**On reducing undue trust in judges:
or, against the modern doctrine of precedent**

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Final draft version accepted for publication. The version of record is in (2020) 31 King's Law Journal, No. 1, 1-18.

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Introduction

This article is unashamedly speculative. I have argued elsewhere that modern senior judges from time to time act for clearly party-political and, or, class-biased motivations, with serious long-term effects. I have offered the familiar example of class (and party) bias in relation to trade union and strike law (the *class* bias in fact, recognised by Scrutton LJ writing extrajudicially in 1920; Lord Esher MR's Conservative *party* bias less familiar);¹ and the rather less familiar example of the overthrow by the Court of Appeal in the early 1950s of a nearly 500-year-old dogma of real property law for the sake of creating a loophole in the Rent Acts for the benefit of landlords - here a narrower class bias (in favour of landlords, at the expense of employers and the general taxpayer) but again a clear *party* bias, attempting to achieve Conservative grassroots opposition to rent control under circumstances where the party leadership thought legislation to this end was politically impossible.² These are merely harder-edged examples of some of the political behaviours catalogued by J.A.G. Griffith in *The Politics of the Judiciary*.³ The question they pose is to what extent the

¹ 'Free Association versus Juridification' (2011) 39 *Critique* 53-82; the Scrutton quotation [1920] at 76; Esher material at 66, 67, 70, 71-73.

² 'Can judges be trusted with the common law?' in Richard Ekins and Graham Gee ed, *Judicial Power and the Left* (London: Policy Exchange, 2017) 31-36; more pre-1950s case law in Mike Macnair, 'Sham: Early Uses and related and Unrelated Doctrines' in Edwin Simpson & Miranda Stewart ed. *Sham Transactions* (Oxford: OUP, 2013) Ch 2 at 49-50.

³ 5th ed. London: Fontana, 1997. 'Harder-edged' because my examples are more specifically of *party-political* decision-making by senior judges, as opposed to Griffith's broader 'political role' biases.

problem of the use of judicial power to legislate for the benefit of employers, of landlords, and of Conservative Party electoral tactics, can be reduced, and how.

When I say *to what extent* and *reduced* I do not mean to propose any sort of quantifiability of effect. The point is merely that the idea of wholly *eliminating* either trust in judges, or the use of judicial office for political purposes, is illusory. What is possible is to *reduce* trust in judges.

As to ‘how’, my suggestion is that it might be possible to redesign aspects of the modern judicial order, on the basis of restoring elements of limitation of the power of individual judges and small groups of judges to make law which were part of this order before the coming of universal suffrage, and to restore more power to parliament in this field - while retaining universal suffrage.

This may seem an odd idea; but my suggestion is, in part, that the expansion of the suffrage between 1832 and 1928 has carried with it, as a sort of reaction on the part of the propertied classes, a reduction of the ‘democratic elements’ of the UK’s mixed constitution - trial by jury, local government, and the *practical* influence of the House of Commons. It is as part of this wider process, I suggest, that changes in the doctrine of precedent have increased the ability of individual judges and small groups of judges to legislate through *single* judicial decisions. If this assessment is even roughly right, then considering the ‘old order’ may help us to imagine an alternative to the present order.⁴

⁴ The speculative nature of the article means that I am not concerned directly either with the theoretical foundations of precedent as such, as in the larger part of Neil Duxbury’s *The Nature and Authority of Precedent* (Cambridge: CUP, 2008), or with trying to make internal sense of the modern authorities on precedent from a broadly positivistic standpoint, as in Rupert Cross & JW Harris, *Precedent in English Law* (Oxford: Clarendon, 1991) - or any of

What follows consists of, first, an argument for the idea that wholly eliminating trust in judges is an illusory project; second, an argument for ‘looking backwards in order to look forwards,’ both in general and in the instant case; third, an attempt to extract, roughly, the implicit principles structuring the sources of law in the period between the revolution of 1688 and the mid to late 19th and 20th century changes which gave rise to the modern conceptions; and fourth, and briefly, an attempt to think *limited* redesign of specific sources of law issues which could *reduce* undue trust in judges.

Reducing, not eliminating, trust in judges

My first point is that *eliminating* trust in judges is an illusory idea. There is a sense in which this point is obvious; but it is still worth making, because there have in the past, and not that distantly, been real failed attempts to eliminate trust in judges. These have moved in two directions. On the one hand, the codification project in revolutionary France around 1800 involved a real attempt to eliminate judicial precedent as a source of law and insist on the exclusive power of legislators to make law.⁵ On the other hand, advocacy of ‘jurors judges both of law and fact’ in Civil War, Commonwealth and Cromwellian England in the 1640s-50s was effectively to argue for jurors to substitute for judges (there was also related advocacy of codification). The idea has resurfaced in

the rest of the extensive literature. For the same reason, I am not endeavouring to give a systematic account of either the relevant historical literature on the sources of English law in the early modern period, or (which would be an enormous task) a fully-sourced account based on primary sources. What I offer below in footnotes is *illustrative* of the argument, not offered as *proof*.

⁵ Jean-Louis Halpérin, *L’Impossible Code Civil* (Paris: PUF, 1992) Ch 6.

20th century leftist advocacy of ‘people’s courts’. There is a connection with arguments about the theoretical Marxist claim of the future withering away of the state and law.⁶

I do not propose to argue at any length about the withering away of state and law, which has been the subject of whole books, but merely to *postulate* that if such a withering away is possible, it will *not* be because abundance in production and the ending of class society produces an end to disputes; because we know from anthropological evidence that disputes are commonplace in societies which lack class stratification, and are there not primarily driven by access to scarce material resources.⁷ Hence, if such a withering away is possible, it will be through technical development leading to an overcoming of *long-term occupational specialisation among humans* (commonly and misleadingly called ‘division of labour’) and, as a corollary of this,

⁶ Jurors judges both of law and fact: Thomas A Green, *Verdict according to conscience* (Chicago: U. Chic. Press, 1985) Ch 5 is a full discussion. People’s Courts: the idea on the left is partly derived from Lenin, *State and Revolution* Ch 3, section 3 ‘Abolition of Parliamentarism’ <https://www.marxists.org/archive/lenin/works/1917/staterev/ch03.htm#s3> (consulted Jan 9 2020). In fact, however, the ‘People’s Courts’ set up after October 1917 consisted of permanent judges sitting with assessors: Zigurds L Zile ed, *Ideas and Forces in Soviet Legal History* (New York, NY: OUP, 1992) 95-100. For China see eg H McAleavy, ‘The People’s Courts in Communist China’ (1961) 11 *American Journal of Comparative Law* 52. Marxism and the withering away of law: most of the Anglophone literature is polemic against the idea, not relevant here; Hal Draper, ‘The death of the state in Marx and Engels’ *Socialist Register* 1970, 281-307, is best on the actual views of Marx and Engels.

⁷ Simon Roberts, *Order and Dispute* (Harmondsworth: Pelican 1979) Chs 4 and 5 already offered a summary account of material for which there is a great deal of other evidence in the anthropological literature.

movement from forms of professionalised, into forms of lay collective, dispute settlement. The latter would then probably be more like the forms of lay dispute settlement in customary regimes than like 'formal' legal orders.⁸

But - the point which is relevant here - would such a hypothetical transition imply no need for trusting *judges*? The answer is that it would not. The reason is that argued in Jo Freeman's 1970 *The tyranny of structurelessness*.⁹ Collective decision-making *needs* procedural forms. In the absence of procedural forms, the decision-making process either fails altogether, or becomes dominated by some informal leader or group. In the case of decision-making about interpersonal disputes, we can add that the right to a hearing - to 'having your day in court' - is pretty much indispensable to consent to unfavourable outcomes to the decision-making process. This is again not something peculiar to liberalism or even, more generally, to complex stratified societies.¹⁰ The meeting needs a person or group to chair it, who is trusted to hold the meeting to explicitly or implicitly agreed - and fair - procedure. The chair is *ipso facto* partially in the role of a judge. *Some degree* of trust in someone standing in the role of a judge is therefore unavoidable.

⁸ Cf. literature cited at Macnair 'Law and State as Holes in Marxist Theory' (2006) 34 *Critique* 211-236 at 234-235 n. 88.

⁹ <https://www.jofreeman.com/joreen/tyranny.htm> (consulted 9 Aug 2019).

¹⁰ Procedural fairness: Tom R Tyler, *Why People Obey the Law* (New Haven, CT: Yale UP, 1990) and id, 'Procedural Fairness and Compliance with the Law' (1997) 133 *Swiss Journal of Economics & Statistics*, 219-240. On the anthropology, Roberts above n. 7. Again, there is a very extensive literature.

It is a step down from this level of generality that proposals for the instant abolition of state and law *without* overcoming occupational specialisation more generally are illusory (and this is, in fact, shown by the experience of ‘people’s courts’).¹¹

It follows *a fortiori* that if we are merely concerned, as I am here, to make proposals for the reduction of undue trust in judges, prior to any possible moves towards the supersession of occupational specialisation, increasing the role of trial by jury is certainly relevant; but to do this will not *eliminate* trust in judges.

As I said before, the alternative line of reasoning is to attempt through codification and the formal abolition of judicial precedent to eliminate the judicial power to legislate. The problem here is illustrated by the actual fate of both the French *Code Civil* and the German BGB: the accumulation of *de jure* (Germany) or *de facto* (France) precedents on the interpretation of these codes.¹²

If we seek a theoretical interpretation of this development, the best is that there is no such thing as a plain or literal meaning of words in abstraction from the colloquy between humans of which they are part. Nor, indeed, is there an undisputable ‘core’ meaning separable from disputable ‘penumbral’ meanings, as Hart argued in *The*

¹¹ See the materials referenced above n. 6. The attempt to do without lawyers can also be seen failing in revolutionary France: Jean-Louis Halpérin ‘Le juge et le jugement en France à l’époque révolutionnaire’ in Robert Jacob ed, *Le juge et le jugement dans les traditions juridiques Européennes* (Paris: LGDJ, 1993) Ch 11.

¹² For some examples, Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law* (Oxford: OUP, 2001), Ch 2.

Concept of Law.¹³ All meanings are both contextual, and disputable. The limited degree of predictability which is actually achieved in law is achieved by virtue of the consensus of a limited legal profession, which is possible because of limited size of the group, acculturation in training, and the profession's common *purposes* (of preventing injustices in the limited 'Nozickian' sense of forms of expropriation and promoting predictability of the judicial decision).

The consequence is that the judge who asserts that the meaning they prefer is the 'ordinary natural' or 'literal' meaning of the code or statutory words is, in fact, *concealing the real reasons of their choice* between disputed meanings; and the legislator who imagines that judges can be tied down to a 'literal meaning' naïvely gives the judges *more* arbitrary and unaccountable political power than they had under a regime in which interpretation was supposed to be purposive and contextual.

We cannot, therefore, eliminate trust in judges by either means. But we can reduce it by other means.

Looking back to look forward

The second point is the speculative case in general terms for looking back in order to look forward. There are two core points here. The first is that the 'modern doctrine of precedent' is a creature of the later 19th and early to mid 20th centuries. The second is that there may be a connection between this development, and other tendencies to reduce the 'democratic' elements of Britain's 'mixed constitution' at the same period, counterbalancing the expansion of the suffrage in the interests of the propertied classes.

¹³ (2nd ed., Oxford: OUP, 1997), Ch 7.

Late 19th-20th century and bureaucratic hierarchy

The first point - that the modern doctrine of precedent, under which a single decision makes law is of 19th century origin - is, in fact, pretty clearly established in the recent literature.¹⁴ This is not to say that there were no references before the 19th century to precedents having authority. But the binding effect of *single decisions* was settled for the House of Lords by *London Tramways* (1898) and for the Court of Appeal by *Young v Bristol Aeroplane Co.* (1944).¹⁵ For the House of Lords (and now the UK Supreme Court) *London Tramways* was overruled by the 1966 House of Lords Practice Statement, though the power to reverse prior decisions is rarely used.¹⁶ The use of decisions of single first-instance judges as authoritative is still ambiguous, but Phillip Morgan in a 2012 article has pointed to the inconveniences of the accumulation of first-instance decisions in the High Court being used as authority capable of binding the County Court.¹⁷

¹⁴ Already suggested by Sir John Baker in the first edition of his *Introduction to English Legal History*, (1st ed, London: Butterworths, 1971), 104-05; more strongly put in the 5th ed (hereafter *IELH*) (Oxford: OUP, 2019), 207-212; Jim Evans, 'Changes in the doctrine of precedent During the Nineteenth Century' in Laurence Goldstein ed., *Precedent in Law* Oxford: Clarendon, 1987) Ch 2; Neil Duxbury, (n. 4) Ch 2; William Cornish, in id et al, *The Oxford History of the Laws of England* (hereafter *OHLE*) vol xi, 1820-1914: *English Legal System* (Oxford: OUP, 2010) 44-52.

¹⁵ *London Tramways Co v London County Council* [1898] AC 375; *White v Bristol Aeroplane* [1944] KB 718, CA; [1945] AC 163, HL.

¹⁶ [1966] 3 All ER 77.

¹⁷ 'Doublethink and District Judges: High Court precedent in the county court' (2012) 32 *Legal Studies* 421-447.

The Civil Division of the Court of Appeal disposed of 1,163 appeals in 2018; the SCUK heard 76 appeals in 2018-19.¹⁸ The Court of Appeal is thus the primary precedent-making body, and *Young v Bristol Aeroplane* confers on a three-judge panel of this court - and hence on a 2:1 majority - an effective delegated legislative power.

Treating High Court first-instance precedents as binding authority illustrates that in the modern judicial system, precedent works through a *career hierarchy* of judges with promotion available from the judges of the High Court, to the Court of Appeal, and in turn to the Supreme Court of the UK. This career-hierarchy aspect has as a consequence that in principle the UKSC by a 3:2 majority can overturn a decision at first instance upheld by a unanimous Court of Appeal, so that three judges overrule six. Equally, the decisions of single judges in the High Court can be said to bind County Court judges merely because the High Court judges are more senior. It can be added that each step upwards in this career hierarchy takes the judge further away from the routine business of trials - and hence from practical 'workability' considerations in relation to the rules they make in the form of precedents. The principle this system discloses is of a bureaucratic hierarchy which *represents itself as* meritocratic.

Why should this development have occurred?

Evans and Duxbury both explain the development of 'modern precedent' by reference to the growing influence of legal positivism.¹⁹ There is a clear basis to this argument: legal positivism, and in particular command positivism, pretty much requires an interpretation of judicial precedent as a delegation of the legislative power. But this

¹⁸ CA, [Civil Justice Statistics Quarterly, January to March 2019 \(provisional\)](#) at p. 12; SCUK [The Supreme Court Annual reports and Accounts, 2018-19](#), 2019 HC 2194, foreword, p. 4.

¹⁹ Evans (n. 14) 65-70; Duxbury (n. 4) 37-48.

is a problem on the ‘supply side’ (of ideas) rather than the ‘demand side’ (of political or litigant demand).

Evans adds the 1830 reform of the writ of error, which created a single Court of Exchequer Chamber standing between the three common law courts and the House of Lords, and the professionalization of the House of Lords in the 1830s-40s.²⁰ This is again on the ‘supply’ side.

Duxbury adds a line of argument which was already in Cross & Harris: that the *nature of the legal literature*, in particular ‘insufficiently’ developed law reporting explains the ‘underdevelopment’ of the doctrine of precedent before the later 19th century.²¹ But here the causation is likely to be the reverse. Reporters of the 18th century were perfectly *capable* of producing long elaborated reports of cases they regarded as important.²² The sketchy quality of most pre-19th century *reports* reflects the reality of rapid unreserved judgements in most *cases*. This can be seen in reports made by sitting judges.²³ It can also be seen in some reports which are diary-format and have dates in them, like Joseph Keble’s from the 1660s-70s; to take a single example,

²⁰ Evans (n. 14) 48-49, 54-55. Professionalisation of the House of Lords: Robert Stevens, *Law and Politics: the House of Lords as a judicial body 1800-1976* (London: Weidenfeld & Nicolson, 1979) Ch 1; Patrick Polden, in *OHLE* xi 529-535.

²¹ Cross & Harris (n. 4) 24-25; Duxbury (n. 4) 53-57.

²² Eg *Coggs v Bernard* (1703) 2 Ld Raym 909, 92 ER 107 (and elsewhere), *Dowager Countess of Coventry v Earl of Coventry* (1718) 1 Comy 312, 92 ER 1088, (1722) 10 Mod 463, 88 ER 811, 9 Mod 12, 88 ER 284 (1724) 2 P Wms 222, 24 ER 707, (and elsewhere).

²³ Eg Lord Nottingham’s reports (Selden Soc Vols 73 and 79) or the part of Sir John Comyns’ reports which cover his time on the bench (1 Comyns 388, 92 ER 1124 - 2 Comyns 756, 92 ER 1300).

on Thursday Jan 24 1666/67 Keble reports four cases orally argued and decided by unreserved judgments by the court of King's Bench *en banc*, which since the court sat only in the morning is rapid.²⁴ Analogously, in Chancery on 16 April 1683 Thomas Vernon reports three cases argued and decided before North LK.²⁵

I suggest that it is possible to see a 'politico-legal' demand element to help account for the later 19th century transition. This is the broader evidence of reduction of the 'democratic elements' in the British mixed constitution at the same period: in this case increasing the legislative power of the judiciary as 'experts'.

It is important to emphasise 'mixed constitution'. This was the orthodox understanding of the British constitution, based ultimately on Aristotle and Polybius, and of the United States at its founding; until such constitutions began to be called 'democracies'.²⁶

²⁴ 2 Keb 139-140, 84 ER 87-88. Court sat only in the morning: Henry Spelman, *Of the Law-Terms: A Discourse* ([1614] London: Gillyflower, 1684), 50-53.

²⁵ 1 Vern 152-155, 23 ER 381-82.

²⁶ See eg Mogens Herman Hansen, 'The mixed constitution versus the separation of powers: monarchical and aristocratic aspects of modern democracy' (2010) 31 *Hist. Pol. Thought* 509-531; David Lieberman, 'The Mixed Constitution and the Common Law' in Mark Goldie & Robert Wokler ed., *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge: CUP, 2006) Ch 11. The evolution towards calling the British constitution a 'democracy' in political argument is discussed by Robert Saunders, 'Doubtful democrats: Democracy in Britain since 1800' (2019) 17 *J. Mod. Hist.* 184-195; for more general context, the introduction to this journal issue by Tim B. Müller & Jeppe Nevers, 'Narratives of democracy: a call for historical studies' id. 123-134.

The mixed constitution implied a mixture of monarchical, aristocratic and democratic elements. In the UK the monarchical element is obvious, but *also* present wherever there is an institutional commitment to ‘one-man-management’; the Prime Minister, for example, or directly-elected Mayors of cities, are varieties of elected monarch. The House of Lords again seems to be the obvious aristocratic element; since ‘aristocracy’ in its origins means ‘rule of the best’ our current House of Lords mainly appointed from among the ‘great and the good’ is still an aristocratic institution. Before we re-wrote the meaning of ‘democracy’, the *professional judiciary* were also understood to be an aristocratic element of the constitution: not only because the final appeal lay to the House of Lords, but also because judges are appointed to permanent posts on the basis of supposed ability and virtue.

The *democratic* elements were then taken to be the House of Commons (being elected), the elected elements of local government (the boroughs, as opposed to the rural and suburban government by JPs), and trial by jury. These were elements of ‘property-owning democracy’ in the sense that in general only property-owners were entitled to vote and to do jury service; but within this framework they were democratic elements, as contrasted with the monarchical and aristocratic elements, of the constitution.

The point, then, is that the extension of the franchise since 1832 has been accompanied by a diminution in the role of the democratic elements of the constitution. Such a tendency was, in fact, already argued to exist on a narrower basis by Karl Kautsky in *The Social revolution* (1902):

... bourgeois liberalism disappears in the same degree that social democracy increases. At the same time that the influence of social democracy grows in

parliament the influence of parliament decreases.²⁷

It is, it seems to me, unnecessary to suppose the rise of ‘social democracy’ (which at this period meant *Marxist* workers’ parties, not, as since 1919, constitutional-loyalist socialist parties) to reach the result. But there is a real insight there nonetheless. The pre-Reform (and anti-Reform) conception of the constitution was a Burkean one of the state as a joint stock (company) and the parliament as a shareholders’ meeting with votes *in very rough proportion to property holdings*.²⁸ It was on the basis of this conception that ‘democracy’ was still a swear-word for a Whig ‘reformer’ like Thomas Macaulay in the 1830 and 1850s,²⁹ and that the 1848 *Communist Manifesto* saw ‘the conquest of democracy’, meaning winning the six points of the People’s Charter, as *in itself* raising the proletariat to the position of ruling class.³⁰ With this background, we

²⁷ www.marxists.org/archive/kautsky/1902/socrev/pt1-3.htm#s6 (consulted 19 Sept 2019).

²⁸ Edmund Burke, *Reflections on the Revolution in France* (Everyman ed, London: Dent, 1920), 55-56; the context at 50-56 makes clear the function of the passage as polemic against universal suffrage and democracy.

²⁹ Macaulay: Speech on the Reform Bill, 1831, <https://sourcebooks.fordham.edu/mod/1832macaulay-reform.asp>; <https://www.nytimes.com/1860/03/24/archives/macaulay-on-democracy-curious-letter-from-lord-macaulay-on-american.html> (both consulted 9 Jan 2020).

³⁰ <https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch02.htm> ‘The immediate aim of the Communists is the same as that of all other proletarian parties: formation of the proletariat into a class, overthrow of the bourgeois supremacy, conquest of political power by the proletariat.’ And ‘We have seen above, that the first step in the revolution by the working class is to raise the proletariat to the position of ruling class to win the battle of democracy’; and

should probably expect that it did not need a big *Marxist* party to induce the properties classes to pursue reductions of the democratic elements of the constitution; being forced to concede even limited expansions in the suffrage would *in itself* produce a desire to shift power away from the Commons, local government and juries.

For the mid-19th century, we can point to the beginning of the professional police forces, and the creation of arms-length relationships between police and local government, though the inception in the Metropolitan Police Act 1829 is at the earlier end of the range;³¹ to the 1854 Northcote-Trevelyan reforms of the civil service, increasing its autonomy from parliament;³² to the beginnings of legal-professional and judicial attacks on civil trial by jury;³³ to substantially increased central regulation of

<https://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch04.htm> ‘Section

II has made clear the relations of the Communists to the existing working-class parties, such as the Chartists in England and the Agrarian Reformers in America.’ (both consulted 9 Jan 2020): i.e. the ‘other proletarian parties’ are *just* the Chartists and their US cothinkers.

³¹ Robert Reiner, *The Politics of the Police* (4th ed., Oxford: OUP, 2010) Ch 2, and Keith Smith in William Cornish et al, *OHLE vol xiii, 1820-1914: Fields of Development*, part I Ch 2, discuss the history.

³² Heather Ellis, ‘Efficiency and counter-revolution: connecting university and civil service reform in the 1850s’ (2013) 42 *History of Education* 23-44.

³³ David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: OUP, 1999) 173-74 (duty of care, and ‘sufficient evidence’ of breach, to remove issues from juries in negligence); Michael Lobban, ‘The Strange Life of the English Civil Jury, 1837-1914’, and Joshua Getzler, ‘The Fate of the Civil Jury in Late Victorian England: malicious prosecution as a test case’, both in John W Cairns & Grant McLeod ed. *The Dearest Birth Right of the*

local government from mid-century;³⁴ to ‘reforms’ to the militia which increased central control;³⁵ and to the displacement of the reserve powers of investigation by *ad hoc* Commons Select Committees, understood in the 18th and early 19th centuries as a backstop power against the failings of the judicial system, replaced by judicialised tribunals.³⁶ There was, in short, a good deal of general movement towards ‘officialism’ in the later 19th century even before the term was coined; and the backdrop to this movement was a fear of revolution, as an infection to which Britain might not be immune, in the early to mid-19th century.³⁷ It is not unreasonable to identify an increase in the power of the professional judiciary, relative to juries, to elected legislators, and even to the lay peers, as an element of the same process.

people of England (Oxford: Hart, 2002) Chs 10 and 11; C Hanly, ‘The decline of civil jury trial in nineteenth-century England’ (2005) 26 *Journal of Legal History* 253-268.

³⁴ Debates about centralisation versus locality discussed in John Prest, *Liberty and Locality* (Oxford: Clarendon, 1990); more general discussion in Stuart Anderson in William Cornish et al ed. *OHLE xi, 1820-1914: English Legal System* (Oxford: OUP, 2010) Part II Ch V.

³⁵ Ian FW Beckett, *Britain’s Part-Time Soldiers* (Barnsley: Pen & Sword Military, 2011, 2nd ed. of id., *The Amateur Military Tradition 1558-1945* (Manchester: Manchester UP, 1991) chs 5 and 6. The reforms were part of longer-running debates about the militia, but nonetheless represent a watershed in moves towards central/ professional control.

³⁶ George W Keeton, *Trial by Tribunal* (London: Museum Press, 1960) Chs 1-3.

³⁷ Chantal Stebbings, “‘Officialism’: Law, Bureaucracy and Ideology in late Victorian England’ in Andrew Lewis and Michael Lobban ed, *Law and History, Current Legal Issues* vol 6 (2003) pp. 318-342; on the general background, Boyd Hilton, *A Mad, Bad and Dangerous People: England 1783-1846* (Oxford: OUP, 2008), especially Chs 1, 9 and 10.

Post-revolutionary but pre-‘modernisation’

It is, therefore, worth considering the possibility that the ‘mixed constitution’ of the long 18th century, which had a recognised, if limited, democratic element (albeit one of property-owners’ democracy), might have things to suggest to us about limiting the judicial power.

I have above characterised the modern system as one of (a) delegation of the legislative power to panels of the professionalised House of Lords/ SCUK, and of the Court of Appeal, and perhaps to single judges of the High Court; and (b) that the regime is one of bureaucratic hierarchy self-representing as meritocratic. What were the equivalent principles of the regime before the development of the ‘reformed’ system, in which precedents were commonly highly persuasive, but *single decisions* were only rarely binding irrespective of their merits?

The particular place of judicial precedents as law-making authorities unavoidably falls within two contexts: the structure of the courts; and the conception of the sources of law more generally, since precedents are never more than *one among the several* sources of law. The general principles which I think can be inferred from both aspects are, *first*, that a good many mechanisms of decision-making and review appeal to the consensus of the profession or at least the consensus of the higher judiciary; and such professional consensus was in several respects an effective source of law. *Second*, other mechanisms of review appeal to political sovereignty; and this very clearly also true of sources of law. *Third*, arguments could be made in court from logic and from the ‘law of nature’; these are different from modern arguments from ‘legal policy’ etc only in that, being *explicit* in their claims, it would be easier for the lay audience to form judgments of their rationality than is possible with moral or policy rhetoric in modern judgments.

a. Court system.

The pre-reform but post-revolutionary judicial system was characterised by the existence of multiple parallel judicial authorities.³⁸ Its lower levels can be disregarded, since they were not precedent-making beyond their own level.³⁹

Common law and equity courts were parallel to each other, though there is a sense in which courts of equity ‘reviewed’ common law. The common law court structure also contained three parallel courts of common law, King’s/ Queen’s Bench, Common Pleas and Exchequer. Each court was a collegiate court of the Chief Justice (Chief Baron in Exchequer) and three puisne judges. Their decisions were not binding on each other.

Within the individual common law courts, the procedural forms affected the availability and weight of rulings as precedents. Pleadings were conducted technically before the court; at this stage, it was possible to demur on a pleading, i.e. assert that it had no legal value, but only by admitting that the allegations of fact contained in it were true. Judgments on demurrers had high precedential value but the procedure was high-risk. Once the parties had pleaded to issue, the case would be sent to trial, usually, by jury at local Assizes. In high-stakes cases ‘trial at bar’ before the full court *en banc*

³⁸ The account which follows is, except as otherwise specified, simplified from the early modern material in Baker, *IELH* Chs 3 and 6 (courts) 5 (pleading and process) and 9 (review of decisions).

³⁹ The Admiralty and the ecclesiastical courts, though they had important jurisdictions, can also be disregarded for present purposes, since it was an official doctrine of both civil and canon law that *non exemplis sed legibus iudicandum est*, - judgments must be based on statutes, not precedents (CJ 7.45.13). In England, sets of printed reports of cases in these jurisdictions appeared first in the 19th century.

might be ordered. Rulings at trial at *nisi prius* were not *systematically* reported until Peake's reports starting in 1790, but casual judicial *obiter* and rulings on evidence there were reported episodically in the 'regular' reports.⁴⁰

After trial, it was possible to apply to the court *en banc* for a new trial on the ground of some misdirection of the jury or erroneous evidence ruling; or for arrest of judgment, notwithstanding a verdict for the plaintiff, on the ground that the pleadings and verdict together did not amount to a cause of action. Rulings on motions in arrest of judgment had more precedential value, but many would be only very briefly reported. These procedures had the implication that most judicial rulings at trial had a provisional character, and judges can be found changing their minds between their own initial ruling at trial and their view of the same case *en banc*.⁴¹

Between the common law courts, the writ of error lay for errors on the face of the formal record: from Common Pleas to King's Bench; from Exchequer to a statutory Court of Exchequer Chamber; and from King's Bench (at first instance) to another statutory court of Exchequer Chamber consisting of the judges of Common Pleas and Exchequer. Error lay from the statutory Exchequer Chamber courts, and from the King's Bench's error jurisdiction over Common Pleas, to the House of Lords.

Possibly as important in judicial law-making as these formal mechanisms were the informal mechanisms of, at the low level, sending the junior puisne judge to consult

⁴⁰ For a single example, the brief reports of cases at the sittings at Guildhall after HT 1728, 1 Barn KB 303-307, 94 ER 206-208.

⁴¹ Briefly reported - see the point above nn. 23-25 and text there. Judicial change of mind - eg *Horton v Coggs* (1691) 3 Lev 299, 83 ER 698 (Pollexfen CJ changed his mind between trial and the arguments on motion in arrest of judgment).

the other courts *ad hoc* on some short point; and, at the high level, informal meetings of all twelve judges at Serjeants' Inn or elsewhere.⁴² For capital criminal cases the informal mechanism of judicial meetings was utterly dominant, though it was occasionally possible to attack an indictment, or a judgment, as formally irregular.⁴³

The equity structure was simpler. There were two parallel higher courts of equity, the Chancery and the equity side of the Court of Exchequer; neither court's decisions were binding on the other. The equity side of the Exchequer was, like its common law side, a collegiate court of the Chief Baron and three puisne Barons. Within the Chancery, the Master of the Rolls sat at first instance; the Lord Chancellor could both sit at first instance, and hear appeals from the Master of the Rolls.⁴⁴ *Particular* issues (like taking accounts) would be delegated to Masters, but this was not analogous to the jurisdictional division between judge and jury at law.⁴⁵

In cases of difficulty or importance, it was not uncommon for the Chancellor to sit with judges assistant, varying between adding the Master of the Rolls and another judge, or two or three of the common law chiefs, or some other combination.

⁴² Puisne to consult: eg *Eggleston v Speke* (1689) 3 Modern 258, 87 ER 170 at 259/ 170-71; *Whithall v Saunders* (1732) W Kel 62, 25 ER 491.

⁴³ Baker *IELH* 562-564.

⁴⁴ There was debate in the 1720s over the judicial authority of the Master of the Rolls, settled by an Act of 1729 which gave him direct authority, but subject to the maintenance of the pre-existing appeal to the Chancellor: W.S. Holdsworth, *History of English law vol i* (pbk ed., London: Methuen/ Sweet & Maxwell, 1969), 419-421; Julia Rudolph, *Common Law and Enlightenment in England 1689-1750* (Woodbridge: Boydell Press, 2013), 248-255.

⁴⁵ H Horwitz, *Chancery Equity Records and Proceedings 1600-1800* (London: HMSO, 1995) 3-4.

Alternatively, cases raising difficult issues of law could be sent to the common law courts by one or another form of reference.⁴⁶ Appeals lay from both Chancery and equity Exchequer to the House of Lords.

The House of Lords was thus the point at which - apart from the important element of informal forms of consultation - the several branches of common law and equity jurisdictions met. This was *not* an institution analogous to the later 19th-20th century House of Lords composed of 'law lords'. It was the full House of Lords, consisting of hereditary peers and bishops, *chaired* by the Lord Chancellor or Lord Keeper. The House commonly took *advice* from the twelve common law judges, at least in cases of difficulty. But it was not bound by this advice.

A clear example from late in the 18th century is *Donaldson v Beckett* (1774) on the claim that copyright existed at common law. The 'law lords' were in effect divided 2:1, with Lord Mansfield recusing himself because the decision was an appeal from proceedings below which included the feigned issue reported as *Millar v Taylor* in which he had given judgment, while the former Lord Chancellor Lord Camden and the current Lord Chancellor Lord Bathurst were for reversing *Millar*, on the ground that the constitution restricted the right to create new property rights to parliament. The judges' advice showed a majority for upholding *Millar*. The lay peers voted 2:1 to reverse.⁴⁷

⁴⁶ *Coventry v Coventry* above n. 22 provides an example of both reference to common law (in 1718), and the use of judges assistant (in 1722-24).

⁴⁷ *Donaldson v Beckett* (1774) 2 Bro PC 129, 1 ER 837. That *Millar v Taylor* (1768) 4 Burr. 2303, 98 ER 101, was merely a 'feigned issue' (fictional litigation to send an issue of law or fact, here of law, to a common law court) in the equity proceedings in *Millar v Donaldson* revived and appealed in *Donaldson v Beckett* is established from the records by Catherine

The *formal* ultimate-review mechanism lay to Parliament, in the shape of the House of Lords; and the sets of reports printed in 1698, 1784 and 1789 named the court as ‘Parliament’.⁴⁸ This was thus an appeal to the sovereign power, though *exercised* by the peers.

The overall pattern was thus one in which judicial statements of single judges could only possibly be more than *dicta* in Chancery, the actual *judgments* in the common law side and the equity side of the Exchequer being the work of the Court *en banc*. Reviewing authorities moved in their *general principles* in two directions: the first to repeated arguments before larger groups of judges, that is, towards professional consensus; the second towards direct political authority - after 1688 that of parliament operating through the House of Lords.

This relative ‘flatness’ also appeared in a feature which had a very long history. Trial judges also heard appeals; conversely, appellate judges continued to be confronted with the consequences of their choices in routine trial business.

Lee, ‘The role of punitive sanctions in the early development of the right to copy’ D Phil thesis, Oxford University 2009, 263-268. The constitutional issue in the House of Lords debate and the decision to overrule the judges is discussed in Ronan Deazley, *On the Origin of the Right to Copy* (Oxford: Hart, 2004) 205-210.

⁴⁸ Sir Bartholomew Shower, *Cases in Parliament Resolved and Adjudged, Upon Petitions and Writs of Error*, London: A & J Churchill, 1698; Josiah Brown, *Reports of cases upon appeals and writs of error determined in the High Court of Parliament* (London: the author, 1779-84); Richard Colles, *Reports of cases, upon appeals and writs of error, in the High Court of Parliament: from the year 1697, to the year 1713 ... being a supplementary volume to Brown's cases in Parliament*. (Dublin: E Lynch, 1789).

b. sources of law. It is, of course, familiar that precedents are not the only source of law; there are statutes too, and to a limited extent ‘books of authority’.⁴⁹ Beyond this, a variety of material, including academic literature and comparative material, can be used as *persuasive* authority. For the period before 19th century ‘modernisation’, we have to add several other classes of potentially dispositive authority.

The first, which was already pretty much silently assumed and continues to operate on this silently-assumed basis today, is the common opinion of the profession.⁵⁰ This was reflected by the practices of consultation and of appeal/ review to larger groups of judges. The second, related, was the normal course of the court; today, there would probably be an appeal to the White Book or to Practice Directions; in the 18th century, the appeal is in effect to professional consensus as to normal practice.⁵¹

⁴⁹ For ‘books of authority’ in modern law see eg Penny Darbyshire, *Darbyshire on the English Legal System* (12th ed., London: Sweet & Maxwell, 2017) 49-50 para. 2-044. Gary Slapper & David Kelly, *The English Legal System* (14th ed, Abingdon: Routledge, 2017) 177-78, para. 4.9, is more addressed to the recent willingness to cite current academic literature.

⁵⁰ On the past of this conception see J.H. Baker, *The Law’s Two Bodies* (Oxford: OUP, 2001), Lecture 3; Ian Williams ‘Common Opinion in the Fourteenth Century: before the common learning, before the Inns of Court’ in David Ibbetson, Neil Jones and Nigel Ramsay ed., *English Legal History and its Sources: essays in honour of Sir John Baker* (Cambridge: CUP, 2029) 300-317. On persistence in modern law, eg AWB Simpson, ‘The Common Law and Legal Theory’ in id ed, *Oxford Essays in Jurisprudence, (2nd series)*, (Oxford: Clarendon Press, 1973), 91-94; with hesitancy, Lord Browne-Wilkinson in *Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 349 at 363.

⁵¹ For some explicit references see eg *Rex v Baden* (1694) Show PC 72, 1 ER 50, at 73/51, ‘the Course of a Court is the Law of that Court, and to be taken Notice of by all other Courts’

The third is maxims; on maxims as a source of law there was a good deal of explicit discussion, and a fairly high level of routine use.⁵² The *theoretical* basis of maxims was that they were self-evident and foundational; in practice many of them were derived from civil or canon law *regulae iuris*. If we rule out their being *actually* self-evident and foundational, the practical basis of their authority was again the common opinion of the profession.

The fourth - explicitly argued for by Henry Finch in his 1613 *Nomotexnia*, but also just routinely used in argument - is argument from one or another general principle of logic.⁵³ Related is arguments from the 'law of nature'. It is a mistake to suppose that

(argument accepted by HL); *Oades v Woodward* (1702) 7 Modern 93, 87 ER 1116, at 95/1117, Holt, CJ: 'the course of the Court has been so time out of mind; and the course of a Court is the law of it.' A Westlaw search for the phrase 'course of the court' produces 87 hits 1701-1720, 126 hits 1721-1740, 127 hits 1741-1760, 25 hits 1761-1780, 91 hits 1781-1800.

⁵² See the literature (especially Ian Williams) and later materials cited in M. Macnair 'Institutional Taxonomy, Roman Forms and English Lawyers in the 17th and 18th Centuries' in Pierre Bonin, Nader Hakim, Fara Nasti, Aldo Schiavone (ed), *Pensiero Giuridico Occidentale e Giuristi Romani: Eredita e Genealogie* (Torino: G Giappichelli Editore 2019) 191-208 at 194-195. A search of the *English Reports* CDROM for the word maxim/ maxims in the form 'maxim*' produced 84 hits in 1701-20, 68 in 1721-40, 88 in 1741-60 and in 1761-80, and 149 in 1781-1800. A few of these will have been 'maximum', but not many.

⁵³ Henry Finch, *Nomotexnia*, London: Society of Stationers, 1613, Ch 3, 3r-7v; translation, (London: A. Millar, 1759), 5-18. An interesting 18th century example of explicit reference to logic as authority is Pratt CJ in *Long v Buckeridge* (1718) 1 Stra 106, 93 ER 414: 'If he had not that power, he could not transfer it, according to the rule in *Sir Moyle Finch's case*, *nemo potest plus juris ad alium transferre quam in ipso est*. This rule holds in all sciences, in

these were merely ornamental; for example, arguments about the scope and limits of the ‘law of nature’ duty of parents to maintain their children had dispositive consequences in both succession, and poor law, cases.⁵⁴

The fifth - again, not commonly directly cited, but routinely used - was the *Register of Writs*, the set of available standard forms for beginning litigation. What was more commonly cited was not the *Register* itself, but Sir Anthony Fitzherbert’s introductory textbook on it, his *New Natura Brevium*.⁵⁵ The *Register* was not, in fact, a statute, but it had been understood since the later middle ages to have a quasi-statutory force.⁵⁶

logick *nil dat quod in se non habet*.’ More commonly, arguments from logic or from the meaning of words simply cited no authority as such.

⁵⁴ R.H. Helmholz, *Natural Law in Court* (Cambridge, MA: Harvard UP, 2015) Chs 3 and 4; a Westlaw search for ‘law of nature’ produced 10 hits 1701-20, 10 1721-40, 12 1741-60, 11 1761-80, falling to 4 1781-1800. Dispositive consequences, eg *Parish of St Giles, Reading v Parish of Eversly, Blackwater* (1722) 8 Mod 169, 88 ER 124 at 170/125.

⁵⁵ For an example of citation of the Register as dispositive, *Mayor of London v Mayor of King’s Lynn* (1796) 1 B & P 487, 126 ER 1026, HL, Eyre CJ giving the opinion of the judges at 513/1040, ‘We have no difficulty in pronouncing against the first objection, on the authority of the Register, which is conclusive.’ For frequency of citation of Fitzherbert’s *Natura Brevium* in the 17th and 18th centuries, Macnair ‘Taxonomy’ at 202-203; for citations of the Register itself, id. 205 n. 57.

⁵⁶ Paul Brand, ‘Chancery, the justices and the making of new writs in thirteenth-century England’ in Matthew Dyson & David Ibbetson eds, *Law and Legal Process*, (Cambridge: CUP 2013), Ch. 2; Sir John Baker, *OHLE vol vi, 1483-1558* (Oxford: OUP, 2003) 323-324.

Citable books of authority had a wider scope in this period than today. For a single example, William Hawkins' *Pleas of the Crown* (1716) became citable by 1727.⁵⁷ Some books were explicitly rejected as authority, while others were simply not cited;⁵⁸ the basis of the authority of citable books was, again, professional consensus.

Statutes may appear to be self-explanatory. But it is necessary to make the point that the treatment of statute in this period was considerably different to the modern treatment. In the first place, although this is not visible from the law reports, David Lemmings has shown that there was a radical increase in the relative significance of statute in 'law in practice' resulting from the regular annual sittings of parliament after 1689.⁵⁹ Secondly, though it could certainly be argued in the period that statutes should

⁵⁷ Hawkins, eg *Ward* (1727) 2 Stra 747, 93 ER 824 (rejected, but taken seriously); *Westbeer* (1739) 1 Leach 12, 168 ER 108. See also references in Macnair 'Taxonomy' fnn. 21, 23, 28. Cf. also James Ram, *The Science of Legal Judgment* (Philadelphia: John S Littell, 1835) Ch 12, for a much longer list.

⁵⁸ Eg *Tranter v Watson* (1703) 2 Ld Raym 931, 92 ER 122, at 123, 'Holt Chief Justice, upon his citing Molloy [*De Jure Maritimo*; any of the editions of 1676, 1677, 1682, 1688, or 1690 could be the one cited], said, cite the authorities there mentioned if you will, but do not cite the book itself.' Merely not cited: eg Macnair, 'Taxonomy' fnn. 17, 25.

⁵⁹ *Law and Government in England during the Long Eighteenth Century: from consent to command* (Houndmills: Macmillan, 2011) esp. Chs. 1, 5. So also several authors in id ed, *The British and their Laws in the Eighteenth Century* (Woodbridge: Boydell, 2005). Lemmings makes the point that the 18th century saw a transition *away* from public participation in the law; but arguably, what is involved is rather a narrowing of the *class* (of property-owners) entitled to participate.

be given a 'literal' interpretation, this needed to be argued for on purposive grounds.⁶⁰

More commonly, statutes were read on the basis of their purposes (as understood by the court). A particular aspect of this understanding was the presence - throughout the period, and until the mid-19th century - of the doctrine of *fraus legis*, 'fraud on a statute', meaning various kinds of artificial avoidance device.⁶¹

As the structure of review of decisions pointed to two basis sources of authority - on the one hand the consensus of the profession, on the other political authority, primarily in the form of parliament - so the body of available sources of law also pointed in these two directions. Statutes themselves and the Register were understood as resting on political authority; precedents, books of authority, the course of the court, and maxims, pointed (more or less directly) towards the consensus of the profession.

The sources of law included a third element: the arguments from logic, and from the law of nature. Arguments of this type appear to moderns to be 'non-legal'. But in reality, arguments of the same underlying type *do* appear in modern arguments and judgments - as arguments from 'fairness' and 'policy'.⁶² It is merely that, neither logic nor the 'law of nature' being explicitly recognised as sources of law, such arguments

⁶⁰ Arguments for 'literal' interpretation eg *Thornby v Fleetwood* (1713) 10 Modern 114, 88 ER 651 at 117/654 (counsel *arg.*; rejected); *Mitchell* (1754) Foster 119, 168 ER 59 at 120-121/59-60; *Lord Camden v Home* (1791) 4 TR 382, 100 ER 1076 at 387/1079.

⁶¹ Purposive reading: Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Tübingen: Mohr Siebeck, 2001) Bd. II, Ch 5. *Fraus legis*: Macnair, 'Sham' (above n. 2) at 40-43, 47-48.

⁶² Eg *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, *passim* in the judgments; *Tiensia v Vision Enterprises* [2010] EWCA Civ 1224, Rimer LJ at [40]-[43].

cannot in modern law be elaborated or *interrogated*, so that they function - like 'literal' or 'natural' meanings - as cloaks for judicial arbitrariness.⁶³

c. *Precedent*. In a sense, in discussing the mechanisms of review, I have already asserted the inherent limits on the scope of precedent: parallel courts were not bound by each others' decisions, though they might and did consult each other informally in order to avoid unnecessary inconsistency; judicial statements at common law trial had an inherently provisional character and hence could never count as more than *dicta*.

The short answer is that everything in the reports - or decisions or judicial statements cited from memory - was *persuasive* authority, with varying degrees of weight. On the other hand, no single decision was a 'binding precedent' irrespective of its content, except House of Lords decisions.

House of Lords decisions were acts of sovereignty. They therefore did not, *prima facie*, have reasons; at most, the arguments of counsel might be reported; or speeches appear in parliamentary diaries.⁶⁴ They were clearly binding even if obviously irrational: thus *Sir Edward Turner's Case* (1681), which overthrew the common understanding of conveyancers in relation to the creation of jointures and created an inconvenient rule and a mess of litigation resulting from it;⁶⁵ thus the inconvenient rule

⁶³ Cf also T Murphy & R Rawlings, 'After the Ancien Regime: the writing of judgments in the House of Lords 1980-81' (1981) 44 MLR 671, (1982) 45 MLR 34.

⁶⁴ Arguments of counsel: Shower (above n. 48) and the use of printed cases by Brown (above n. 48); parliamentary diaries: eg notes of the speeches in *Donaldson v Beckett* included in Cobbett's *Parliamentary History* discussed by Deazley above n. 47.

⁶⁵ 1 Vern 7, 23 ER 265, reversing Lord Nottingham's decision *Turner v Turner* (1678) 79 SS 711. The later note in Vernon's report illustrates both the decision's conclusive operation, and the difficulties caused by it.

in *Kerrich v Bransby* (1727) that fraud or undue influence in procuring a will was in the exclusive jurisdiction of the probate court, and thus excluded from equity jurisdiction.⁶⁶

Beyond this point, no single decision was dispositive as such. Chancery equity decisions were *a fortiori* to this, since they often did not even create effective *res judicata* between the parties. As long as the decree had not been enrolled - and it was common *not* to enrol decrees - it could be reopened by application for a rehearing before the same judge or his successor. Even if it had been enrolled, it could be attacked at the same level by bill of review, either for error of law on the face of the decree, or for new evidence which could not have been found with reasonable diligence at the time of the original hearing.⁶⁷ The consequence is that though there was extensive citation of precedents in argument, and regular law reporting in Chancery from around 1660, it would be surprising for a *single* decision to be dispositive - and Chancellors certainly could and did change the policies of their predecessors without much heart-searching (at least until Lord Eldon, who still did so, but with more hesitation and heart-searching).⁶⁸

⁶⁶ (1727) 7 Bro PC 437, 3 ER 284, (*Bramsbeys or Bransby v Kerridge* 1 Eq Ca Ab 133, 21 ER 937). For difficulties with the reasoning, but the case still binding, see eg *Wynne v Humphrys* (1729) Mos 126, 25 ER 309; *Bennet v Vade* (1742) 9 Mod 312, 88 ER 474; *Barnsley v Powel* (1749) 1 Ves Sen 284, 27 ER 1034; *Ex parte Fearon* (1800) 5 Ves Jun 633, 31 ER 778.

⁶⁷ Horwitz, *Chancery* (n. 35) 21-22 conveniently summarises the position.

⁶⁸ Dennis Klinck, 'Lord Eldon on "Equity"', (1999) *Journal of Legal History* 51-74; Rose Melikan, *John Scott, Lord Eldon, 1751-1838* (Cambridge: CUP, 1999) Ch 16; Michael Lobban, 'Preparing for Fusion: Reforming the 19th Century Court of Chancery, part I' (2004) 22 *Law & History Review* 389, 390-409; James Oldham, 'Comment: A Profusion of Chancery Reform' in the same issue at 611-613.

Back to the sources of authority. This regime of precedent pushed authority in one of two directions: the first sovereignty, in the form of Parliament/ the House of Lords; the second professional consensus, in the form of a *course* of precedents, since the decision of a single court *en banc* would not make law. The case of precedent thus displays the same general principles as the structure of review of judicial decisions, and that of the sources of law more generally, already discussed. As with the sources of law, it also presses towards defensible reasons being given for decisions which *are* likely to make precedents for the future.

Taking the matter to one further level of abstraction. There is not a fully explicit theory which explains these patterns; because the authors of the period who did write on the theory of the common law did so on the basis either of sovereignty-based positivism, which had difficulty in accounting for precedent and other forms of law based on legal professional consensus; or on the basis of natural law, ancient-custom and declaratory theories of law which were a fairly imperfect ‘fit’ for the heavy use of statute and the role of the House of Lords in the judicial system after the Revolution of 1689.⁶⁹ But to analyse them in terms of their effects, as I have said, the fundamental sources of authority appear to be (a) sovereignty - statute, read purposively, and the ultimate review/ appeal to the House of Lords as a political assembly; (b) professional

⁶⁹ Several different perspectives in Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon, 1986); David Lieberman, *The Province of Legislation Determined* (Cambridge: CUP, 1989); Michael Lobban, *The Common Law and English Jurisprudence* (Oxford: OUP, 1991). Lobban, ‘Custom, nature and authority: the roots of English legal positivism’ in Lemmings ed., *British and their Laws* (above n. 59) argues more specifically for practical dominance of command positivism.

consensus, expressed in the forms of review which went to larger bodies of judges and the limited decisiveness of most precedents, as well as in professional consensus itself, the ‘course of the court’, maxims and books of authority; and (c) ‘the law of nature’ and arguments from logic, which differ from the modern use of such arguments not in *existing*, but only in being more explicit and hence more debatable.

The overall effect is that the law-making authority of individual justices and courts as precedent-makers was substantially less than in modern law; and the explicit quality of purposive arguments about the interpretation of statute, and the review jurisdiction of the House of Lords, required of the courts more fidelity to statute than modern positivistic ‘literal’ or ‘natural’ meaning-interpretation, and appellate jurisdiction retained within the profession, does. The overall effect was *less* trust in individual judges than in the modern regime.

Modest proposals

How might we redesign the modern judicial system to make it approximate to these principles of law-making either through the political sovereign, or through something more like professional consensus, as opposed to the high level of trust we presently place in small panels of judges?

I would suggest: (1) the design of the senior judiciary should be significantly flattened, with appeals lying from the single judge to a divisional court, and from a divisional court (on a point of law only) to a general judicial assembly. The case for this approach is to flatten the judicial hierarchy to some extent.

(2) The general judicial assembly should be required to vote on answers to a certified question, and that its adopted answer should have effect between the parties, but in order to make law for future parties, should be a negative statutory instrument. The general judicial assembly should be bound by those of its own decisions which

have not been rejected in parliament. This would reverse the 1966 Practice Statement, on the basis that the availability of parliamentary review makes the decision a sort of sovereign act. The case for this approach is to provide a substitute for the old *sovereign* appellate jurisdiction of parliament (exercised by the House of Lords). It would do so in a limited way: it merely provides *space* for parliamentary review of judicial law-making, which would depend on MPs paying attention.

(3) The divisional court should not be bound by its own prior single decisions, but only by a prolonged consistent course of such decisions or where there is clear evidence of reliance over a decade. This would restore the position before the development which resulted in *White v Bristol Aeroplane*.

(4) Decisions at first instance should not be citable as binding authority at all. The problem is that there is a tendency to overproduction of precedents - which was already visible as a problem in Chancery, where single-judge decisions were citable, in Lord Eldon's time. No doubt there could properly be a 'course of the court' or consensus of practice arising from consistency over time in first instance decisions; but to have individual first instance decisions citable as potentially binding authority is a serious problem.

No doubt the likelihood of adopting this sort of approach is low. But it would be one which would *mitigate* - not, by any means, eliminate - the tendency to arbitrary judicial decision-making which I referred to at the beginning of this article.