958) 76–9.

<sup>65</sup> 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 (W S Holdsworth, ‘The Commons Debates 1621’ (1936) 52 *Law Quarterly Review* 481, 489) — ‘Parliament was frequently a forum for the display of their talents, a way station on the highroad to promotion in their chosen profession’ (Robert E Ruigh, *The Parliament of 1624: Politics and Foreign Policy* (1971) 55).

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 parliamentarians exaggerated their claims for personal gain and which did not.<sup>66</sup> The words of all, therefore, may have to be treated with a degree of scepticism.

### B *The Relationship between the 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 they were to do with hatred of abuses of the royal prerogative. This section will consider this 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 of those 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.<sup>67</sup> This is unlikely to 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 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.<sup>68</sup> As early as 1566, the Queen had to ‘cope’ with a ‘very persistent opposition’,<sup>69</sup> although, ‘even at the end of Elizabeth’s reign, the Opposition was a small and uninfluential lot’.<sup>70</sup> The lack of cohesion amongst parliamentarians in both the late 16<sup>th</sup> and early 17<sup>th</sup> 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 the decade before Elizabeth’s death and throughout the reign of James. The most vigorous parliamentary session on

<sup>66</sup> 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 Guilds and Companies of London* (3<sup>rd</sup> ed, 1938) 318.

<sup>67</sup> Louis A 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’s four parliaments were dissolved by the king in fits of anger’: Willson, above n 47, 15.

<sup>68</sup> Elton, *The Tudor Constitution*, above n 47, 302.

<sup>69</sup> Notestein, *The Winning of the Initiative by the House of Commons*, above n 42, 13.

<sup>70</sup> Ibid 23. This opposition did not amount to an opposition ‘party’: Williams M Mitchell, *The Rise of the Revolutionary Party in the English House of Commons: 1603–1629* (1957) 25. According to Mitchell, such a party would develop in the 17<sup>th</sup> century. For a discussion of the academic debates surrounding the existence of an opposition party at the time, see Robert Zaller, ‘The Concept of Opposition in Early Stuart England’ (1980) 12 *Albion* 211.

this topic in Elizabethan times took place in 1601.<sup>71</sup> Unnamed monopolies were, however, challenged in both the 1566<sup>72</sup> and the 1571 Parliaments.<sup>73</sup> Given the few patents granted by that time, it is likely that the monopolies complained of related to a mining commission<sup>74</sup> — a commission that gave rise to *R v Earl of Northumberland*<sup>75</sup> and that may be seen as a battle between the rights of landowners and those of the Crown.<sup>76</sup>

In terms of the 1597 debate, there is little evidence of what was said in Parliament.<sup>77</sup> It is known, though, that the Lord Keeper of the Privy Seal, speaking for Elizabeth, said:

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 hath proceeded to trial of them already, so she promiseth to continue that they shall all be examined to abide the trial and true touchstone of the law.<sup>78</sup>

This passage suggests a recognition on Elizabeth's 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 patents seems to be considered central to her role as monarch, though this may have been an attempt to emphasise the sacrifice she appeared to be making by submitting patents 'to the test of the Common Law.'<sup>79</sup>

There is much more source material available on the 1601 debates. The motivations and aims of those who spoke against patents, however, are 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

<sup>71</sup> For a detailed recitation of the debate, see J E Neale, *Elizabeth I and Her Parliaments: 1584–1601* (1957) 376–93.

<sup>72</sup> Keir, above n 44, 144.

<sup>73</sup> Neale, *Elizabeth I and Her Parliaments*, above n 71, 352.

<sup>74</sup> It is possible that the complaints in the 1571 Parliament related to the grants that gave rise to the decisions of *Hastings' Case* (1569), *Matthey's Case* (1571) and *Bircot's Case* (1573). These decisions, referred to below in Part V(C), related to patents for improvements on previous products. All were successfully challenged through the courts; therefore it is not clear why they would have been 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.

<sup>75</sup> (1567) 1 Plow 310; 75 ER 472 ('*The Case of Mines*').

<sup>76</sup> For a discussion of this battle, see Eric H Ash, '*Queen v Northumberland*, and the Control of Technical Expertise' (2001) 39 *History of Science* 215; 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) 137.

<sup>77</sup> In the words of Neale, '[o]bscurity dogs us in this story': Neale, *Elizabeth I and Her Parliaments*, above n 71, 354.

<sup>78</sup> Quoted in P J Federico, 'Origin and Early History of Patents' (1929) 11 *Journal of the Patent Office Society* 292, 300.

<sup>79</sup> Neale, *Elizabeth I and Her Parliaments*, above n 71, 354.

drying up of the flow of official gifts and rewards.<sup>80</sup> Another commentator argues that the complaints in 1601 were the result of a decline in prosperity in the last decade of the 16<sup>th</sup> century, following which ‘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’.<sup>81</sup>

The uncertainty of the grounds of complaint becomes 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 product.<sup>82</sup> 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 the local ‘infant industr[y]’.<sup>83</sup> The protection of such industries was sound policy and not counter to the interests of the nation.

Another complaint focused on a patent for the manufacture of salt<sup>84</sup> — it has been suggested that the salt in question was not the ‘common commodity’, but ‘white salt’, the product of a ‘new industry’.<sup>85</sup> Others highlighted problems with the actions of agents of the patentees, rather than the patents themselves,<sup>86</sup> and with the monopolies of trading corporations.<sup>87</sup> In short, ‘many of the complaints’ in the 1601 Parliament were ‘utterly irrelevant’<sup>88</sup> or, at least, they did not directly address problems with monopolies per se but were concerned with the impact of specific grants on specific sectors of the community.<sup>89</sup>

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. Sir Francis Bacon described these grants, during the Parliamentary debates on monopolies, as ‘hateful’.<sup>90</sup> With the growth of the

<sup>80</sup> Stone, ‘The Fruits of Office’, 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.

<sup>81</sup> Scott, above n 60, 107.

<sup>82</sup> *Ibid.* 117.

<sup>83</sup> *Ibid.* 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 L Singman, *Daily Life in Elizabethan England* (1995) 138. This means that it would only have been the upper echelons of English society that were adversely impacted by the price of drinking glasses.

<sup>84</sup> Neale, *Elizabeth I and Her Parliaments*, above n 71, 380.

<sup>85</sup> Scott, above n 60, 119.

<sup>86</sup> Thirsk, above n 4, 60. This supports the claim that ‘the greatest antagonism displayed [in Parliament] against the monopolies was not so much in respect to their existence but ... to the manner in which they were supervised’: Fox, above n 11, 186.

<sup>87</sup> There was, for example, a pamphlet published in 1601 that touched on the granting of monopolies: John Wheeler, *A Treatise of Commerce* (1601). This was written by the secretary of the Society of Merchants Adventurers: George Burton Hotchkiss (ed), *A Treatise of Commerce by John Wheeler* (1931) 10–11, 60. It may have been published, in part, to sway the minds of parliamentarians.

<sup>88</sup> Scott, above n 60, 118.

<sup>89</sup> It has also been suggested that the complaints against 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’: *ibid.* 111.

<sup>90</sup> ‘Debate in Parliament on a Bill against Monopolies, and the Queen’s Message Touching the Same, November, 1601’ in G W Prothero (ed), *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I* (4<sup>th</sup> ed, 1913) 111, 112, quoting

independence of Parliament — evinced by the fact that ‘Elizabeth had in her last years found Parliament refractory and critical’<sup>91</sup> — it may have been that the delegation of licensing powers to individuals offended a sense that it was Parliament’s role to govern.<sup>92</sup> Further, it is this class of patent that was most affected by the *Statute of Monopolies*.<sup>93</sup>

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 roundly praised as a ‘brilliant and decisive’ tactical move on her part.<sup>94</sup> 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, that it was both good and beneficial to the Subjects in general, though a private profit to some of my ancient Servants who had deserved well: But the contrary being found by Experience, I am exceeding beholding to such Subjects as would move the same at 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 speak 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 gives us to know that no respects or interest[s] had moved them ... [t]hat my Grants should be grievous to my People, and Oppressions to be Privileged under colour of our Patents, our Kingly Dignity shall not suffer it ...<sup>95</sup>

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 speech does not, however, suggest that all grants were bad or that they had been abused. The second point that may be drawn from the speech is an understanding of the role of parliamentarians as representatives of their constituencies. Elizabeth spoke of those whom ‘grievances never touched [and

Heywood Townshend, *Historical Collections: Or, an Exact Account of the Proceedings of the Four Last Parliaments of Queen Elizabeth of Famous Memory* (1680) 231.

<sup>91</sup> Keir, above n 44, 156–7.

<sup>92</sup> For a discussion of the Parliaments’ actions with respect to these grants, see Edie, above n 48.

<sup>93</sup> A Bill was brought before Parliament in 1601 to the effect that ‘every man which had or could invent any Art or Trade, should for his life monopolize the same to his own use, or he that could add to or refine the same should do the like’: Simonds D’Ewes (ed), *A Compleat Journal of the Votes, Speeches and Debates, Both of the House of Lords and House of Commons throughout the Whole Reign of Queen Elizabeth of Glorious Memory* (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.

<sup>94</sup> See, eg, Edward C Walterscheid, ‘The Early Evolution of the United States Patent Law: Antecedents’ (Pt 2) (1994) 76 *Journal of the Patent and Trademark Society* 849, 866.

<sup>95</sup> Elizabeth I, ‘The Golden Speech’ (Speech delivered at the House of Commons, London, 30 November 1601), quoted in D’Ewes, above n 93, 659. See also Neale, *Elizabeth I and Her Parliaments*, above n 71, 389–90.

who] speak out of Zeal to 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 opposing 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.<sup>96</sup> Importantly, these complaints were made on behalf of provincial merchants who were against the 'companies whose restrictive membership was a factor ensuring the continued domination of London',<sup>97</sup> and may have been prompted by the decline in trade that followed the plague year of 1603.<sup>98</sup> Complaints such as these have been described as 'little more than the envious rantings of the disgruntled and declining outports.'<sup>99</sup> They, therefore, may be an example of where 'a welter of vested interests came together and cancelled one another out.'<sup>100</sup>

Following the grievances expressed in and by Parliament,<sup>101</sup> there was another regal statement made concerning monopolies. James issued a Declaration in 1610 that came to be known as the *Book of Bounty*.<sup>102</sup> 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.'<sup>103</sup> One exception to this prohibition was '[p]rojects of new invention, so they be not contrary to the Law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or otherwise inconven-

<sup>96</sup> See, eg, Robert Ashton, *The City and the Court: 1603–1643* (1979) 85. See also Wallace Notestein, *The House of Commons: 1604–1610* (1971) 106–25.

<sup>97</sup> Ashton, *The City and the Court*, above n 96, 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': at 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 K Rabb, *Jacobean Gentleman: Sir Edwin Sandys, 1561–1629* (1998) 88–90.

<sup>98</sup> Supple, above n 27, 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: at 25.

<sup>99</sup> Ashton, *The Crown and the Money Market: 1603–1640*, above n 58, 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': Lawrence Stone, 'State Control in Sixteenth-Century England' (1947) 17 *Economic History Review* 103, 118. This continued during the depression of the 1620s, when the restrictions on trade imposed by monopolist corporations such as the Merchants Adventurers were resented 'more bitterly' by those excluded by the grants: Russell, above n 9, 61.

<sup>100</sup> Lambert, above n 43, 64. This has been put by Lambert, somewhat harshly, in terms of the debates in the Commons during the reign of James being 'frequently little more than shadow-boxing': at 76.

<sup>101</sup> Patents attacked in the Committee for Grievances 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 wines had not been sold before, as well as to unruly alehousekeepers "to the great increase of drunkenness"': Notestein, *House of Commons*, above n 96, 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 ordnance' and the impositions levied on currants: at 169.

<sup>102</sup> *A Declaration of His Majesties Royall Pleasure, in What Sort He Thinketh Fit to Enlarge: Or Reserve Himselfe in Matter of Bountie* (1610) ('*Book of Bounty*').

<sup>103</sup> Kyle, above n 5, 205, citing *ibid* 13–14.

ient.<sup>104</sup> Aside from these well-meaning patents, James ‘solemnly renounced all intention of granting fresh patents of monopoly or privilege and forbade any to approach him with projects’.<sup>105</sup> This Declaration was made despite his previous publication, *The True Lawe of Free Monarchies* (1598), that inclined him ‘towards a conception of enlightened absolutism.’<sup>106</sup>

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 complaints relating to the grants for the enforcement of penal statutes.<sup>107</sup> According to Robert Ashton, ‘[o]ne of the reasons why 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’.<sup>108</sup> These patents were considered by the Committee for Grievances, where it was further alleged that patentees had the power to dispense with the penalty.<sup>109</sup> 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.<sup>110</sup>

In the 1621 Parliament, ‘the hostility of the Commons to privileged economic concessionaires was greatly exacerbated by severe economic depression’;<sup>111</sup> ‘no concessionary interest, monopolist, customs farmers, licensee or member of a

<sup>104</sup> *Book of Bounty*, above n 102, 21. See also Thomas A Hill, ‘Origin and Development of Letters Patent for Invention’ (1924) 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 goods and to reduce the price of the goods: Price, above n 11, 29.

<sup>105</sup> Price, above n 11, 28. The *Book of Bounty*, 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.

<sup>106</sup> Keir, above n 44, 157.

<sup>107</sup> It may be noted that this class of patent was also complained of in the Parliament of 1593: A Hassell Smith, *County and Court: Government and Politics in Norfolk, 1558–1603* (1974) 124.

<sup>108</sup> Ashton, *The English Civil War*, above n 39, 46.

<sup>109</sup> 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) 57, 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 powers of the Crown’: Edie, above n 48, 199.

<sup>110</sup> 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: Smith, above n 107, 122–3. According to Russell, ‘[w]hen the [justices of the peace], 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 savoured of the dog in the manger’: Russell, above n 9, 70.

<sup>111</sup> Ashton, *The English Civil War*, above n 39, 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 27, 80. The economic troubles, though linked to trade, could not be blamed on the existence or structure of the trading companies.



privileged trading company was safe from attack.<sup>112</sup> It has been suggested, in particular, that '[s]ome of the more vocal attacks on the restriction of trade' by the monopolist corporations in the 1620s were 'fiscal, rather than economic, in origin'<sup>113</sup> — 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, '[v]ested interests, including the [Company of] Staplers, excluded from normal trade were quick to seize the opportunity afforded by the depression to press for a liberalization'.<sup>114</sup> The stench attached to the label 'monopoly' meant that in 1621 any proposal put forward to regulate an industry would be objected to on the basis that 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'.<sup>115</sup>

Patents were put to another use in the 1621 Parliament: they provided an opportunity by which 'ambitious men at court could hope to discredit each other'.<sup>116</sup> One of the 'successes' of 1621 was the impeachment of Sir Giles Mompesson.<sup>117</sup> He is now known as a monopolist who abused the privileges he was granted;<sup>118</sup> he was also, however, 'one of the most notorious' players in the system by which 'concealed' Crown lands were found and profited from.<sup>119</sup> The hunt for such concealed Crown lands 'was a subject of bitter Parliamentary

<sup>112</sup> Ashton, *The City and the Court*, above n 96, 107. One of the first classes to be attacked was that relating to bullion: Robert Zaller, *The Parliament of 1621: A Study in Constitutional Conflict* (1971) 55. 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': Foster, above n 109, 65.

<sup>113</sup> Russell, above n 9, 60.

<sup>114</sup> Supple, above n 27, 62. It has also been suggested that foreigners, such as the Venetian ambassador, who had a desire to trade in muscatel, encouraged parliamentarians to protest against regulated trade: Foster, above n 109, 81 fn 36. Foster also emphasised the role of other 'lobbying interests' in the parliamentary debates: at 66.

<sup>115</sup> Russell, above n 9, 93–4. The term monopoly had also been applied derisively to the College of Physicians in the 16<sup>th</sup> century: Christopher Hill, *Intellectual Origins of the English Revolution Revisited* (1997) 68.

<sup>116</sup> 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': at 100. 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'. This, then, is an example of a political attack that took advantage of the circumstances of the time and that was not directed against the principle of monopoly patents.

<sup>117</sup> It has been argued that the impeachment of Mompesson has been considered 'politically unimportant': John Dykstra 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: Colin C G Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* (1974) 1. The action against Mompesson may, therefore, be seen as indicative of a shift in the attitude and intention of Parliament itself — the 'attack upon patents was just part of the much broader criticism of the structure of office and of fees': W J Jones, *Politics and the Bench: The Judges and the Origins of the English Civil War* (1971) 56–7.

<sup>118</sup> See Keir, above n 44, 167; Tite, above n 117, 89–90; Churchill, above n 18, 279. His patents included one for the licensing of alehouses: Peck, above n 117, 142.

<sup>119</sup> 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.

complaint'.<sup>120</sup> The relative importance of Mompesson's actions as a licensor of alehouses and as a seeker of concealed lands in his impeachment is not clear.<sup>121</sup> Legal histories written in the last century tend to focus on his role as a patentee; however, that oversimplifies 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 Part V in the context of the background to the *Statute of Monopolies* itself.

## 2 Succession

In addition to the economic problems during 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 powerbrokers 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 for the change of regime.

Succession had also been a point of conflict between Parliament and Elizabeth for much of her reign.<sup>122</sup> A significant contributor to this was her reluctance to name the person who would succeed her. That she had no children meant 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.<sup>123</sup> The Earl of 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.<sup>124</sup> The ambitions and practices of those in power and at the court meant that Parliament was 'restive'.<sup>125</sup> The 'Queen's loosening grip in her last years ... 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.'<sup>126</sup>

The disappearance of Lord Burghley from the scene is also an important factor in the development of the patent crisis. He died in 1598, after having enjoyed an

<sup>120</sup> Russell, above n 9, 66.

<sup>121</sup> The issue of concealment of Crown lands was subject to statute in 1624: *Crown Suits, etc Act 1624*, 21 Jac 1, c 2. See also Kitching, above n 112, 77.

<sup>122</sup> This was, in part, fuelled by 'fears of a popish succession': Elton, *The Tudor Constitution*, above n 47, 302. The importance of the issue to the wider community is demonstrated by the perception that the work of Shakespeare 'return[s] continually to the question of succession': Clare Asquith, *Shadowplay: The Hidden Beliefs and Coded Politics of William Shakespeare* (2005) 81.

<sup>123</sup> Neale, *Essays in Elizabethan History*, above n 64, 80.

<sup>124</sup> See generally J E Neale, *Elizabeth I* (2005) ch 21.

<sup>125</sup> Mitchell, above n 70, xiv.

<sup>126</sup> 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.

‘immense concentration of power [over] four momentous decades.’<sup>127</sup> Burghley had been central to Elizabeth’s approach to industrial development: he had wanted to make the ‘realm self-sufficient. ... He desired to develop English industry of every kind’.<sup>128</sup> Not only would his death have meant a loosening of control over what was said in Parliament, but 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’s 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, although attacks on and defences of particular patentees for political purposes persisted nonetheless. More importantly, the profile that the political jockeying gave to monopolies at the end of the 16<sup>th</sup> century handed many in Parliament a weapon to wield in debates. As will be seen in Part IV, this ‘patent problem’ was not necessarily something that troubled the average English citizen.

#### IV THE 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 that this was an important factor in the passing of *Statute of Monopolies*.<sup>129</sup> This Part considers the possible existence of any public anger with patents outside Parliament to see if the debates in the House reflected such anger or whether the statements in the Commons merely described the position of other constituencies.

<sup>127</sup> Joel Hurstfield, ‘The Succession Struggle in Late Elizabethan England’ in S T Bindoff, J Hurstfield and C H Williams (eds), *Elizabethan Government and Society: Essays Presented to Sir John Neale* (1961) 369, 369.

<sup>128</sup> Fox, above n 11, 67.

<sup>129</sup> D Seaborne Davies, for example, claims that the patent that gave rise to the case of *Darcy v Allen* was ‘widely resisted and opposed throughout the whole country’: D Seaborne Davies, above n 13, 400. His evidence for this is the records of the Privy Council and the State Papers Domestic of the Public Record Office. All that these show, however, are 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, *The Gilds and Companies of London*, above n 66, 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) that ensued after Darcy struck an alderman: at 257. The riot therefore seems to be more akin to industrial unrest as a result of competition than widespread dissatisfaction amongst the general population.

Despite assertions in the traditional histories of patents, there is little evidence of anti-monopolist public opinion.<sup>130</sup> The sole specific comment found on the subject 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.”’<sup>131</sup> This does not describe ‘public outcry’<sup>132</sup> and it is not clear which monopolies are being complained of.<sup>133</sup> It is possible that 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 those for the mining of saltpetre<sup>134</sup> or for alehouses),<sup>135</sup> or it could be that the

<sup>130</sup> 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 generally Joad Raymond, *Pamphlets and Pamphleteering in Early Modern Britain* (2003). In the literature, there are reproductions of handbills with illustrations lampooning patentees: see, eg, Unwin, *The Gilds and Companies of London*, above n 66, 298, 322. These, most likely, were published in the 1640s. There was also the pamphlet, *A Treatise of Commerce*, that touched the granting of monopolies: see above n 87. This was written in 1601, the time of the tension in Parliament. That the Merchants Adventurers 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 184-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 Merchants Adventurers. This pamphlet was written by a customs officer about the problems facing those in his position and was distributed only to the Lords of the Privy Council: Hotchkiss, above n 87, 10–11, 60, 64.

<sup>131</sup> Quoted in Hirst, above n 7, 178. Notestein, however, suggests that ‘Parliament and its daily goings-on were matter for gossip on the streets and in alehouses’ throughout the 1590s and does not indicate that this was limited to discussions of monopolies: Notestein, *The Winning of the Initiative by the House of Commons*, above n 42, 22.

<sup>132</sup> Edith Tilton Penrose, *The Economics of the International Patent System* (1951) 5. Another commentator described the level of protest as a ‘national outburst’: Churchill, above n 18, 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.

<sup>133</sup> It is arguable that the actions of the Stationers’ Company in the 16<sup>th</sup> 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.

<sup>134</sup> 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’ (5 November 2005) *New Scientist* 33, 34) and so had to be sourced from animal waste. Limitations were placed on the manner of mining — for example, it had to be between sunrise and sunset and there could be no digging in the floors of houses or barns (*The Case of the King’s Prerogative in Saltpetre* (1606) 12 Co Rep 12, 12; 77 ER 1294, 1295–6). It was, however, alleged in the Committee for Grievances that the ‘saltpeter men ... enter the houses of ... subjects, use them continuously, [and] dig up their dove-houses at unseasonable times’: Notestein, *House of Commons*, above n 96, 168, quoting the

complainant simply did not like those that encouraged the importation of expertise, and experts, from the continent.<sup>136</sup> 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.<sup>137</sup>

It is, therefore, necessary to look elsewhere for evidence of public anger.<sup>138</sup> The record of unrest is similarly weak if artefacts of popular culture are examined.<sup>139</sup> 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 [parliamentarians]’.<sup>140</sup> These reports most likely refer to the ‘impeachment of two notorious monopolists, Michell and Mompesson’,<sup>141</sup> rather than concerns over patents generally.<sup>142</sup>

Another example of alleged public complaint is the poem of Edmund Spenser, *Prosopopoiā: Or Mother Hubberds Tale* (*‘Prosopopoiā’*),<sup>143</sup> which has been said to ‘bitterly describ[e]’ the activities of courtiers in their pursuit of monopolies.<sup>144</sup> This work, however, was written in 1591 — well before the bulk of complaints about patents in Parliament.<sup>145</sup> If *Prosopopoiā* is, however, a statement against

*Petition of Grievances* (1606). 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 for saltpetre at the time: Scott, above n 60, 114. This, again, would impute a more selfish motivation on the part of the parliamentarians or others who raised concerns about them.

- <sup>135</sup> ‘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 have generated public complaint.
- <sup>136</sup> There were riots against ‘foreign artisans’ in London in the 1590s: Palliser, above n 22, 363. One of the ancillary issues is the terminology that may be used to describe protests. A description of a ‘riot’ (see, eg, above nn 39, 129) 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’: John Walter and Keith Wrightson, ‘Death and the Social Order in Early Modern England’ (1976) 71 *Past and Present* 22, 26. This could include large-scale protests; though it could also include ‘petty acts of neighbourly malice’.
- <sup>137</sup> According to Cecil, some parliamentarians ‘had desired to be popular without the House for speaking against Monopolies’: quoted in Hirst, above n 7, 178.
- <sup>138</sup> 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 F T Plucknett, *Taswell-Langmead’s English Constitutional History: From the Teutonic Conquest to the Present Time* (11<sup>th</sup> ed, 1960) 310. Another commentator suggests that the granting of patents to courtiers for the purpose of regulating industries meant that ‘[p]ublic opinion was gratified’: Unwin, *The Gilds and Companies of London*, above n 66, 256.
- <sup>139</sup> 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’ (1941) 26 *History* 105.
- <sup>140</sup> Richard Cust, ‘News and Politics in Early Seventeenth-Century England’ (1986) 112 *Past and Present* 60, 74.
- <sup>141</sup> Keir, above n 44, 167.
- <sup>142</sup> Peck, above n 117, 189, asserts that ‘[s]atirical prints’ of Mompesson ‘circulated after his impeachment in 1621 and contemporary tracts attacked official venality.’ Further, as has been noted, complaints about Mompesson may not have been focused on his role as patentee: see above nn 117–21 and accompanying text.
- <sup>143</sup> Edmund Spenser, *Prosopopoiā: Or Mother Hubberds Tale* (1591).
- <sup>144</sup> Rowse, above n 59, 185.
- <sup>145</sup> 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 F Hardin, *Civil Idolatry: Desacralizing and Monarchy in Spenser*,

courtiers generally, it is possible that any public unrest that it represented was directed at the arbitrary powers of the Crown, rather than monopolies specifically.<sup>146</sup> There have, for example, been suggestions that there were public reactions to other shows of arbitrary power.<sup>147</sup> Analysis of commentary produced around the time of Elizabeth's death suggests that the prerogative powers of the monarch could be considered in terms of the merchant role<sup>148</sup> — an analogy that is not overly flattering of the Crown. Further, Paul Slack writes of 'opposition' to the various Books of Order that included provisions for the regulation of the sales of grain to protect food sources and for the better management of infectious diseases.<sup>149</sup> Such opposition suggests resistance to a particular form of social control (and therefore offers insights into the sentiments of those governed by it); however, it is less clear whether 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 was known to be identified, in the public mind, with Richard II — a tyrant — may support an anti-Crown and perhaps an anti-monopoly perspective.<sup>150</sup> This symbolic connection, however, lasted throughout her reign, which raises the question as to the reason for the link.<sup>151</sup> It is possible that the association arose as a result of

*Shakespeare, and Milton* (1992) 97–8. The critique of courtiers in popular culture was continued in the 17<sup>th</sup> century, for example in John Milton, *A Maske Presented at Ludlow Castle, 1634* (1637) (commonly known as 'Comus'): Christopher Hill, *Liberty against the Law: Some Seventeenth-Century Controversies* (1996) 11.

<sup>146</sup> It has been suggested that Ben Jonson's 1616 play — Ben Jonson, *The Devil Is an Ass* (1631), which was first performed in 1616 — includes reference to a patent relating to the sale of aqua vitae that was complained of in the 1601 debates: Scott, above n 60, 116. This suggests that the creative class at the time was willing to raise the issue of monopolies. However, the few mentions do not, in turn, imply a groundswell of public opposition. Jonson included a reference to a patent for forks as a 'jibe' at a friend of his, rather than a protest over patents: M Frumkin, 'The Origin of Patents' (1945) 27 *Journal of the Patent Office Society* 143, 146–7. Another commentator highlighted that the 'notorious abuses of dishonest informers were sufficient to people a whole season of Jonsonian comedies': Beresford, above n 35, 231.

<sup>147</sup> 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[led] the export of cloth, and maintain[ed] their monopoly by heavy bribes': Hotchkiss, above n 87, 85–7. This is understood to suggest that the Society of Merchants 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 as an anti-regulated corporation Bill — that is, the attack was based on the restricted access to the benefits of the Society's monopoly rather than on the monopoly it held over certain types of trade.

<sup>148</sup> Jordan, for example, argues that the work of Fulbecke sees the monarch as, in part, 'a trader in merchandise, profiting from the common wealth': Constance Jordan, *Shakespeare's Monarchies: Ruler and Subject in the Romances* (1997) 122–3, citing William Fulbecke, *Pandectes of the Law of Nations* (1602).

<sup>149</sup> Slack, above n 61, 139–42.

<sup>150</sup> It has been reported that she said to her Keeper of the Rolls, 'I am Richard II, know ye not that?': Frank Kermodé, *The Age of Shakespeare* (2004) 45. It has been suggested, however, that Shakespeare himself avoided direct reference to the Queen in his plays: Lisa Hopkins, *Writing Renaissance Queens: Texts by and about Elizabeth I and Mary, Queen of Scots* (2002) ch 6.

<sup>151</sup> See generally Lily B Campbell, *Shakespeare's 'Histories': Mirrors of Elizabethan Policy* (1947) ch 13.

questions of Elizabeth's legitimacy as monarch.<sup>152</sup> If this was the case, it was in all probabilities a function of the religious division in England at the time.<sup>153</sup> Elizabeth was a Protestant and many felt that a Catholic should have been on the throne.<sup>154</sup> This would explain why she was equated with the deposed King.<sup>155</sup> If the connection arose as a result of specific improper *exercises* of power (such as the granting of monopolies) then it is likely that the link would have been established later in her reign. In other words, claims of dissatisfaction with Elizabeth's rule may have developed from problems with her receiving the Crown to begin with.<sup>156</sup> Whilst it is difficult to prove a negative — that there was no public outcry — there is little evidence to indicate the existence of widespread antagonism to monopolies amongst the general public.<sup>157</sup>

<sup>152</sup> See 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 *ibid* ch 12.

<sup>153</sup> It has been observed that '[r]eligion permeated every aspect of English society in the sixteenth and seventeenth century': David Cressy and Lori Anne Ferrell, 'Introduction' in David Cressy and Lori Anne Ferrell (eds), *Religion and Society in Early Modern England: A Sourcebook* (1996) 1, 1.

<sup>154</sup> According to Plucknett, above n 138, 296–7:

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 ...

<sup>155</sup> A side issue to 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, holds that the Crown has a 'body natural' and a 'body politic': see generally Ernst H Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1997). Kantorowicz, at 7–23, 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 has] 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 from 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': Hardin, above n 145, 24. Marie Axton, *The Queen's Two Bodies: Drama and the Elizabethan Succession* (1977) 16 (citations omitted), offers a more political view, arguing that 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 minimize the personal impact of the new sovereign and should emphasize the continuity of the monarchy in their professional work.

William Shakespeare's *Richard II* (1<sup>st</sup> folio, 1623) may be understood from the perspective of this doctrine: C G Thayer, *Shakespearean Politics: Government and Misgovernment in the Great Histories* (1983) ch 1. Further, not all jurists agreed with the concept of the two bodies; Lord Ellesmere, the Lord Chancellor, for example, 'believed in a concept of the King's single, natural body': Knafla, *Law and Politics in Jacobean England*, above n 67, 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.

<sup>156</sup> Also, if the work of Shakespeare is considered, then it is not clear that he would write his *Richard II* (1<sup>st</sup> folio, 1623) and intend it to highlight concerns about the use of prerogative powers yet not reference 'Caesar's unlawful appropriation of royal powers and prerogatives' in his *Julius Caesar* (1<sup>st</sup> folio, 1623): James Shapiro, *1599: A Year in the Life of William Shakespeare* (2005) 147.

<sup>157</sup> Indeed, another historian who quoted Cecil and the words he had overheard on the street appended another statement: 'The time was never more apt to disorder': Neale, *Elizabeth I and Her Parliaments*, above n 71, 386. Cecil was not reporting protests in the street, but rather the

V THE *STATUTE OF MONOPOLIES* AS COMPROMISE

Others have noted that the *Statute of Monopolies* was a compromise; however, this perspective has been limited to a conception of James compromising his power to grant patents in order to gain funds from Parliament.<sup>158</sup> 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 that the *Statute of Monopolies* represented a compromise not only 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.<sup>159</sup> The importance of this acknowledgement is that the *Statute of Monopolies* itself, when taken as a whole, is not an expression of idealism, but is best characterised as a statement of political appeasement.

## A Background

The drafting of the *Statute of Monopolies* has a lengthy history, much of which is detailed elsewhere.<sup>160</sup> 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’.<sup>161</sup> The report of the 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.<sup>162</sup> 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.<sup>163</sup> It is possible that these revocations were

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 27, 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 Stone, ‘State Control in Sixteenth-Century England’, above n 99, 116.

<sup>158</sup> ‘In accepting this Act ... James secured the supply necessary for English participation in the [Thirty Years] war’: Paul L Hughes and Robert F Fries (eds), *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, 169–71.

<sup>159</sup> Knafla, *Law and Politics in Jacobean England*, above n 67, 84. In Tudor times, according to Elton, the politics in the court ‘always contributed [to any action], was usually ideological, and gave a purposeful backbone to those groupings of generally very self-seeking men (and women)’: Elton, ‘Tudor Government’, above n 126, 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’: Zaller, *The Parliament of 1621*, above n 112, 64; Sir Hamon L’Estrange raged against the ‘[Jezebels] that lye in the eares of kyngs, wormes that breed of the crudities of ill digestions ... [T]he kinge need[s] not their counsel’: at 65.

<sup>160</sup> See, eg, Foster, above n 109; Kyle, above n 5.

<sup>161</sup> Willson, above n 47, 41.

<sup>162</sup> *Ibid.* 43.

<sup>163</sup> *Ibid.* Arguably, the only practical result that came out of the 1621 Parliament with respect to current grants and the future granting of patents was a Proclamation by James that cancelled



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.’<sup>164</sup> This meant that there was a degree of political power that rested with Parliament.<sup>165</sup> It also gave rise to the use of patents to supplement the royal income<sup>166</sup> — though there are questions as to the financial success of the practice.<sup>167</sup> The expense of government was one of the key factors in the relationship between James and the Parliament — government for him was becoming increasingly expensive.<sup>168</sup> This, when coupled with the economic troubles of the 1620s, gave the Commons ample clout to negotiate with the monarch.<sup>169</sup>

One commentator even speaks of the ‘new partnership between [the Royal] Court and Commons’ that existed in the 1624 Parliament which meant that over 100 statutes were successfully passed at a ‘rate of over 70 per cent.’<sup>170</sup> Another argued that ‘not very much was wrong with relations between Crown and Parliament.’<sup>171</sup> 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.<sup>172</sup>

eighteen monopolies and ensured that another ‘seventeen were offered to the test of the common law’: Price, above n 11, 32. For a list of the affected grants, see at 166–8 (appendix O). Others were ‘earmarked’ by the Privy Council ‘for further examination’: Zaller, *Parliament of 1621*, above n 112, 138.

<sup>164</sup> Hirst, above n 7, 7.

<sup>165</sup> 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 22, 33.

<sup>166</sup> Other streams of royal income included 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 as Master of the Court of Wards’, above n 6, 97.

<sup>167</sup> 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, *Law and Politics in Jacobean England*, above n 67, 99. This accords with Fox’s view that 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 — such as £30 825 for the soap monopoly and a similar figure for wine licences: Churchill, above n 18, 291.

<sup>168</sup> Notestein, *The Winning of the Initiative by the House of Commons*, above n 42, 31.

<sup>169</sup> It has been suggested that one of the reasons for the strengthened independence of the Commons in the 17<sup>th</sup> century was ‘the neglect of James to keep a sufficient number’ of Privy Councillors in the lower house: *ibid* 26.

<sup>170</sup> Rabb, above n 97, 273. It may be that James’s declining mental faculties meant that he was less obstructive than in earlier Parliaments: see Willson, above n 47, 16–17. Alternatively, it may have been the ‘domination of James by the prince and Buckingham’ that encouraged compromise: Ashton, *The City and the Court*, above n 96, 110.

<sup>171</sup> Russell, above n 9, 419. David Hume, the Scottish philosopher, economist and historian, considered that ‘[a]dvantage was also taken of the present good agreement betwixt the King and parliament, in order to pass the bill against monopolies’: David Hume, *The History of Great Britain: The Reigns of James I and Charles I* (first published 1754, 1970 ed) 204.

<sup>172</sup> Russell, above n 9, 5.

The focus, then, was on compromise and negotiation. Regardless of the relationships between the parliamentarians of the time, what is more important for this argument is that '[o]ne 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.'<sup>173</sup>

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'.<sup>174</sup> It is 'easily forgotten' now, according to Conrad Russell, 'that the 1620s were a war decade.'<sup>175</sup> The compromises that are evident in the *Statute of Monopolies*, such as the exceptions, may have been a worthwhile sacrifice to Sir Edward Coke (one of the prime movers against monopolies and the drafter of the Monopolies Bill)<sup>176</sup> because 'he shared to the full the commons' hatred for Spain'.<sup>177</sup>

The fear of war also impacted on the negotiations surrounding 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 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 Privy Council, and Parliament was called with those Members present.<sup>178</sup> It was these changing power relationships that facilitated the passing of the *Statute of Monopolies*.

### B *The Relationship between the Statute of Monopolies and the 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',<sup>179</sup> this perspective is, however, limited to the regulation of patents for

<sup>173</sup> Ibid 100.

<sup>174</sup> Willson, above n 47, 161.

<sup>175</sup> Russell, above n 9, 72.

<sup>176</sup> Kyle, above n 5, 206.

<sup>177</sup> Willson, above n 47, 90. Two exceptions to the *Statute of Monopolies* (both contained in s 10) are particularly relevant to the potential war with Spain. The first is that for the manufacture of saltpetre was a necessary ingredient for gunpowder and, therefore, a native manufacturing industry would improve the nation's self-sufficiency in times of war. In the 16<sup>th</sup> century, at least, much of the trade in gunpowder passed through Antwerp — a city controlled by the King of Spain. Removing potential Spanish control of saltpetre imports would have been an important strategic move: Ramon A Klitzke, 'Historical Background of the English Patent Law' (1959) 41 *Journal of the Patent Office Society* 615, 640. The second, the ordnance exception, was included after the House of Lords had looked at the Bill and was deemed 'vital for the defence of the realm': Kyle, above n 5, 208, 214. In part due to the use of patents, 'England's ordnance became the best in Europe by 1600': Klitzke, above n 177, 632.

<sup>178</sup> See Willson, above n 47, 166; see generally at 160–7.

<sup>179</sup> Fox, above n 11, 125. See also 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. For a discussion of the debates, see Walterscheid, above n 94, 874 fn 104. 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

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 specific industries and trade routes and the enforcement of statutes.<sup>180</sup> This Part will show how the *Statute of Monopolies* impacted on each type of grant in a different manner.

Section 1 of the *Statute of Monopolies* stated, in part, that:

all Monopolies, and all Commissions, Grants, Licences, Charters and Letters Patents heretofore made or granted, or hereafter to be made or granted, to any Person or Persons, Bodies Politick or Corporate whatsoever, of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm, or the Dominion of Wales, ... or of any other Monopolies, or of Power, Liberty or Faculty, to dispense with any others, or to give Licence or Toleration to do, use or exercise any Thing against the Tenor or Purport of any Law or Statute ... and all Proclamations, Inhibitions, Restraints, Warrants of Assistants, 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.

The Act, therefore, may be seen to cover, amongst other things, all four 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 and Monopolies, and of the Benefit of any Penal Laws, or of Power to dispense with the Law, or to compound for the Forfeiture, are contrary to your Majesty’s Laws’.<sup>181</sup> This, however, raises an important issue — what, exactly, constitutes a monopoly for the purposes of the Act? This point is considered below in the context of s 6.<sup>182</sup>

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 *Statute of Monopolies* was the proscription of dispensations of penal laws (the second category of patent),<sup>183</sup> though the legislation was not sufficient, in itself, to fully regulate this type of

monopolies’: Foster, above n 109, 76–7. On the other hand, ‘[f]rom a constitutional perspective, the *Statute of Monopolies* represents an incredible assertion of parliamentary 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 [*Statute of Monopolies*] thus invade, attack or limit the royal prerogative?’ with a direct ‘No’: Kyle, above n 5, 216.

<sup>180</sup> It is worth noting that the Act, unlike most of the debates during the reign of James, differentiated between those monopolies that regulated trading companies and those that devolved the enforcement of penal statutes to private individuals: see Ashton, *The English Civil War*, above n 39, 88–9.

<sup>181</sup> *Statute of Monopolies* s 1.

<sup>182</sup> There is also the side issue of whether statements such as ‘monopolies are contrary to the law’ are statements of law, fact, advocacy or, in modern parlance, ‘spin’. The impact of James making the statement in the *Book of Bounty* is different from a statement by Parliament, and different from a statement made by an individual with links to both the Parliament and the Crown, such as 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’s book (including whether it is a Proclamation or Declaration) in Kyle, above n 5, 216. Kyle does not, however, consider the possibility that the statements were an example of political posturing.

<sup>183</sup> It may be noted that the ‘grants of dispensation from the penal laws’ were examined in Committees during the 1621 Parliament: Tite, above n 117, 86.

patent. The Act was one of three statutes passed in the 1624 Parliament aimed at the better regulation of this class of patent that gave rise in ‘almost every Parliamentary session [to] an indignant proposal for the restraint of informers’ abuses.’<sup>184</sup> As these *non obstante* grants (tolerations against statutes) were also rendered contrary to law,<sup>185</sup> the *Statute of Monopolies* reinforced the legitimacy of the laws passed by Parliament and the power of justices of the peace 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<sup>186</sup> unless the patent was granted to a company or to an office holder (patents for the creation of offices were included in the exceptions in s 10 of the *Statute of Monopolies*). There were also a number of regulatory patents maintained elsewhere in the legislation — s 12 of the Act, for example, contained an exception for the ‘Licencing 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 an Exception to the Act

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

any Declaration before-mentioned shall not extend to any Letters Patents and Grants of Privilege 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 this 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 ...

<sup>184</sup> Beresford, above n 34, 222; see also at 235–6. See also *Continuance of Acts, etc, 1624*, 21 Jac 1, c 28; *General Pardon Act 1624*, 21 Jac 1, c 35.

<sup>185</sup> This, therefore, conforms with the finding in *Penal Statutes* (1604) 7 Co Rep 36; 77 ER 465. The judges were of the opinion that the *non obstante* grant in question was ‘utterly against law’: at 36; 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* (1628–44)) 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 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 O Wagner, ‘Coke and the Rise of Economic Liberalism’ (1935) 6 *Economic History Review* 30, 31) and that, at least once, Coke ‘completely misrepresent[ed]’ a precedent in the furthering of his case (at 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.

<sup>186</sup> The grant at the heart of the decision of *The Case of Monopolies* (1603) 11 Co Rep 84b; 77 ER 1260 is an example of a regulatory patent that was found to be contrary to the law.

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 Manufactures’, ‘contrary to the Law [or] mischievous to the State’ and ‘generally inconvenient’.<sup>187</sup>

The first of these, ‘manner of new Manufactures’, is not discussed in great depth in the literature. It appears to be seen as self-evident. However, 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 they do now; the second is that it is known that not all examples of ‘new Manufactures’ were granted a patent by either Elizabeth or James; and the third is that 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 aspect, ‘invention’ included the introduction of a new technology from a foreign country<sup>188</sup> and, with respect to the second, it is known that patents for previously unknown inventions such as a stocking knitting machine,<sup>189</sup> a water closet<sup>190</sup> and armour plates were not granted to their inventors.<sup>191</sup> The third aspect, 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: *Hastings’ Case* (1569), *Matthey’s Case* (1571) and *Bircot’s Case* (1573). There are no surviving reports for any of these, though all three, apparently, rejected monopoly protection for inventions on the basis that the

<sup>187</sup> With respect to the term ‘[i]nventors’, 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 A Knafla, ‘Ramism and the English Renaissance’ in Louis A Knafla, Martin S Staum and T H E Travers (eds), *Science, Technology, and Culture in Historical Perspective* (1976) 26, 41. Knafla further asserts that Ramism influenced ‘merchants ... statesmen ... and lawyers’: at 42. It is possible, therefore, that the new logic provided an intellectual basis for the statute — in addition to the existing economic justifications. Such privileging of intellectual effort is evident in the text of a small number of patents granted before 1624. The grant to Ramsey and Wildgosse suggested that the patent was granted to ‘encourag[e] ... others in ... lyke lawdable studyes and indeavors’: *English Patent No 6: Patent of David Ramsey and Thomas Wildgosse* (1618) 2 in Patent Office (UK), *Specifications of Patents: Old Law* (1857) vol 1. It may be noted, however, that Ramsay was a Page of the Bedchamber and Wildgosse was a Gentleman and, therefore, neither fit the modern model of an inventor who is an expert in a field of technical expertise: see at 1.

<sup>188</sup> At the time, the meaning of the term ‘to invent’ 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.

<sup>189</sup> 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 stockings by hand would be forced out of work’: Federico, above n 78, 298. It may be arguable, then, that a manner of new manufacture for the *Statute of Monopolies* excludes ‘labour-saving’ inventions, particularly when read in context of the potential ‘public interest’ qualifiers discussed below.

<sup>190</sup> For a discussion of Harrington’s flush toilet, see Joseph Loewenstein, *The Author’s Due: Printing and the Prehistory of Copyright* (2002) 132–8. The inventor’s name is also spelt as ‘Harington’ in some of the literature. That the inventor of the water closet was a godson of Elizabeth makes the circumstances surrounding its rejection all the more unclear.

<sup>191</sup> Hulme, ‘The History of the Patent System: A Sequel’, above n 15, 53.

invention was already known in England.<sup>192</sup> What is known about these cases is found in subsequent decisions,<sup>193</sup> and in the writings of Coke.<sup>194</sup> As a result of these three factors, the exact nature of what constituted a ‘new Manufactures’ in the collective mind of the Parliament (as opposed to just in the mind of Coke) in 1624 cannot be known with any degree of certainty.<sup>195</sup>

The second phrase to be focused on, ‘contrary to the Law [or] mischievous to the State’, is similarly problematic. Traditionally, “[c]ontrary to the law” had little or no meaning in the case of grants made by prerogative;<sup>196</sup> the monarch, as head of state, had a degree of independence of action — at the very least, it could be said that the ‘common law favoured the Crown.’<sup>197</sup> In addition to this bias is the statement of James that suggested that monopolies were contrary to the common law.<sup>198</sup> There is a suggestion in the literature that there was a degree of deliberate ambiguity in the language chosen for the drafting of the *Statute of Monopolies*. 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.’<sup>199</sup> The use of broad terms allowed the parliamentarians to vote for

<sup>192</sup> Two of the three cases (*Hastings’ Case* and *Matthey’s Case*) 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 subject of the third patent (*Bircot’s Case*) was alleged to be the invention of an Englishman and was held invalid on the grounds that the technology was already in use in Derbyshire. Both *Hastings’ Case* and *Matthey’s Case* were referred to in Noy’s report of *Darcy v Allin* (1603) Noy 173; 74 ER 1131. The former was mentioned at 182–3; 1139 and the latter at 183; 1139–40. There is another decision, *Humphrey’s Case*, that is cited in Noy’s report. It is likely, however, that *Bircot’s Case* and *Humphrey’s Case* relate to the same patent. Both *Humphrey’s Case* and *Bircot’s Case* relate to a patent for smelting lead ore, and Hulme refers to Coke’s writings on the patent of Humphrey (Hulme, ‘The History of the Patent System’, above n 11, 148), whereas the only pre-*Darcy v Allin* case relating to patents for invention referred to by Coke is *Bircot’s Case*.

<sup>193</sup> *Darcy v Allin* (1603) Noy 173; 74 ER 1131.

<sup>194</sup> Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (first published 1644, 1979 ed) 184. See also Pila’s discussion of the decisions in light of Sir Edward Coke’s *Institutes*: Justine Pila, ‘The Common Law Invention in Its Original Form’ (2001) 3 *Intellectual Property Quarterly* 209, 220–3. 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.

<sup>195</sup> Pila argues, however, that the term in s 6 of the *Statute of Monopolies*, 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 (respectively) include but are not limited to trades and devices’: Pila, above n 194, 220.

<sup>196</sup> Edward Hughes, *Studies in Administration and Finance 1558–1825* (1934) 67, quoting Edward P Cheyney, *A History of England: From the Defeat of the Armada to the Death of Elizabeth* (1967) vol 2, 292. Similarly, *An Information v Bates* (1606) Lane 22, 23; 145 ER 267, 267 (‘*Bates’ Case*’), which dealt 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’. This decision is discussed in Eusden, above n 117, 104–10.

<sup>197</sup> Edie, above n 48, 208.

<sup>198</sup> *Book of Bounty*, above n 102, 13–14.

<sup>199</sup> Russell, above n 9, 191.

the regulation of the practices that they were against<sup>200</sup> and allowed greater leeway in the interpretation of the Act after it had been passed. The difficulty here is that the law was comfortable with certain types of monopolies — the courts, for example, were happy with restraints of trade imposed by the City of London<sup>201</sup> — but not with others.<sup>202</sup> There was also no successful legal challenge to the monopolistic trading corporations, and there were judicial statements in support of patents of invention.<sup>203</sup> It is, therefore, possible that only illegal monopolies were contrary to law.<sup>204</sup> 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.<sup>205</sup> The lack of clarity around the phrases ‘new Manufactures’ and ‘monopoly’ could, therefore, be intentional. The broad thrust of the *Statute of Monopolies*, then, may be aimed at the general, and perhaps too much focus on the specific limitations of words in s 6 of the Act 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 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.’<sup>206</sup> A historian also considered that the test of inconvenience was viewed ‘through fiscal spectacles’.<sup>207</sup> Further, Coke himself, in his commentary on the *Statute of Monopolies*, stated that an invention was ‘inconvenient’, and therefore contrary to the Act, if

<sup>200</sup> The use of the vague term ‘monopoly’ in the Free Trade Bill 1604 (Eng) ‘was excellent propaganda, for the imprecision allowed all [parliamentarians] to vote against a hated form of privilege’: Rabb, above n 97, 92–3. That Bill did not make it past the House of Lords: at 96.

<sup>201</sup> *The Case of the City of London* (1609) 8 Co Rep 121b; 77 ER 658.

<sup>202</sup> *Davenant v Hurd* (1599) Moo KB 576; 72 ER 769. This report is written in Law French. Fox, however, provides a detailed summary of the arguments and the decision (Fox, above n 11, 311–13) as does Lewtin (above n 11, 359–62).

<sup>203</sup> See, eg, *Clothworkers of Ipswich Case* (1614) Godbolt 252, 254; 78 ER 147, 149:

if a man hath 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 hath made a new discovery of any thing, in such cases the King of his grace and favour, in recompence of his costs and travail, may grant by charter unto him, that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it.

This case was a restraint of trade case and, therefore, the reference to patents for invention may be seen as obiter dictum — it nonetheless indicates that the Court agreed with the concept of patents for invention.

<sup>204</sup> Nachbar also considers the tautologous possibility that monopolies were (implicitly) defined to be those restraints that the speaker considered to be illegal: Thomas B Nachbar, ‘Monopoly, Mercantilism, and the Politics of Regulation’ (2005) 91 *Virginia Law Review* 1313, 1323–4.

<sup>205</sup> The mercantilists had a specific definition of the term: ‘The parts then of a Monopoly are twaine. The restraint of the liberty of Commerce to some one or few: and the setting of the price at the pleasure of the Monopolian to his private benefit, and the prejudice of the publique’: Edward Misselden, *Free Trade: Or the Meanes to Make Trade Flourish* (first published 1622, 1970 ed) 57. In other words, a restraint of liberty of commerce alone was insufficient to be called a monopoly.

<sup>206</sup> Foster, above n 109, 74.

<sup>207</sup> Hughes, above n 196, 69.

it turned ‘many labouring men to idleness’.<sup>208</sup> It is possible, then, that the ‘generally inconvenient’ test was intended to be a broad public benefit test<sup>209</sup> — that is, if a patent for invention was not in the public interest (such as in terms of its effect on employment), then it would be contrary to the Act and, as a result, not granted.<sup>210</sup>

One particular aspect of the public interest is worth highlighting. It is likely that one of the underlying motivations for the *Statute of Monopolies* was to encourage employment, as a major concern of the Parliament in the 1620s was the economy.<sup>211</sup> There was ‘widespread unemployment’ and ‘widening poverty’ that resulted from bad harvests and declining trade of 1621 and 1622.<sup>212</sup> The

<sup>208</sup> Coke, above n 194, 184. Coke was also known to have ‘fully endorsed’ the *Artificers and Apprentices Act 1562*, 5 Eliz 1, c 4 (*Artificers and Apprentices Act*), which 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 — ‘[w]hen he died he left some 99 estates and ... twice that number had passed through his hands’: at 1324 (citations omitted). As a result, it is possible that his position was pro-employment, rather than anti-monopoly. The poor laws of Elizabeth (*Poor Act 1597*, 39 Eliz 1, c 3; *Poor Relief Act 1601*, 43 Eliz 1, c 2) provided for the taxation of land owners by parishes to fund the relief of the poor (see Plucknett, above n 138, 688, 698); the higher the level of employment, therefore, the lower the level of taxation for poor relief. Coke’s reasoning in the monopoly cases tends to reinforce a desire for increased employment. Likewise, his decision in *R v Tooley* (1613) 2 Bulst 186, 191; 80 ER 1055, 1060–1, may be seen as pro-employment by his ruling that an upholsterer who had served an apprenticeship as a wool-packer did not contravene the *Artificers and Apprentices Act* and therefore was not subject to a penalty.

<sup>209</sup> It has been suggested in the literature that s 6 of the *Statute of Monopolies* ‘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, eg, Miranda Forsyth, ‘Biotechnology, Patents and Public Policy: A Proposal for Reform in Australia’ (2000) 11 *Australian Intellectual Property Journal* 202, 216–17; Dianne Nicol, ‘Should Human Genes Be Patentable Inventions under Australian Patent Law?’ (1996) 3 *Journal of Law and Medicine* 231, 240–2. None of the decisions cited discuss the meaning of the phrase ‘generally inconvenient’ in detail.

<sup>210</sup> The public interest 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 17<sup>th</sup> century: Price, above n 11, 29. A number of the patents also included statements such as ‘idleness[s] ... is the bane of these [commowealths]’ (*English Patent No 5: Patent of Thomas Murraye* (1617) 1 in Patent Office (UK), *Specifications of Patents: Old Law* (1857) vol 1) and reference to the impact on trade of the grant (Eland’s 1622 patent for the manufacture of lead specified that such lead had previously needed to be imported at ‘deare rates’: *English Patent No 22: Patent of Christopher Eland* (1622) 1 in Patent Office (UK), *Specifications of Patents: Old Law* (1857) vol 1).

<sup>211</sup> 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 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* (Vulgate version, 425 ed) 24:6 (*The Case of Monopolies* (1603) 11 Co Rep 84b, 86b; 77 ER 1260, 1264), and Noy paraphrased the *Book of Thessalonians* 3:10–12 (*Darcy v Allin* (1603) Noy 173, 180; 74 ER 1131, 1137). Other Bills of the late 16<sup>th</sup> and early 17<sup>th</sup> centuries that may be seen to have pastoral connotations include one against swearing (Norman Jones, *The English Reformation: Religion and Cultural Adaptation* (2002) 167–8) and one ‘prohibiting fairs and markets to be holden on the Sunday’ (Neale, *Elizabeth I and Her Parliaments*, above n 71, 395).

<sup>212</sup> Supple, above n 27, 55.



*Statute of Monopolies* generally, and s 6 of the Act specifically,<sup>213</sup> therefore may be seen to fit with the edicts of the economic theory of the day — mercantilism.<sup>214</sup> The prime policy objective of the mercantilists was wealth creation.<sup>215</sup> It was the wealth of the nation as a whole — the ‘[preservation and] augmentation of the wealth of the Realme’<sup>216</sup> — rather than the wealth of individuals<sup>217</sup> that was important.<sup>218</sup> Two of the key themes of the mercantilists are relevant to the drafting of the *Statute of Monopolies*: the desire to boost employment, and the benefits of improving the balance of trade.<sup>219</sup> In addition, it may be noted that there was also support amongst the mercantilists for the ideal of patents for invention.<sup>220</sup> It is possible then, given this agreement among the elites, that the

<sup>213</sup> 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.

<sup>214</sup> Economics during the 16<sup>th</sup> and 17<sup>th</sup> centuries was not the developed academic discipline that it is 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 have been recognised in the literature. Viner has argued that ‘[p]leas 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’: Jacob Viner, *Studies in the Theory of International Trade* (1937) 115, quoted in L Getz, ‘History of the Patentee’s Obligations in Great Britain’ (1964) 46 *Journal of the Patent Office Society* 62, 70 fn 31.

<sup>215</sup> There are problems with making generalisations such as this with respect to a diverse group of writers: see Joyce Oldham Appleby, *Economic Thought and Ideology in Seventeenth-Century England* (1978) ch 2; see especially at 26. Further, there is debate as to whether there could be considered to be a school of mercantilist thought: see generally Lars Magnusson, *Mercantilism: The Shaping of an Economic Language* (1994) ch 2.

<sup>216</sup> Gerrard de Malynes, ‘A Treatise of the Canker of England’s Common Wealth’ in Antoin E Murphy (ed), *Monetary Theory: 1601–1758* (1997) vol 1, 57, 102.

<sup>217</sup> One writer argued that the ‘great plenty which we enjoy, makes us a people not only vicious and excessive, wastful of the means we have, but also improvident [and] careless of much other wealth that shamefully we lose’: Thomas Mun, ‘England’s Treasure by Forraign Trade’ in Antoin E Murphy (ed), *Monetary Theory: 1601–1758* (1997) vol 1, 109, 164 (emphasis omitted).

<sup>218</sup> 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 especially Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Tavistock Publications trans, first published 1966, 1970 ed) [trans of: *Les Mots et les choses: Une archéologie des sciences humaines*] ch 6.

<sup>219</sup> The following, in de Malynes, above n 216, 64, 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 worke, to avoide idlenesse which is the root of all mischief: when through plenty of money and gaines, merchants shall be encouraged to seeke out new trades, whereby the Realme wil more flourish through Gods blessings.

Another suggestion that policy decisions around trade were a factor in the drafting of s 6 is the use of the phrase ‘raising Prices of Commodities at home, or Hurt of Trade’. With respect to the raising of prices, the sense of the word ‘commodity’ in the 17<sup>th</sup> century focused on quantities of goods suitable for trade: see J A Simpson and E S C Weiner (eds), *The Oxford English Dictionary* (2<sup>nd</sup> ed, 1989) vol III, 563, 564 (definition of ‘commodity’). The logic, presumably, was that if patents increased the cost of manufacturing commodities in England then it would make those goods less attractive to people in Europe, thereby impacting the balance of trade. For a consideration of patents and the *Statute of Monopolies* in the context of mercantilist ideas, see generally Nachbar, above n 204.

<sup>220</sup> One of the key mercantilists was Edward Misselden. He wrote (Misselden, above n 205, 60):

Also the Law of this Realme alloweth, that if any man invent a new Art, beneficiall to the Common wealth, he may have a Patent to use that Arte solely, with restraint of all others for

tests in s 6 of the Act do not relate to a broad public interest test, but rather to a requirement that the grants be in keeping with the policy objectives of the patent system.<sup>221</sup> Apart from the patents for the trading corporations,<sup>222</sup> 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 *Statute of Monopolies* as passed by the Parliament.<sup>223</sup> It is these exceptions to the restrictions imposed by the statute that emphasise the statute's nature as a political compromise. In the words of one commentator, the Members of the House of Commons were 'unable to rise above their own selfish interests'.<sup>224</sup> 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,<sup>225</sup> the Newcastle hostmen<sup>226</sup> and the making of smalt.<sup>227</sup> It should also be noted that the *Statute of Monopolies* explicitly excludes judges and justices of the peace<sup>228</sup> — 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.

seven yeares: as well in recompence of his industry, as for the incuragement of others, to study and invent things profitable for the publike symbiosis.

221 If s 6 is read as a statement of innovation policy aimed at the coopting of technological developments for the good of the common wealth, then the matter of whom the policy is aimed at may be considered. 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 and court gentlemen (such as *English Patent No 6: Patent of David Ramsey and Thomas Wildgosse*, above n 187) — those who had contacts on the continent and the capacity to bring new technologies back to England. The Elizabethan and Jacobean patent system, after all, predated the Enlightenment in England (whether this is measured from the publication of Isaac Newton's *Philosophiae Naturalis Principia Mathematica* in 1687 or even the establishment of the Royal Society in 1660).

222 According to one mercantilist, Misselden, above n 205, 84–5:

Those that Trade without Order and Government, are like unto men, that makes Holes in the bottome of that Ship, wherein themselves are Passengers. For want of Government in Trade, openeth a gap and letteth in all sorts of unskillfull and disorderly persons: and these not only sinke themselves and others with them; but also marre the Merchandize of the land, both in estimation and goodness: then which there can bee nothing in Trade more prejudiciall to the Public Utility.

223 Some commentators have minimised the impact of the exceptions, calling them 'a few political concessions': Malament, above n 208, 1351.

224 Churchill, above n 18, 278.

225 *Statute of Monopolies* s 11.

226 *Statute of Monopolies* s 12.

227 *Statute of Monopolies* s 14.

228 *Statute of Monopolies* s 8.

The exceptions relating to corporations<sup>229</sup> were included ‘to preserve the rights of the monopoly trading companies and the interests of the City of London’,<sup>230</sup> despite complaints being made against trading corporations in the 1624 Parliament.<sup>231</sup> This inclusion may not have been entirely partisan; it has been argued that the ‘official protection’ of companies throughout the Stuart period stemmed ‘directly from an employment policy [despite bearing] the superficial marks of being concerned solely with private or strategic interests.’<sup>232</sup> Further, the exceptions for corporations may be seen to comply with the public interest test of the Act<sup>233</sup> through their regulatory effect<sup>234</sup> and through the role that the trading corporations played in the promotion of foreign trade.<sup>235</sup> The corporations exception, nonetheless, gave rise to the ‘rash of corporate monopolies which were such a marked feature of the next reign.’<sup>236</sup> A ‘final irony’ relating to the case of *Darcy v Allen* was that ‘only a few years after Darcy’s monopoly ...

<sup>229</sup> Corporations, here, are understood broadly. The provision in s 9 of the *Statute of Monopolies* covers the:

City of London, or ... 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 of Merchandize ...

<sup>230</sup> G E Aylmer, *1603–1689: The Struggle for the Constitution — England in the Seventeenth Century* (3<sup>rd</sup> ed, 1968) 81.

<sup>231</sup> Russell, above n 9, 158.

<sup>232</sup> Supple, above n 27, 243.

<sup>233</sup> That is, where those monopolies that are contrary to the law are only those that do not demonstrate a public benefit.

<sup>234</sup> It is possible that the regulated nature of patent industries encouraged ‘capitalists’ to invest in these industries, or at least reassured them: see J U Nef, ‘The Progress of Technology and the Growth of Large-Scale Industry in Great Britain, 1540–1640’ (1934) 5 *Economic History Review* 3, 6–9; Stone, ‘State Control in Sixteenth-Century England’, above n 99, 112. 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, during the late 16<sup>th</sup> and early 17<sup>th</sup> centuries, ‘a good deal of the accumulating wealth of the upper and middle classes was seeking investment’: Unwin, *The Gilds and Companies of London*, above n 66, 303. This may have been a condition of possibility for the ‘general movement towards incorporation’: at 301.

<sup>235</sup> 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, *The City and the Court*, above n 96, 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: at 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.

<sup>236</sup> Ashton, *The City and the Court*, above n 96, 118. Also, in the time of James’s reign, ‘a weird new batch of companies had appeared, such as 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* (3<sup>rd</sup> ed, 1990) 513.

was judged void at common law, the same monopoly was given, under authority of the *Statute of Monopolies*, to the Company of Card Makers.<sup>237</sup>

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 [to the inclusion of this exception] only in order that the Bill should pass.’<sup>238</sup> As it was, the Lords only passed the Bill with the ‘personal intervention of the Prince.’<sup>239</sup> It has also been noted, however, that Mansell’s glass-making patent covered what was asserted to be a new manufacturing process ‘which used coal instead of wood [and] brought down the price of glass’.<sup>240</sup> According to Elizabeth Foster, however, the Commons in 1621 ‘voted the patent a grievance in creation’ as it did not conserve wood and raised prices.<sup>241</sup>

The exceptions relating to alum mines, the Newcastle hostmen<sup>242</sup> and the making of smalt<sup>243</sup> may also be considered in terms of political expediency. There is little discussion in the literature about the extent of these patents.<sup>244</sup> A complaint by the Lord Mayor of London against the Newcastle coal monopoly is reproduced by Richard Tawney and Eileen Power,<sup>245</sup> though it is not clear as to whether this 1590 complaint engages with the same patent that is excepted by the *Statute of Monopolies*.<sup>246</sup> The complaint itself may be best seen in terms of the abovementioned (political and economic) tension between London and the

<sup>237</sup> Letwin, above n 11, 367.

<sup>238</sup> Russell, above n 9, 191.

<sup>239</sup> *Ibid.*

<sup>240</sup> Peck, above n 117, 150. See also *English Patent No 24: Patent of Sir Robert Mansell* (1623) in Patent Office (UK), *Specifications of Patents: Old Law* (1857) vol 1. Rowse suggests that Mansell’s glassworks also produced glass for windows and describes the development of the glass-making industry in this period as a ‘first step to industrial power’: Rowse, above n 59, 165. See also Peck, above n 117, 151.

<sup>241</sup> Foster, above n 109, 73. A patent was deemed a ‘grievance in creation’ rather than a ‘grievance in execution’ if the grant, as opposed to the conduct of the patentees, was counter to the law: at 74.

<sup>242</sup> Reference to the abovementioned exclusions for the regulation of taverns and the selling of wines is also made in s 12 of the *Statute of Monopolies*.

<sup>243</sup> 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: *Statute of Monopolies* s 14.

<sup>244</sup> 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’: Russell, above n 9, 191.

<sup>245</sup> ‘Complaint of the Lord Mayor of London against the Newcastle Coal Monopoly, circa April, 1590’ in R H Tawney and Eileen Power (eds), *Tudor Economic Documents: Being Select Documents Illustrating the Economic and Social History of Tudor England* (1924) vol 1, 267, 267–71. The complaint refers to the ‘freehostes’ of Newcastle: at 267.

<sup>246</sup> Section 12 of the *Statute of Monopolies* 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 and Stewards, and Brethren of the Fellowship of the Hoast-men of the Town of Newcastle upon Tyne, or by the ancient Fellowship, Guild or Fraternity, commonly called Hoast-men, ... for or concerning the Selling, Carrying, Lading, Disposing, Shipping, Venting or Trading of or for any Sea-coals, Stone-coals or Pit-coals, forth or out of the Haven and River of Tyne; or to any Grant made by the said Governor and Stewards, and Brethren of the Fellowship of the said Hoast-men to the late Queen Elizabeth, of any Duty or Sum of Money to be paid for or in respect of any such Coals as aforesaid ...

The reference to Elizabeth suggests that it is the same, or at least a similar, grant.

outports. The exclusion of the hostmen 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 these exceptions, as in the case of the saltpetre, though they may still offer advantages in terms of the regulation of those industries.

The final exception to be considered here is the one for the printing monopolies. As exercises of the royal prerogative,<sup>247</sup> these grants are central to the history of copyright, because they were the first mechanisms that the Crown used to control the reproduction of literary and (some forms of) artistic works.<sup>248</sup> Under these grants, 'printing was prohibited without the consent of the owner' of the licence;<sup>249</sup> therefore, the patents and their exclusion from the penalties in the *Statute of Monopolies* are central to the licensing/censorship debates of which John Milton's *Areopagitica* was a part.<sup>250</sup> There is, however, little consideration in the patent (or copyright) literature as to why these patents were included as exceptions to the *Statute of Monopolies*.<sup>251</sup> It is likely that the regulation of the printing industry (via the printing patents and the Stationers' 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.<sup>252</sup> It may, however, best be seen as a point of inflection in the development of the patent system, rather than as a fresh beginning.

<sup>247</sup> A 17<sup>th</sup> 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 of Roll's Abridgment* (1665) Cart 89, 90; 124 ER 842, 843.

<sup>248</sup> Lyman Ray Patterson, *Copyright in Historical Perspective* (1968) 80–90. 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 generally at chs 3–5.

<sup>249</sup> Gillian Davies, *Copyright and the Public Interest* (1994) 7–8 (emphasis omitted).

<sup>250</sup> John Milton, *Areopagitica* (1644). See generally Blair Hoxby, 'The Trade of Truth Advanced: *Areopagitica*, Economic Discourse, and Libertarian Reform' (1998) 36 *Milton Studies* 177; Christopher Kendrick, 'Ethics and the Orator in *Areopagitica*' (1983) 50 *ELH* 655; Loewenstein, above n 190, 171–91; Sandra Sherman, 'Printing the Mind: The Economics of Authorship in *Areopagitica*' (1993) 60 *ELH* 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* (1999) 120. Milton's call, instead, was for post-publication restrictions where necessary, rather than pre-publication censorship.

<sup>251</sup> Kyle, above n 5, 212, does note that the printing exception was redrafted between the 1621 and 1624 Parliaments in order to satisfy concerns of the Stationers' Company. 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.

<sup>252</sup> Sherman and Bently 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: Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760–1911* (1999) 208.

Immediately after the 1624 Parliament adjourned, '[t]he Privy Council withdrew a large number of grants'.<sup>253</sup> Examples of complaints during the reign of Charles were detailed above, as was the 'rash of corporate monopolies' granted by James's son.<sup>254</sup> It has also been suggested that the Act was 'simply circumvent[ed]' by calling monopolies 'offices'.<sup>255</sup> This suggests that the Act did not 'fix' the patent system; it may, therefore, be better to see the 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 grievanc[e]' in England under James and Charles.<sup>256</sup> 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.<sup>257</sup>

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 that arose in the same decades. That the *Statute of Monopolies* is a compromise is emphasised by its timing: there is little evidence to show that the abuses of monopolies were worse in the 1620s than at any other time during James's reign; it is only the sum of the conditions 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'.<sup>258</sup>

It is not unusual to see the passage of legislation through current Parliaments as a matter of compromise. It is also 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

<sup>253</sup> Foster, above n 109, 78.

<sup>254</sup> See above nn 39, 236 and accompanying text.

<sup>255</sup> Russell, above n 9, 115. The Jacobean court had a history of 'openly' selling 'knightships, titles and offices': Peck, above n 117, 20.

<sup>256</sup> See Rabb, above n 97, 71.

<sup>257</sup> It may, therefore, be seen as an early 'problematization' in the Foucauldian sense of the word. For a discussion of this concept, and its application to copyright, see Chris Dent, 'Copyright, Governmentality and Problematization: An Exploration' (2009) 18 *Griffith Law Review* 129. That patents as governmentalist 'problematization' coexisted 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) 87.

<sup>258</sup> *Statute of Monopolies* s 6. Further, the provision has to be read in conjunction with the other ambiguous phrase, monopoly 'contrary to the Law'.

‘familiarity of early modern social relations to [21<sup>st</sup> century] eyes.’<sup>259</sup> The *Statute of Monopolies* was the outcome of political negotiations<sup>260</sup> — 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 of the Act may be seen to provide for a broad ‘public interest’ test for patents for invention (at the very least, they may impose a test that patents need to be granted in line with the policy objectives of the patent system).<sup>261</sup> This may have consequences for the interpretation of the current ‘manner of manufacture’ test of patentability in the *Patents Act 1990* (Cth).<sup>262</sup> Such analysis is beyond the scope of this article; however, revisiting the passage of the *Statute of Monopolies* allows for a more contextualised understanding of the scope of the phrase ‘generally inconvenient’.

<sup>259</sup> Hindle, above n 135, 231.

<sup>260</sup> And, by implication, not the ‘first and final source of authority’ for the patent system, as was asserted by Hulme, ‘The History of the Patent System’, above n 11, 141.

<sup>261</sup> 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 *Statute of Monopolies* suggests that a thoroughness of description was the drafting style of the time.

<sup>262</sup> It is noted, however, that the test in s 18(1)(a) of the *Patents Act 1990* (Cth) 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 which *have been developed for the application of s 6 of the Statute of Monopolies?*’: *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252, 269 (Dixon CJ, Kitto and Windeyer JJ) (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* (2006) vol 2, [2.9.1.2].