Oxford Journal of Legal Studies 2024, Vol. XX, No. XX pp. 1–29
https://doi.org/10.1093/ojls/gqae007

Partisan Legal Traditions in the Age of Camden and Mansfield

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Abstract—The 18th century is often treated by scholars as a period of juristic consensus. This article argues, in contrast, that the late 18th century saw the emergence of rival 'Patriot' and 'Tory' legal traditions. Through a detailed study of the jurisprudence of Lords Camden and Mansfield—who were both pillars of the law, as well as political and juristic rivals—we show that they differed systematically in their understanding of the common law, and that those differences had a partisan cast: although they were not crude attempts to instrumentalise law to political ends, their political and jurisprudential commitments influenced each other and emerged from the same intellectual roots. We place these differences in the context of the fragmentation of 18th-century Whig politics, and argue that they have important implications for how we understand and make use of the common law tradition in present-day scholarship.

Keywords: legal history, tradition, copyright, executive power, British Empire, eighteenth century

1. Introduction

This article's purpose is to advance a new interpretation of 18th-century common law thought. Legal scholars often treat that period as an age of juristic consensus. We argue, in contrast, that the late 18th century saw the emergence of rival 'Patriot' and 'Tory' legal traditions, which took divergent positions on a range of substantive and methodological legal questions. The traditions were not attempts to instrumentalise law to serve partisan ends, but they nevertheless had a partisan cast. Judges decided cases according to law, not politics, but their conceptions of law owed much to their politics, and their political and jurisprudential commitments emerged from the same intellectual roots.

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We develop this argument by comparing the jurisprudence of Lord Mansfield and Lord Camden, 'the two great pillars of the law' in the early reign of George III.[1] Their political and personal rivalry is well known.[2] We show, however, that they also had divergent understandings of the common law itself, which developed in the context of deep partisan divisions. Mansfield's jurisprudence arose from the same intellectual environment as the policies favoured by 'Tory' ministries in the 1760s and 1770s. Camden's reflected the world view of a 'Patriot' opposition trying to resist Tory innovations. Camden's approach was methodologically conservative, more rigidly historical and more concerned about the potentially irreversible corruption of the law. Mansfield, in contrast, took a more open-textured approach to legal authority, which not only drew on a wider range of sources, but also revealed a more optimistic view of doctrinal development. Mansfield wanted to improve English law by rebuilding it upon new foundations; Camden wanted to stop it from getting worse by making its first principles more secure.

We begin in section 2 by situating Mansfield and Camden in the contemporary partisan landscape. We then discuss two areas of law in which the judges disagreed: copyright and executive power. Both concerned controversial matters, but neither judge's approach was crudely partisan. Indeed, their conclusions often cut against their party's immediate interests; and despite their political antagonism, they could reach similar conclusions even in contentious cases. Nevertheless, their rationales revealed consistent differences in analysing the common law which are best explained by the mutual influence between their jurisprudential and political beliefs (as we show in section 3).

In making this argument, our purpose is partly historiographic. Eighteenth-century English legal history has been divorced from both political history and American legal history, whose practitioners have long assumed a connection between jurisprudence and party politics.[3] Our article offers a way to reunite these subfields and, in doing so, to enable a more sophisticated analysis of the relationship between law and political thought in the 18th-century anglophone world.

But we also seek to make a deeper point about how common lawyers engage with the past. Courts, advocates and scholars often cite history (especially

[1] Philip Francis to Rev Allen (4 February 1766) in Beata Francis and Eliza Keary (eds), *The Francis Letters*, vol 1 (Hutchinson and Co 1901) 73; see also Duke of Newcastle to Lord Rockingham (5 September 1768), BL Add MS 32991, f 65. Camden's judicial career lasted about eight years, split between Chancery (where he decided few cases of lasting importance) and Common Pleas. Peter DG Thomas, 'Pratt, Charles, First Earl Camden' in *Oxford Dictionary of National Biography* (2004) <https://doi.org/10.1093/ref:odnb/22699>. Mansfield spent nearly four times as long as Chief Justice of King's Bench, the most important common law court, where he enduringly influenced multiple areas of law. James Oldham, *English Common Law in the Age of Mansfield* (UNC Press 2004) 12–34.

[2] See eg David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* (CUP 1989) 97.

[3] See eg Daniel J Hulsebosch, *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664–1830* (UNC Press 2005) 277–95; John Phillip Reid, *In a Defiant Stance: The Conditions of Law in Massachusetts Bay, the Irish Comparison, and the Coming of the American Revolution* (Penn State UP 1977) 92–9; nn 20–7. Even relatively formalist judges have sometimes applied a partisan lens to American doctrinal history. See eg *Simmat v US Bureau of Prisons* 413 F.3d 1225, 1234 and fn 10 (10th Cir 2005) (McConnell, J) (explaining the 'curious history' of mandamus by noting that a key decision was written by a 'Jeffersonian appointee').

18th-century history) to settle doctrinal or theoretical questions. Sometimes, that is just the 'normal lawyers' work' of finding old cases or statutes that 'remain good law'.[4] But historical arguments use the past not just as positive legal authority, but also as normative authority[5]—as a criterion for identifying what *ought* to count as positive law.[6] In making these arguments, lawyers often disagree about the meaning and significance of the past. But their disagreements typically share a common premise: that the history of our law, if interpreted correctly, yields a single, unified normative core.[7] The question is how to interpret the history to extract that core—which usually amounts to an empirical debate about the content of the historical record.[8]

In sections 3 and 4, we argue that this framing is misconceived. In engaging with the past, lawyers typically seek to demonstrate that their preferred argument has support not just in historical rules, but also in their jurisdiction's legal *tradition*.[9] Drawing on work by James Alexander, Edward Shils and others, we show that traditions represent a distinct type of historical consciousness. Traditions read the past selectively in ways that do not always obey the conventions of historiography.[10] They value the past because it is *our* law's past, and they emphasise those aspects of it that have a normative significance to present-day questions.[11] Nor do traditions always track the blackletter rules of legal authority: a tradition may view a dissenting opinion as better evidence of the law than the majority, for example.[12]

Disagreements about the past are frequently debates not about how to interpret *a* tradition, but about *which* tradition to invoke. As the example of Camden and Mansfield illustrates, the law's past does not speak with a single voice because it does not represent a single tradition; and the choice of one tradition over another resists merely empirical resolution because it requires normative as well as empirical judgments. This insight offers a more constructive framing, which lets us

[4] William Baude and Stephen E Sachs, 'Originalism and the Law of the Past' (2019) 37 LHR 809, 809–10.

[5] See eg *R (Miller) v The Prime Minister* [2019] UKSC 41 [31]–[32]; *Smethurst v Commissioner of Police* (2020) 376 ALR 575; Marc O DeGirolami, 'Traditionalism Rising' Journal of Contemporary Legal Issues (forthcoming) <https://ssrn.com/abstract=4205351>; Adam Tomkins, 'The Authority of Entick v Carrington' in Adam Tomkins and Paul Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing 2015) 180–4.

[6] cf Felipe Jiménez, 'Legal Principles, Law, and Tradition' (2022) 33 Yale JL & Human 59 (explaining how tradition might perform this function within a positivist framework).

[7] For example, compare *Dobbs v Jackson Women's Health Org* 142 S Ct 2228, 2260 (2022) with ibid 2326–7 (Breyer, Sotomayor and Kagan JJ dissenting).

[8] See William Partlett, 'Historiography and Constitutional Adjudication' (2023) 86 MLR 629, 633–4; nn 192–4.

[9] eg the debates around *R (Miller) v The Prime Minister* [2019] UKSC 41: contrast J Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (2020) University of Oxford Research Paper 6/2020 <http://ssrn.com/abstract=3548657> with PP Craig, 'The Supreme Court, Prorogation and Constitutional Principle' [2020] PL 248. cf debates about the use of 'history and tradition' by the US Supreme Court. See eg Sherif Girgis, 'Living Traditionalism' (2023) 98 NYU L Rev 1477; Andrew Koppelman, 'The Use and Abuse of Tradition: A Comment on DeGirolami's Traditionalism Rising' Journal of Contemporary Legal Issues (forthcoming) <https://ssrn.com/abstract=4383680>.

[10] cf Robert W Gordon, 'Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography' (1975) 10 Law & Soc'y Rev 9, 17.

[11] See James Alexander, 'A Systematic Theory of Tradition' (2016) 10 Journal of the Philosophy of History 1, 9; Jack M Balkin, 'The New Originalism and the Uses of History' (2013) 82 Fordham L Rev 641, 678; Edward Shils, *Tradition* (University of Chicago Press 1981) 12; cf Martin Krygier, 'Law as Tradition' (1986) 5 Law and Philosophy 237, 248–50; FW Maitland, *Why the History of English Law Is Not Written* (CJ Clay & Sons 1888) 13–14.

[12] See eg Mike Macnair, 'Free Association versus Juridification' (2011) 39 Critique 53, 68–9; Jeffrey A Pojanowski, 'Reading Statutes in the Common Law Tradition' (2015) 101 Va L Rev 1357, 1413; n 144.

avoid the unhelpful dichotomy of either wallowing in historical indeterminacy or manufacturing an artificial historical consensus. Greater attentiveness to the internal complexity of our law's past can prompt lawyers, judges and scholars to make more explicit, principled and transparent choices about *whose* common law tradition they invoke, and why.

2. *Mansfield and Camden: Politics, Tradition and Judicial Disagreement*

Modern commentators typically speak of '*the* common law tradition'.[13] Although they recognise that 18th-century lawyers often disagreed, scholars usually interpret these differences as reflecting ambiguities within a single tradition.[14] Theoretical work on traditions, however, suggests the need for a different and more nuanced approach.

A tradition is a disposition or attitude to the past. As Shils has shown, traditions see the past as having patterns, and associate those patterns with beliefs about the implications they have for present and future conduct.[15] This association means that traditions are both normative and selective. They are normative in that the guidance they offer only influences human action if the beliefs they embed are accepted as having normative value.[16] They are selective in that they emphasise those aspects of the past that best fit with the tradition's normative core.[17]

Traditions have a distinctive structure and logic. Alexander has argued that all traditions have an element of continuity linking past and present. In addition, more complex traditions also have a clear sense of a 'canon' and a 'core'. The 'canon' of a tradition is the set of texts that cumulatively embody its most distinctive features. Its 'core' is the set of beliefs that constitute its essence.[18]

Crucially, a shared past does not necessarily produce a shared tradition. Keeping a tradition unified requires more than a common inheritance of ideas, beliefs and practices. It also requires the tradition's adherents to have a shared sense of what that inheritance means normatively.[19] Thus, if common lawyers at a given point of time shared a past or a canon of legal authorities but disagreed about its normative implications, there was no single common law tradition. As we show in this section, this very type of fragmentation lay at the heart of the jurisprudential divide between Camden and Mansfield.

The suggestion that England in the later 18th century had different traditions grounded in political divides will not come as a surprise to political historians, for whom George III's early reign was a time of intense, ideologically driven

[13] See Gordon (n 10) (offering a critical perspective on the idea).
[14] See eg Gerald J Postema, *Bentham and the Common Law Tradition* (2d edn, OUP 2019) 30–8.
[15] Shils (n 11) 10–11.
[16] ibid 23–5.
[17] ibid 25–7.
[18] Alexander (n 11) 10–23.
[19] Shils (n 11) 12, 41–3.

partisan conflict.[20] These were not parties in the modern sense of whips and party machinery, but rather devices that structured political debate.[21] Skjönsberg has helpfully defined 18th-century parties as 'set[s] of flexible and evolving principles … which categorized and managed political actors, voters, and commentators'.[22] Georgian writers themselves disagreed about the nature and meaning of party membership, but practically everyone thought that party mattered.[23]

Legal scholars, in contrast, usually discuss 18th-century law without mentioning party at all.[24] In contrast with other periods,[25] disagreements among Hanoverian lawyers are ignored or are treated as matters of intellectual rather than political history.[26] Indeed, the few legal historians who have written about party politics suggest that the decades after 1760 were marked by growing jurisprudential consensus rather than partisan strife.[27]

Yet judges were part of the party-driven world.[28] David Lemmings has described the 18th-century bench as 'politicized', especially at the top. Judicial appointments depended on political connections as well as merit. Every Chief Justice of King's Bench appointed in the 18th century had previously served in

[20] See eg John Brewer, *Party Ideology and Popular Politics at the Accession of George III* (CUP 1976); Justin du Rivage, *Revolution Against Empire: Taxes, Politics, and the Origins of American Independence* (Yale UP 2017); James M Vaughn, *The Politics of Empire at the Accession of George III: The East India Company and the Crisis and Transformation of Britain's Imperial State* (Yale UP 2019).

[21] See sources cited in n 20.

[22] Max Skjönsberg, *The Persistence of Party: Ideas of Harmonious Discord in Eighteenth-Century Britain* (CUP 2021) 10.

[23] See Richard Bourke, *Empire & Revolution: The Political Life of Edmund Burke* (Princeton UP 2015) 22–3.

[24] There are exceptions. Philip Hamburger, *Law and Judicial Duty* (Harvard UP 2008) 232–4 has sketched rival Whig and Tory conceptions of constitutional law and judicial precedent. But while he suggests that the 'Whig' law espoused by Camden was more orthodox than Mansfield's alternative (ibid 145), we argue that both could both plausibly claim to represent common law orthodoxy. John Brewer, 'The Wilkites and the Law, 1763–74: A Study of Radical Notions of Governance' in John Brewer and John Styles (eds), *An Ungovernable People: The English and Their Law in the Seventeenth and Eighteenth Centuries* (Rutgers UP 1980) 133 has reconstructed radical legalism, but focuses on the political ideology of a single group rather than competing legal traditions. See also Brewer, *Party Ideology* (n 20) 259–64. Lobban notes in passing that Sir William Blackstone and Sir Robert Chambers taught 'in Tory Oxford', but party is not the focus of his analysis. Michael Lobban, 'Custom, Nature, and Authority: The Roots of English Legal Positivism' in David Lemmings (ed), *The British and Their Laws in the Eighteenth Century* (Boydell Press 2005) 58.

[25] See eg Michael Lobban, 'The Politics of English Law in the Nineteenth Century' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (CUP 2012); Mike Macnair, 'On Reducing Undue Trust in Judges: Or, Against the Modern Doctrine of Precedent' (2020) 31 King's LJ 41, 41; William Ortman, 'Probable Cause Revisited' (2016) 68 Stan L Rev 511, 521–30; cf *Uzuegbunam v Preczewski* 141 S Ct 792, 806 (2021) (Roberts CJ dissenting) (discounting a 1703 decision of the House of Lords as 'collateral damage in a Whig–Tory political dispute').

[26] See eg Jim Evans, 'Change in the Doctrine of Precedent During the Nineteenth Century' in Laurence Goldstein (ed), *Precedent in Law* (Clarendon Press 1991) 35–45; Emily Kadens, 'Justice Blackstone's Common Law Orthodoxy' (2009) 103 Northwestern University Law Review 1553; Lieberman, *Province of Legislation Determined* (n 2); Michael Lobban, *The Common Law and English Jurisprudence, 1760–1850* (Clarendon Press 1991); Oldham, *English Common Law* (n 1). Thompson, despite the title of his landmark book, emphasises class rather than party politics. EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books 1975).

[27] For example, David Lemmings describes a growing convergence by 1780 between 'old Tory landowners' and 'the heirs of the Whig governing families' with respect to parliamentary and executive power. David Lemmings, *Law and Government in England During the Long Eighteenth Century: From Consent to Command* (Palgrave Macmillan 2011). Stewart Jay has written about 'the rise of party politics' after 1760, but he argues that it encouraged a firmer separation of law from politics. Stewart Jay, 'Servants of Monarchs and Lords: The Advisory Role of Early English Judges' (1994) 38 American Journal of Legal History 117.

[28] As were many lawyers. See Linda Colley, *In Defiance of Oligarchy: The Tory Party 1714–60* (CUP 1985) 22; RA Melikan, 'Mr Attorney General and the Politicians' (1997) 40 The Historical Journal 41.

Parliament, and many remained politically engaged after their appointments.[29] This was certainly true of Mansfield and Camden, who remained active policy makers with distinctive political profiles.[30] Mansfield owed his early career to the Whig machine controlled by the Pelham brothers and Lord Hardwicke. He remained close to that party after his appointment as Chief Justice of King's Bench in 1756. But starting in the 1760s, he was identified increasingly with the political group that historians have variously described as 'neo-Tories', 'authoritarian reformers' and 'paternalists'.[31] (For convenience, we use the term 'Tories'.) In contrast, Camden owed his rise to William Pitt, later the Earl of Chatham, and the party that historians have termed 'Patriots', 'radical Whigs' and 'populists'.[32]

Mansfield and Camden insisted that their political connections had no bearing on their judicial decisions. Mansfield was happy to play politics, but he repeatedly insisted on his independence as a judge, and stressed his duty to avoid speaking politically on questions that were before him judicially.[33] Camden had a similar view, assuming (with some dismay) that his appointment to Common Pleas had curtailed his political life.[34]

Not everyone agreed, however, that the judges successfully separated their judicial and political characters. Legal commentators ignored judges' party affiliations, but popular writing did not. The pseudonymous pamphleteer Junius offered a particularly overheated version of this analysis: Mansfield's jurisprudence, like his 'whole life', had reflected 'one uniform plan to enlarge the power of the crown, at the expence of the liberty of the subject', while Camden's judgments had reflected his purer politics.[35] The suggestion that Mansfield and Camden typically took consistent (and opposed) stances on legal issues of political significance also recurred when they seemed to be acting against type. During one parliamentary debate (discussed below), Edmund Burke found it 'most curious' to hear 'Lord Mansfield all for Liberty, Lord Cambden [*sic*] for prerogative'—suggesting that they had reversed their accustomed roles.[36]

How accurate were these contemporary impressions? This section addresses that question through a close reading of two areas where Camden and Mansfield clashed: common law copyright and the limits of executive power. These were not

[29] David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (OUP 2000) 271–92.

[30] Henry Swanston Eeles, *Lord Chancellor Camden and His Family* (P Allan 1934) 108; Oldham, *English Common Law* (n 1) 10; Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's UP 2013) 305–6.

[31] See Christian R Burset, 'Why Didn't the Common Law Follow the Flag?' (2019) 105 Va L Rev 483, 503, fn 115 (collecting citations); Christian R Burset, *An Empire of Laws: Legal Pluralism in British Colonial Policy* (Yale UP 2023) 10.

[32] Camden later described himself as having 'directed' Chatham's ministry when its nominal principal became ill. In the same letter, he said he became Lord President of the Council (in 1782) as 'one of a Party'. Camden to John Jeffreys Pratt (3 November 1785), Pratt MSS U840/C172/1, Kent Archives & Local History.

[33] Mansfield to Duke of Newcastle (29 May 1767), BL Add MS 32982, f 160v.

[34] Eeles (n 30) 67.

[35] John Cannon (ed), *The Letters of Junius* (Clarendon Press 1978) 208; see also [Charles Townshend], *A Defence of the Minority in the House of Commons, on the Question Relating to General Warrants* (J Almon 1764) 38 (describing Camden as a 'truly Patriot judge').

[36] Edmund Burke to Charles O'Hara ([after 1766 November 11]) in Thomas W Copeland (ed), *The Correspondence of Edmund Burke*, vol 1 (CUP 1958) 1:277.

the only sites of disagreement,[37] but they illustrate two different ways in which jurisprudence and politics interacted. Our goal is less to offer a definitive account of partisan jurisprudence than to highlight why legal scholars should pay close attention to it.

Executive power was one of the chief axes of partisan debate throughout the 18th century; it thus offers a unique opportunity to explore the *direct* influence of party concerns on jurisprudence. In contrast, copyright was a controversial and unsettled area of law, but the divisions it generated did not track party lines.[38] It thus offers a chance to explore the *indirect* influence of political concerns. Together, these areas allow us to sketch the complex relationship between partisan politics and legal thought.

A. Copyright at Common Law

In 1774, the House of Lords heard arguments in *Donaldson v Beckett*[39] on whether authors and publishers had a common law proprietary right in literary works, independent of the Statute of Anne (1710).[40] The question was controversial. In *Millar v Taylor*,[41] Mansfield had held that such a right did exist. Legal and public opinion remained divided, however, and in *Donaldson* the House of Lords reached the opposite conclusion, with Camden playing a significant part in the outcome.[42] Their disagreement went beyond doctrine, covering legal methods, the relationship between law and non-legal practices, the use of history and the common law's ability to respond to social change. These disagreements led the judges not just to different positions on common law copyright, but also to different understandings of what was at stake in the dispute and who was best placed to resolve it.

[37] We discuss two further issues—the territorial jurisdiction of English courts and the constitution of empire in *Campbell v Hall*—in section 3. We have noticed similar patterns of disagreement in other areas, including habeas corpus, civil procedure and commercial law. See eg Barbara Wilcie Kern, 'The English High Judiciary and the Politics of the Habeas Corpus Bill of 1758' in Hendrik Hartog and William E Nelson (eds), *Law as Culture and Culture as Law: Essays in Honor of John Phillip Reid* (Madison House Publishers 2000); Christian R Burset, 'Merchant Courts, Arbitration, and the Politics of Commercial Litigation in the Eighteenth-Century British Empire' (2016) 34 Law & Hist Rev 615, 636–7; Cannon (n 35) 209–10. We hope to discuss these in future work.

[38] See Phillip Johnson, *The Booksellers' Bill 1774* (Wiley for the Parliamentary History Yearbook Trust 2022) 40.

[39] (1774) 2 Bro PC 129; 4 Burr 2408; 17 Parl Hist 953.

[40] 8 Anne c 19.

[41] (1769) 4 Burr 2303.

[42] Discussions of *Millar* have typically relied on James Burrow's summary report. In 1771, William Coke printed a fuller report based on a shorthand transcript. *Speeches or Arguments of the Judges of the Court of King's Bench in April 1769 in the Cause Millar against Taylor for printing Thomson's Seasons* (William Coke 1771). Although Coke's version has some defects, the British Library holds a copy with extensive handwritten corrections by Francis Hargrave on which we rely. British Library General Reference Collection, Shelfmark 709.a.5 (hereinafter Coke-Hargrave Report). The official Journal of the House of Lords and the contemporary press provide different accounts of how the judges in *Donaldson* voted. Tomás Gómez-Arostegui has persuasively argued that the Journal is more accurate. H Tomás Gómez-Arostegui, 'Copyright at Common Law in 1774' (2014) 47 Conn L Rev 1. There are different accounts of the speeches in that case, but they substantially agree about Camden's remarks. 17 Parl Hist 953; *The Pleadings of the Counsel Before the House of Lords, in the Great Cause Concerning Literary Property; Together with the Opinions of the Learned Judges* (C Wilkin 1774); *The Cases of the Appellants and Respondents in the Cause of Literary Property, Before the House of Lords* (J Bew 1774).

(i) Background: the origins of literary property

The debate around copyright ('literary property', as contemporaries commonly called it) arose out of the lapse in 1695 of the Licensing Act 1662.[43] The Licensing Act codified the system of pre-publication censorship of the press created by royal prerogative in the 1530s. The Company of Stationers—whose members had a monopoly over book production—was a fundamental part of that system. Its Hall Register acted both as a record of publication and as a device to ensure that published works had been appropriately licensed.[44] (A work would only be entered into the Register if it had been approved by an authorised licenser.[45]) The Register also served to allocate publishing rights within the Company. Once a publisher had acquired a work from an author and entered it on the Register 'to his copy', no other member of the Company was permitted to publish it.[46] The effects of this perpetual exclusivity have been likened to customary tenure.[47] The right to publish a work could be traded with other members of the Company. It could be sold, used as security and subdivided, and it was enforceable in the Company's court.[48]

Parliament's decision not to renew the Licensing Act in 1695 was motivated more by complaints about the monopolisation of popular works than a desire to relax censorship.[49] Predictably, it dramatically increased the production of competing editions.[50] In response, the Company of Stationers lobbied Parliament to restore its monopoly. The Statute of Anne was the product of their efforts, but it gave them less than they wanted: a monopoly of only 28 years for newly published works, rather than a perpetual monopoly.[51] In the 1730s, the first works copyrighted under the Statute of Anne started to lose their protection, and competing editions once again emerged. In response, the Company's members sued competing publishers in Chancery and common law courts, asserting a common law right of 'literary property' independent of the statute.[52]

(ii) Natural law, common law and statute: competing approaches to legal change

The soundness of the Company of Stationers' argument remained unresolved when it came before Mansfield and Camden three decades later. That led to

[43] 13 & 14 Car 2 c 33.

[44] Michael Treadwell, 'The Stationers and the Printing Acts at the End of the Seventeenth Century' in John Barnard and DF McKenzie (eds), *The Cambridge History of the Book in Britain* (CUP 2002) 755–8.

[45] Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (University of Chicago Press 2002) 29.

[46] Adrian Johns, *The Nature of the Book: Print and Knowledge in the Making* (University of Chicago Press 1998) 187–90.

[47] ibid 213.

[48] ibid 214, 220–9; H Tomás Gómez-Arostegui, 'What History Teaches Us about Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement' (2008) 81 S Cal L Rev 1197, 1256–66.

[49] Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695–1775)* (Bloomsbury Publishing 2004) 3–4, 9–10; Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 Stan L Rev 661, 714–17.

[50] Treadwell (n 44) 776. A particular threat was posed by rival publishers in Edinburgh, Dublin and America, as well as a new class of professional writers, who aggressively maximised the income they derived from their works. Dustin Griffin, 'The Rise of the Professional Author?' in Michael F Suarez and Michael L Turner (eds), *The Cambridge History of the Book in Britain: Volume 5, 1695–1830* (CUP 2009).

[51] Deazley (n 49) 36–43.

[52] ibid 31–6.

the first point of difference between them: their contrasting ideas about how common law courts should approach questions without an obvious answer in statute or precedent.[53] Mansfield thought that courts could use natural law and other sources to discover answers implicit in the common law. Camden took a narrower view of the judge's role, arguing that it was neither constitutionally nor practically appropriate for courts to develop new rules. In his view, Parliament, not the courts, ought to fill gaps in legal authority. These competing theories of legal innovation were accompanied by divergent approaches to statutory interpretation. Although both judges agreed in theory that a statute could abrogate the common law, Mansfield was more reluctant than Camden to hold it had done so.

Mansfield began by asserting the congruence of 'common law' and 'natural principles': 'what is agreeable to natural principles is common law; what is repugnant to natural principles is contrary to common law'.[54] He continued that 'it is agreeable to natural principles, that an author should have the copy of his own works before publication'.[55] Mansfield advanced several reasons for this. Natural principles included 'convenience and policy, as well as moral justice and fitness'.[56] Under these principles, it was 'just' for an author to 'reap the fruits and profits of his own ingenuity and labour'; to determine whether, when and how frequently to publish; to stop others from using his name without his consent; and to choose a publisher he trusts. Because these considerations survived publication, so did the author's common law property right.[57]

Mansfield then turned to the Statute of Anne. The defendant in *Millar* had argued that even if the common law had once recognised a perpetual copyright, the statute superseded it. Mansfield, however, found that it was 'absolutely impossible' to read the act as taking away 'the property of authors'.[58] The statute's legislative context mattered more than its 'particular expressions'.[59] It was a supportive response to authors' and publishers' demands for greater copyright protection. To read it as having taken away their rights would turn it into a bill 'of pains and penalties against them'.[60] It should, accordingly, be interpreted as creating a new remedy that did not curtail their pre-existing rights.[61]

Mansfield's analysis reflected a wider view that a statute should only be construed as displacing the common law if it was 'so clearly repugnant, that it

[53] The issue was genuinely difficult: *Millar* was the first non-unanimous decision in King's Bench since Mansfield joined the bench 13 years earlier. *Perrin v Blake* (1770) 4 Burr 2579, 2582 (reporter's comment).
[54] *Millar v Taylor*, Coke-Hargrave Report (n 42) 93.
[55] ibid 93.
[56] ibid 95.
[57] ibid 93–4.
[58] ibid 103.
[59] ibid.
[60] ibid 106.
[61] For another example of Mansfield's reluctance to interpret statutes as curtailing pre-statutory rights, see RH Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Harvard UP 2015) 114–16.

necessarily implies a negative'.[62] Camden's approach in *Donaldson* was very different. Unlike Mansfield, he thought it inappropriate for judges to recognise a right unsupported by clear precedent, especially if a statute covered the same ground. In Camden's view, proponents of common law copyright had not produced 'any thing like legal authority' on which to ground their claim,[63] and common law or natural principles could not fill the gap. To explain why, Camden catalogued the complex questions that such principles would need to answer. What were the boundaries, he asked, of 'this fanciful property'? What was the legal relationship (if any) between the 'incorporeal ideas' of a text and the 'materials to which they are affixed'? Did copyright extend to 'the sentiments, the language and style, or the paper?' Could works be abridged or translated?[64]

Camden's point was not that these questions were unanswerable; it was, rather, that 'they are all new to the common law', and that their novelty 'leaves us perfectly in the dark about their solution'. Judges would be required to decide them 'without a rule or guide', and under circumstances where their 'books and studies afford no more light upon the subject than the common understandings of the parties themselves'. The result would be decisions 'without a trace or line of law' to guide them, which would 'not be law at last, but legislation'. Judges ought to be concerned with 'how the law stands, not how it should be'; otherwise, the law would be 'most vague and arbitrary', with questions of right and wrong being reduced to 'the private opinion of the judge, as to the moral fitness and convenience of the claim'.[65]

Nor was 'convenience' straightforward. Whereas Mansfield thought natural principles required the author to have absolute control over his work, it was far from obvious to Camden that the law should encourage 'scribblers for bread, who teaze the press with their wretched productions'.[66] The law's focus should be on the communication of knowledge, not the protection of authors. Great authors had been 'intrusted by Providence with the delegated power of imparting to their fellow-creatures that instruction which heaven meant for universal benefit; they must not be niggards to the world, or hoard up for themselves the common stock'.[67] A perpetual copyright would cut against these basic principles by allowing publishers to 'monopolize' knowledge.[68] Not every Patriot agreed with these sentiments, which were predictably unpopular with professional authors of all stripes.[69] But Camden's focus on improvement was characteristic of the Patriot tradition and reflected their concern with concentrated power, whether private or public.[70]

[62] Bl Comm, Introduction III:7.
[63] *Donaldson v Beckett* (1774) 17 Parl Hist 953, 994, 997.
[64] ibid 997–8.
[65] ibid 998. Camden also seems to have disagreed with Mansfield's reading of the Statute of Anne. None of the extant reports provide a full account of his reasoning, but the crux appears to have been that the statute expressly limited its remedy to a specific period of years. Had the legislature intended a perpetual right, 'they would have taken care that the remedy should be so too'. ibid 1001.
[66] ibid 1000.
[67] ibid 999.
[68] *Donaldson v Beckett* (1774) 17 Parl Hist 953, 1000.
[69] See eg Catharine Macaulay, *A Modest Plea for the Property of Copy Right* (Edward and Charles Dilly, 1774).
[70] See Steve Pincus, *The Heart of the Declaration: The Founders' Case for an Activist Government* (Yale UP 2016) 18.

(iii) Usage and origins: competing approaches to history

Mansfield and Camden took different views of 'natural principles' partly because they had different views of the past. To Mansfield, historical usage, common law and natural justice were mutually reinforcing. The long-standing practices of the Company of Stationers and the courts were evidence that perpetual copyright was rooted in natural justice and that 'the general consent of this kingdom for ages' supported a common law right in literary property. The Statute of Anne, rather than undermining that right, showed that 'the legislative authority has taken it for granted, and imposed penalties to protect it'. That Chancery regularly granted injunctions to restrain publication of unauthorised editions, even in cases not covered by the statute, underscored that point. The injunctions were interlocutory, not final determinations, but to Mansfield they were nevertheless evidence of 'what is agreeable or repugnant to natural principles'.[71]

Mansfield was not alone in seeing judicial and social usage as a guide to natural principles and the common law.[72] Camden, in contrast, emphasised the practice's genealogy. While Mansfield presented the usages of the Company of Stationers as reflecting popular consent, Camden traced their roots to the royal prerogative, enforced by the Star Chamber. The usages on which Mansfield relied, Camden argued, existed only because the Crown had asserted the prerogative power to license books and a monopoly over printing them. Transactions of this type provided no evidence of natural principles, popular consent or the common law, but instead were part of 'this arbitrary prerogative, which stifled and suppressed the common law of the land'.[73] No reliance could be placed on usages whose origins were unconstitutional. Recognising a non-statutory right of literary property would not so much vindicate the common law or natural rights as subordinate them to the Crown and its delegates.

B. Executive Power

It has usually been thought that Mansfield favoured the prerogative, while Camden was more protective of individual liberty.[74] That statement requires qualification. Their actual decisions were somewhat compatible; nonetheless, they adopted different frameworks for analysing the power of the state in general and of the Crown in particular. We will focus on two well-known examples: the search-and-seizure cases arising from raids on the *Monitor* and *North Briton* in the 1760s; and the grain embargo of 1766.

[71] *Millar v Taylor*, Coke-Hargrave Report (n 42) 95; see Gómez-Arostegui, 'What History Teaches Us' (n 48) (discussing such injunctions).

[72] See eg Edmund Burke, 'Proceedings in the Commons on the Booksellers' Copy-Right Bill' (24 March 1774) 17 Parl Hist 1088; Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (OUP 2021) 48–9.

[73] *Donaldson v Beckett* (1774) 17 Parl Hist 953, 994.

[74] See eg Poser (n 30) 111.

(iv) Search-and-seizure cases

In the early 1760s, the government led by the Earl of Bute came under attack by two periodicals, the *Monitor* and the *North Briton*, for its conduct at the end of the Seven Years' War. The Bute ministry responded by ordering raids on various printers, writers and others associated with those publications. The subjects of those raids, in turn, brought trespass actions against the agents who conducted those raids.

Those suits raised several related questions about the search-and-seizure powers of government agents, including the authority of senior officials to issue warrants. In one such case, *Entick v Carrington*, Camden used a sliding scale to evaluate the government's arguments: as the government claims broader authority, its burden of proving the lawfulness of that authority rises.[75] In *Entick* itself, the secretary of state had made an 'extensive' claim of authority to issue a warrant; 'therefore', Camden reasoned, 'the Power ought to be as clear as it is extensive'.[76] Camden also considered the government's claim of authority in light of its public utility. The legality of a search, he suggested, might depend on the nature of the crime for which evidence was being sought. *Entick* involved seditious libel. Because that crime was public by its very nature, it was easy to prove without extensive investigation. But Camden indicated that 'necessity' might authorise more intrusive searches in 'secret Cases'—ie those in which detection of the crime is especially difficult. The legality of the government's action thus depended on triangulating among the size of the asserted power, the clarity of the legal authority cited to justify it and the need for the power's exercise.[77]

Mansfield employed a similar framework in the related case of *Leach v Money*, which involved the legality of general warrants. (Indeed, *Entick* praised *Leach* as 'very right'—a rare instance of Camden heaping praise on his rival.[78]) All judges in *Leach* agreed that general warrants were void, and Mansfield's rationale tracked Camden's framework in *Entick*.[79] In issuing general warrants, secretaries of state claimed an exceptionally broad discretion, much greater than that enjoyed by other magistrates.[80] Such power required express legal authority and could not be grounded in practice alone: 'Usage, no doubt, has great weight; but Usage against clear principles and authorities of Law never weighs.'[81] As in *Millar*, Mansfield treated practice as potential evidence of the common law's principles. But there was no need to consider such evidence in cases like *Leach*, where the case law

[75] cf William Baude, 'Rethinking the Federal Eminent Domain Power' (2013) 122 Yale LJ 1738, 1749–50 (arguing that in the 18th century, some powers were deemed so 'great' that they had to be expressly authorised, while lesser powers might be implied).

[76] See TT Arvind and Christian R Burset, 'A New Report of Entick v Carrington (1765)' (2022) 110 Ky LJ 265, 324; cf *Entick v Carrington* (1765) 19 St Tr 1065–6 ('Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant').

[77] We develop this argument more fully in Arvind and Burset (n 76).

[78] Perhaps the praise is not surprising, since *Leach* affirmed a verdict over which Camden had presided.

[79] See the account of decision in '*Money v Leach*: Notes of what the Judges said on the Argument of this Case in BR' TNA TS 11/923; see also James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (UNC Press 1992) vol 1, 204.

[80] *Money* (n 79) ('the Soll[r] General has admitted, that such a warrant from a Justice of Peace would be bad').

[81] ibid.

was clear. Like Camden, Mansfield evaluated the legality of government actions in light of their necessity.[82] Immediately after declaring that 'Usage' could not trump clear legal authority, he suggested that a legally dubious practice might nonetheless be tolerated if 'the Public' would experience 'great inconvenience from changing the Usage'. This exception was a high bar; the precedent that Mansfield cited to support it involved a case in which 'the Inconvenience would have been ten Times more in overturning what had been done there, than in letting it remain as it was'.[83]

Thus, for both Camden and Mansfield, the legality of an executive action depended on the relationship between the size of the asserted power and the clarity of the underlying legal authority. Both judges sought to evaluate legality not in the abstract, but in light of its effect on the public. And both assumed that the government could sometimes act in the absence of clear legal authority. There was, however, one crucial difference: whereas Camden focused on the size of the asserted power and drew a distinction between major and minor powers, Mansfield focused on its public utility and its contribution to the common good. This difference, as we will see, was entirely consistent with their politics.

(v) The embargo of 1766

Entick cemented Camden's reputation as a defender of English liberties. Just a year later, however, critics accused him of abandoning his principles when he defended the Crown's authority to suspend grain exports.[84] But although some observers found it 'most curious' to hear Camden championing the prerogative,[85] his analysis of the 1766 grain embargo followed the same approach he had used in the search-and-seizure cases. So did Mansfield's.

That spring, a poor harvest led to food riots, and Parliament responded by blocking the export of grain.[86] The prohibition expired in August, after Parliament had adjourned for the summer. When food riots resumed in September, the Chatham administration felt compelled to respond.[87] With Parliament not due to return until November, Chatham and George III persuaded the Privy Council to issue an Order in Council declaring another embargo on grain exports.[88]

The embargo was popular, but of dubious legality.[89] Parliament had not authorised the Crown to declare it, and it was unclear whether the Crown had inherent

[82] See also Mansfield's speech (12 November 1766), BL Add MS 57833, f 37v ('That a noble Lord in the Service of the Crown [presumably Lord Chancellor Camden] had said with great Propriety and Spirit, that notwithstanding all that has passed about General Warrants, if an occasion should arise where the Public Safety could not be insured without such a Warrant, he would be the first to grant it').

[83] ibid.

[84] See eg 'Of Lord Camden's Political Conduct' [1770] Scots Magazine 693; see also the anonymous satirical print titled 'The Apparition of a late Patriot C[hie]f J[ustic]e to a Modern Prerogative C[h]anc[ellor]' (c 1766) <https://www.britishmuseum.org/collection/object/P_1868-0808-4385> accessed 1 February 2024.

[85] See n 36 above.

[86] 6 Geo 3, c 5.

[87] For the danger dearth posed to civil order, see EP Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' (1971) 50 Past & Present 76.

[88] Philip Lawson, 'Parliament, the Constitution and Corn: The Embargo Crisis of 1766' (2008) 5 Parl Hist 17.

[89] For its popularity, see 'News' *Gazetteer & New Daily Advertiser* (27 September 1766); 'Wednesday and Thursday's Posts' *Leeds Intelligencer* (4 November 1766).

authority to do so. Indeed, there was some suggestion that subjects enjoyed a statutory right to export grain, which the Crown could not simply suspend. At first, Camden was 'firm in the opinion' that the King-in-Council had no authority to bar grain exports.[90] But Chatham eventually convinced Camden to join the rest of the Privy Council in giving unanimous consent to the embargo.[91] He continued to insist that 'the king's ordinary prerogative' did not authorise such an action. But it was lawful in this instance because the British constitution, like all constitutions, included 'a power to save the whole, the *salus populi*', which empowered the Crown to act in cases of true 'necessity'.[92]

When Parliament returned in November, opposition politicians led by George Grenville denounced the embargo as illegal. In the ensuing debate, Camden and Mansfield further articulated their respective theories of prerogative. No transcript exists of Camden's argument, but we can piece together his thinking from several surviving accounts.[93] First, he argued, no statute expressly granted or denied to the Crown the power to declare an embargo.[94] (As in *Entick*, Camden denied that the Crown had only those powers expressly granted by Parliament.) Accordingly, the question was whether such power could be inferred from precedent or other legal materials. Again tracking *Entick*, Camden argued that the Crown's burden of proof depended on the size of the power it claimed. In this case, the power in question—keeping grain in the country for a few weeks until Parliament returned—was minor and of limited duration, 'a power as he believes Lucius Junius Brutus would have intrusted Nero himself with'.[95] (In a remarkably poor choice of words, he described the short-lived embargo as 'but forty days tyranny at the outside'.) Unlike the libel that gave rise to *Entick*, the food shortages of 1766 were a true emergency, which gave the Crown greater freedom to act.

Mansfield's conclusions were similar.[96] Most contemporaries assumed that he would pounce on the opportunity to attack his rival. But that is not what happened. In a letter to Grenville, written just before the parliamentary debates on the topic, he expressed 'uncertainty' about the embargo's legality, but declined to condemn it. As Mansfield explained, the power to declare an embargo was

[90] George III to Lord Shelburne (23 September 1766) in *The Correspondence of King George the Third from 1760 to December 1783*, vol 1 (Macmillan 1927) 397.

[91] Lawson (n 88).

[92] DA Winstanley, *Lord Chatham and the Whig Opposition* (CUP 1912) 73 (quoting Add MS 32977, f 160).

[93] Camden's argument is reconstructed from *A Speech, in Behalf of the Constitution, Against the Suspending and Dispensing Prerogative, Etc* (J Almon 1767) 75; *State Necessity Considered as a Question of Law* (S Bladon 1766) 16–17; Sir Henry Cavendish, *Debates of the House of Commons, During the Thirteenth Parliament of Great Britain, Commonly Called the Unreported Parliament* (J Wright ed, Longman, Orme, Brown, Green & Longmans 1841) 594–5; 19 Parl Hist 1245.

[94] *A Speech, in Behalf of the Constitution* (n 93) 38 (paraphrasing Camden as challenging 'any one to shew that act of parliament, that excludes the Crown from the power of stopping the exportation of grain'). This was controversial; Grenville thought the embargo had been 'against the positive words and plain intention of an Act of Parliament'. Grenville to Mansfield (10 November 1766) in William James Smith (ed), *The Grenville Papers*, vol 3 (J Murray 1852) 339.

[95] *A Speech, in Behalf of the Constitution* (n 93) 39.

[96] Camden's position was also similar to doctrines articulated by Lord Hardwicke in 1739 and his son Charles Yorke in 1754. See WS Holdsworth, *A History of English Law* vol 10 (Methuen 1903) 364–5.

necessarily 'adapted to sudden emergencies of short duration'. For that reason, the British constitution had 'trusted the executive power with' that authority, which 'could not be exercised by Parliament'. It was possible, Mansfield conceded, that Parliament had created a general statutory right to export grain, which the Crown 'ought not' override as a matter of 'general policy'. But Mansfield hinted that 'an immediate danger of famine' might allow for an exception.[97] He refused to say definitively whether the embargo had been lawful. (Several suits were pending against customs officers who had enforced it, and the question was likely to come before him judicially.)[98]

There was, however, one difference in their approaches. For Mansfield, 'government by law' defined the British constitution.[99] But the law might prove inadequate for unusually severe emergencies. In those situations, the law did not automatically evolve. Instead, public officials had a moral duty to break the law in defence of the common good. In doing so, they acted 'at their own peril'.[100] But if their actions proved justifiable in retrospect, the legislature should indemnify their 'meritorious *illegality*' after the fact.[101] Importantly, acts of indemnification did not change the law itself; indeed, they often reiterated the illegality of the very action they praised.[102] Parliament followed this model when it indemnified those who had enforced the 1766 embargo, declaring that it 'could not be justified by law', but that it had been so 'necessary' for the public good 'that it ought to be justified by act of parliament'.[103] Camden, in contrast, argued that Parliament's declaration of necessity 'would operate with a Retrospect so as to make the Act become legal ab initio'.[104] The constitutional response to necessity was for Parliament to remake the law, not for the executive to break it.

3. *Patriot and Tory Jurisprudence?*

A. Mansfield v Camden Revisited: A Difference of Tradition

Mansfield and Camden shared many assumptions about legal sources and reasoning. In the most politically charged cases—general warrants, for example,

[97] Mansfield to Grenville (10 November 1766) in Smith (n 94) 337–9.

[98] See Grafton to George III (11 November 1766) in *The Correspondence of King George the Third from 1760 to December 1783* (n 90) 1:415; Lord George Sackville to General John Irwin (9 December 1766) in *Report on the Manuscripts of Mrs Stopford-Sackville, of Drayton House, Northamptonshire* (HM Stationery Office 1904) 1:115.

[99] Mansfield's Speech (12 November 1766), BL Add MS 57833, ff 36–8; see also *State Necessity Considered as a Question of Law* (n 93) 6; Cannon (n 35) 300–1.

[100] *State Necessity Considered as a Question of Law* (n 93) 8.

[101] *A Speech, in Behalf of the Constitution* (n 93) 85.

[102] This framework survived in the early United States. Jane Manners, 'Executive Power and the Rule of Law in the Marshall Court: A Rereading of Little v Barreme and Murray v Schooner Charming Betsy' (2021) 89 Fordham L Rev 1941, 1960–1; Matthew Steilen, 'How to Think Constitutionally About Prerogative: A Study of Early American Usage' (2018) 66 Buff L Rev 557, 567. For a contemporary critique of this framework, see Francis Hargrave (ed), *A Collection of Tracts Relative to the Law of England* (printed by T Wright and sold by E Brooke 1787) xxxi–xxxiv.

[103] 7 Geo 3 c 7; see also Bl Comm 1, 261.

[104] Scaevola to Junius, *Public Advertiser* (12 October 1771). 'Scaevola' was later identified as James Macpherson, of 'Ossian' fame. 'Junius' largely accepted Macpherson's recollection, although he initially remembered Camden as saying that the King-in-Council, not Parliament, was to judge necessity in the first instance. Cannon (n 35) 299–300.

or the grain embargo—Mansfield and Camden broadly agreed about the law, despite their parties' opposing positions. Equally, neither judge took a strictly 'blackletter' view of legal authority. Mansfield was famous (or notorious) for using natural law to supplement common law jurisprudence. But Camden, too, thought that background principles of natural law—particularly the duty of self-preservation—could provide a basis of legal authority, at least when positive law was silent.[105] Neither used natural law to trump positive law,[106] and both used positive law to help identify natural-law principles.[107] Finally, both judges assessed positive legal authority not in the abstract, but in relation to the kind of power being claimed and the need for its exercise.

Nonetheless, there were also consistent differences in their approaches to the common law. It was not simply that Mansfield was more willing to innovate while Camden was less given to departing from precedent, as others have argued.[108] Rather, the divergence was so fundamental as to suggest two competing common law traditions which mirrored contemporary partisan divides.

As section 2 discussed, for a tradition to remain unified there must not only be a perceived continuity between past and present, but also a shared sense of the obligations that continuity imposes, as well as a shared approach to identifying them.[109] A tradition can fragment, therefore, if its adherents start to disagree about the normative significance of their shared past, even if they continue to agree about what the past was. Over time, fragmentation can produce competing traditions which, despite their shared origins, differ radically in their interpretation of the past and its implications for the present.[110]

The differences between Mansfield and Camden represent just such a fragmentation. In the decades after the accession of George I in 1714 and the premiership of Sir Robert Walpole, Whigs held a near monopoly on high office.[111] During this period, elite Whig lawyers forged a legal orthodoxy that reflected both the seventeenth-century inheritance of the 'classical' common law and the principles and institutions that emerged from the Glorious Revolution of 1688.[112]

[105] See Helmholz (n 61) 91.

[106] See eg RC Simmons and PDG Thomas (eds), *Proceedings and Debates of the British Parliaments Respecting North America, 1754–1783* (Kraus International Publications 1982) 2:568 ('Lord Mansfield... said that Locke, Harrington, and other writers on the Law of Nations had been improperly brought in as they were not then settling a new constitution but finding and declaring the old one').

[107] As when Mansfield used the history of injunctions to identify a natural law of copyright, or when Camden followed Locke in drawing natural-law principles 'from the heart of our constitution'. See Camden, 'Speech of Lord Camden on the American Declaratory Bill' (1766) 16 Parl Hist 177–8.

[108] See eg Evans (n 26) 40–1; Oldham, *English Common Law* (n 1) 359–60.

[109] Krygier (n 11) 245, 250; Shils (n 11) 12, 41–3.

[110] Shils (n 11) 265, 280–2.

[111] Political contestation persisted throughout this period. Our point is that the *government*, not Britain, became the nearly exclusive province of Whigs. See eg Colley (n 28) 290; du Rivage (n 20) 26–31.

[112] See eg Julia Rudolph, *Common Law and Enlightenment in England, 1689–1750* (Boydell Press 2013); Reed Browning, *Political and Constitutional Ideas of the Court Whigs* (Louisiana State UP 1982) 151–74. Our point is not that the period lacked dissenting voices: we suspect that a study of it would reveal competing 'Whig' and 'Tory' views of the common law and tensions within Whiggism. cf Michael Macnair, 'Sir Jeffrey Gilbert and His Treatises' (1994) 15 Journal of Legal History 252, 255, 260. But the bench and the elite bar were overwhelmingly populated by Whigs, particularly those who appealed politically to Walpole, Hardwicke and the Duke of Newcastle. See Lemmings, *Professors of the Law* (n 29) 248–92; David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680–1730* (OUP 1990) 212–34. One can therefore speak of Whig 'orthodoxy', even if 'heresies' persisted.

Mansfield and Camden—both self-professed Whigs—were formed in this orthodoxy.[113] But Whiggism had always come in different flavours.[114] Even during the so-called 'Whig supremacy', there was heated debate between its Patriot (or 'country') and establishment (or 'court') factions.[115] Over the course of the 18th century, these two groups came more fully into conflict, opposing each other's policies and questioning the other side's commitment to the constitution, until Whig dominance finally collapsed during the Seven Years' War.[116] As a product of this political upheaval, the 'Whig' legal orthodoxy broke into rival Patriot and Tory traditions, as the views of Camden and Mansfield instantiate.

Alexander's analysis of the role of continuity, canon and core in traditions helps us better understand how this fragmentation happened. Mansfield and Camden both accepted continuity with the past—unsurprisingly, since law generally depends on the authority of past acts[117]—and they generally agreed about the history itself. They mostly agreed about the canon of legal authorities. But they disagreed in defining the core precepts of the common law tradition.[118]

We do not claim they deliberately altered the core to advance their political agendas. Both almost certainly saw themselves as faithful stewards of the Whig tradition.[119] But that tradition had internal tensions,[120] which the fragmentation of Whig politics accentuated. In explaining and resolving those tensions, Camden and Mansfield each emphasised those elements of legal orthodoxy that they believed to constitute the tradition's true core. If Camden could cite Coke's description of the common law as static and immemorial, Mansfield could with equal plausibility cite Sir Matthew Hale's account of it as the accumulated product of continuous refinement.[121] But their respective notions of the 'core' were

[113] Camden was educated at Eton, King's College, Cambridge and the Inner Temple, while Mansfield went through Westminster, Christ Church, Oxford and Lincoln's Inn. But their different educations were unlikely to have produced distinct approaches to law. The Inner Temple educated not only Camden, but also George Grenville and Edward Thurlow, whose views were more Mansfieldian. Westminster and Christ Church were indeed known as Tory institutions, and Cambridge was traditionally Whig. Poser (n 30); Skjönsberg (n 22) 55; Colley (n 28) 22. But contemporaries did not seem to think that mattered for educating lawyers: even Whig governments favoured Oxford men for judicial appointments. Mike Macnair, 'Eighteenth-Century Antecedents and Rivals of Blackstone's Institutionalism' in Mordechai Feingold, Robin Darwall-Smith and Peregrine Horden (eds), *History of Universities*, vol XXXV/1 (OUP 2022) 149. Even if Tory Oxford and Whig Cambridge produced different kinds of judges, that would only reinforce our story about the importance of party politics.

[114] See eg JGA Pocock, 'The Varieties of Whiggism from Exclusion to Reform' in *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (CUP 1985); Rudolph (n 112) 201–30.

[115] Colley (n 28); Amy Watson, 'The New York Patriot Movement: Partisanship, the Free Press, and Britain's Imperial Constitution, 1731–39' (2020) 77 William and Mary Quarterly 33, 35.

[116] See Vaughn (n 20) 41–9.

[117] See eg John Finnis, *Natural Law and Natural Rights* (2nd edn, OUP 2011) 269.

[118] cf TT Arvind and Lindsay Stirton, 'Slaying the Misshapen Monster: The Case for Constitutional Heuristics' in Dimitrios Kyritsis and Stuart Lakin (eds), *The Methodology of Constitutional Theory* (Hart Publishing 2022) 112–13.

[119] See nn 111–15.

[120] Lieberman, *Province of Legislation Determined* (n 2) 87; Gerald J Postema, 'Classical Common Law Jurisprudence (Part II)' (2003) 3 OUCLJ 1, 14–15; see also Christian R Burset, 'Advisory Opinions and the Problem of Legal Authority' (2021) 74 Vand L Rev 621, 660–6 (noting contemporary uncertainty about the sources of law).

[121] See David Lieberman, 'Law/Custom/Tradition: Perspectives from the Common Law' in Mark Phillips and Gordon Schochet (eds), *Questions of Tradition* (University of Toronto Press 2004) 235; see also JGA Pocock, 'Burke and the Ancient Constitution—A Problem in the History of Ideas' (1960) 3 The Historical Journal 125.

coloured by their political world views. Thus, each judge could sincerely see himself as the true heir to common law orthodoxy even as he reconfigured its elements into a new, partisan legal tradition.

B. The Interaction of Political and Legal Traditions

As we discussed in section 2, Mansfield was closely connected with the faction of 'court' Whigs, which evolved into what is sometimes called the 'neo-Tory' party, while Camden was associated with the 'Patriots'. The differences between the two parties were broad and deep, ranging from their models of political economy to their theories of imperial governance. For present purposes, however, we can focus on their contrasting views of political authority.

The difference was not simply a matter of one party prizing freedom and the other preferring order, as historians have sometimes suggested.[122] At a high level of generality, both parties would have endorsed the aphorism pronounced by Lord Hardwicke a generation earlier: law without liberty was tyranny, and liberty without law was 'anarchy and confusion'.[123] They would also have agreed with Hardwicke that the common law was directed 'to the preservation of the true Balance of our Excellent Constitution', which sought to defend not just the 'Liberties of the People' against the 'danger from Encroachments of the Crown', but also the 'the Lawful Power of the Crown' against attacks 'by Faction or Popular Fury'.[124] But Camden and Mansfield had very different ideas about how to achieve that balance.

Tories took a more positive, technocratic view of centralised authority and its expansion in response to novel challenges. The heart of the Tory programme was restoring order to Britain and its empire.[125] Their project required hierarchical, professionalised and flexible institutions that could respond decisively to the emerging needs of a complex polity.[126] Like the 'court' Whigs before them, Tories believed the constitutional settlement of 1688 authorised them to craft such a system of government, and that its operation ought to be entrusted to a (relatively) expert bureaucracy under their own vigorous direction.[127]

Patriots also supported a vigorous state, but they feared the corruption and tyranny that might come from concentrating power too narrowly. In their view,

[122] See eg John Phillip Reid, 'In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution' (1974) 49 NYU L Rev 1043, 1043.

[123] BL Add Ms 35878, ff 40, 47. Camden and Mansfield both made substantially similar statements. See eg *Entick v Carrington* BL Add MS 36206, ff 24–48, printed in Arvind and Burset (n 42); Oldham, *English Common Law* (n 1) 229.

[124] BL Add Ms 36115, ff 97–8.

[125] du Rivage (n 20) 6–8; Vaughn (n 20) 169–70; see also Lisa Ford, *The King's Peace: Law and Order in the British Empire* (Harvard UP 2021).

[126] Justin duRivage and Claire Priest, 'The Stamp Act and the Political Origins of American Legal and Economic Institutions' (2015) 88 S Cal L Rev 875, 888–90.

[127] See John Brewer, *The Sinews of Power: War, Money, and the English State, 1688–1783* (Alfred A Knopf 1989) 59; Sarah Kinkel, *Disciplining the Empire: Politics, Governance, and the Rise of the British Navy* (Harvard UP 2018); Steven Pincus, Tiraana Bains and A Zuercher Reichardt, 'Thinking the Empire Whole' (2019) 16 History Australia 610, 621.

English liberty depended not on technocratic professionalisation, but on representative institutions, distributed authority and strict conformity to established rules. They put special weight on traditional institutions, such as trial by jury.[128]

The Tories' dynamic approach to British institutions fit well with Mansfield's historicised view of law. Since his days as a barrister, he had presented the common law as contingent and committed to its own progressive perfection. In arguing *Omichund v Barker*, for instance, he had explained that the absence of precedents for 'infidel' testimony reflected only the parochial condition of English commerce in earlier times, rather than a deep-seated commitment to excluding non-Christian witnesses.[129] Because the common law was contingent, it was also capable of development and refinement. Steered by expert judges, it could 'work itself pure by rules drawn from the fountain of justice'. Near the end of his judicial career, he made the same point. 'General Rules are adapted, to the frequent and ordinary State of the Subject Matter to which they relate, at the time when they are made', he explained. 'But in process of Time, through the Succession of Ages, New Manners arise, New Modes of Acting diversify the Subject and beget Cases within the letter but not within the Reason of the general Rule.'[130] This view of legal history made doctrinal innovation more palatable: new circumstances demanded new rules. Precedent was, as he put it in *Jones v Randall*,[131] 'evidence of the law', but 'not law in itself, much less the whole of the law', and the law did not consist solely of cases.[132] Evolving social practices—'New Manners' and 'New Modes of Acting', as well as 'commerce, arts and circumstances'[133]—could shed light on the direction legal innovation should take.

Mansfield's use of merchant practice to develop commercial law is perhaps the best-known example of his approach to legal change, but common law copyright provides an equally clear illustration. The practices of the Company of Stationers were, to him, evidence of new modes of acting that the common law ought to accommodate. The judicial practice of granting interlocutory injunctions to protect the Company of Stationers' rights provided evidence that it conformed to natural principles. A skilled judge could build the common law on these materials.[134]

Indeed, as Lieberman and others have shown, Mansfield generally preferred that judges, not legislators, take the lead in keeping English law up to date,[135] and he was prepared to read down statutes to this end. In *R v Webb*, for example, Mansfield urged jurors not to enforce anti-Catholic penal laws by arguing that

[128] See eg Brewer, *Party Ideology* (n 20) 260–1.

[129] 1 Atkyns 31; see discussion in Lieberman, *Province of Legislation Determined* (n 2) 90; Jud Campbell, 'Testimonial Exclusions and Religious Freedom in Early America' (2019) 33 Law & Hist Rev 431.

[130] Lord Mansfield, Ringsted v Lady Lanesborough: Copy Demurrer Book (1782), NRAS776, Mansfield Papers, box 68, Scone Palace.

[131] (1774) Lofft 383, 98 ER 706.

[132] ibid 385.

[133] ibid.

[134] *Millar v Taylor*, Coke-Hargrave Report (n 42) 95.

[135] Lieberman, *Province of Legislation Determined* (n 2) 69–143.

the laws were only made *in terrorem* and not designed for regular enforcement, particularly in an era where the power of the pope had been diminished.[136]

This perspective prioritised judicial technocracy over representative institutions. But given the Tories' comparatively elitist approach to governance, it was unproblematic for legal development to be driven by a relatively small corps of experts.[137] Mansfield certainly had less reason than Camden to focus on the separation-of-powers concerns that so often animated the Patriots. When Mansfield entered politics, the same party—and, indeed, the same men—led Parliament, the ministry and the judiciary, dampening institutional rivalries and encouraging judges to take a more technocratic approach to institutional competence. We see this not only in Mansfield's preference for judicial over legislative reform, but also in his efforts to bring law and equity into greater harmony (a project previously endorsed by Hardwicke).[138] From the 'court' and Tory perspective, the elaborate system of institutional checks and jurisdictional boundaries that characterised seventeenth-century jurisprudence was a historical artifact that had less relevance when the same Whigs controlled everything and the threat of royal absolutism had diminished.

Camden, in contrast, spent most of his career in the service of an opposition party at odds with the Crown. Although he was not a reflexive opponent of executive action, he retained a sharper awareness than Mansfield of its potential abuses,[139] and a keener sense of the role of traditional institutions in restraining the excessive accumulation of power. This commitment to traditional institutions led Camden to a view of English legal history that was comparatively static and even ahistorical. When confronted in 1766 with evidence that taxation and representation had once been severable—*pace* the American Patriots—he rejected the historical inquiry out of hand: 'To endeavour to fix the era when the House of Commons began in this kingdom, is a most pernicious and destructive attempt … owing to the idle dreams of some whimsical, ill-judging antiquarians.'[140] Even revolution did not change the law. 'The Revolution only restored this Constitution to it's first Principles', Camden insisted. 'It did nothing more.' Accordingly, a practice dating merely from 1688 was 'much too modern to be Evidence of the Common Law'.[141] The first principles of the constitution were static.

[136] John Holliday, *The Life of William, Late Earl of Mansfield* (P Elmsly 1797) 179; see also *Foone v Blount* (1776) Cowp 464, 98 ER 1188.

[137] cf Henry Horwitz and James Oldham, 'John Locke, Lord Mansfield, and Arbitration During the Eighteenth Century' (1993) 36 The Historical Journal 137, 150 (noting 'Mansfield's well-documented practice of relying heavily for assistance on a small coterie of legal professionals').

[138] See Mansfield to Hardwicke (10 December 1758), BL Add MS 35595, f 312.

[139] For the divergence between Camden and Mansfield on the Crown's threat to liberty, see Christian R Burset, 'Redefining the Rule of Law: An Eighteenth-Century Case Study' (2022) 70 American Journal of Comparative Law 657, 680–1.

[140] Arvind and Burset (n 76). Camden warned against 'inquiring too minutely into the origin[ ]' even of 'established' institutions that he disfavoured, such as Exchequer's *quo minus* jurisdiction. [Charles Pratt], 'A Discourse against the Jurisdiction of the King's Bench over Wales, by Process of Latitat' [c 1747] in Hargrave (n 102) 422.

[141] ibid; see also Pratt (n 140) 420 ('In a matter that depends upon usage, every body knows that modern precedents are the same as no precedents').

This did not mean that history was irrelevant for Camden. He could scrutinise the pedigree of a practice to test its evidentiary value, as in his dispute with Mansfield over copyright.[142] If a practice's origins lay in the prerogative, as with the Company of Stationers' treatment of literary property, then the practice was evidence of neither natural principles nor the common law.[143] Camden also used historical context to calibrate a precedent's relative authority,[144] or clarify the boundaries of a disputed power.[145] But history could not provide a basis on which to alter settled rules or to invent new ones, as he emphasised in *Entick*.[146] Nor could it be a basis on which to critically scrutinise the foundations of the law itself. While Mansfield saw the common law as working itself pure, Camden's view was more defensive: a yardstick for measuring new innovations and a bulwark against new threats to liberty.

Camden acknowledged that the law sometimes had to change, but his approach to change differed from Mansfield's. Camden preferred to entrust the law to representative institutions—particularly legislatures and juries—as the ultimate guardians of both legality and the common good. This understanding of legal authority underpinned his jurisprudence not just in cases directly involving executive action, but also in cases where the power of the executive was only tangentially relevant, such as copyright. The common law had a very important place, but Camden prized it for its stability rather than its capacity to generate new ideas.

More generally, Camden's jurisprudence reflected the Patriot distrust of concentrated power, whether held by judges, secretaries of state or even Parliament. Hence his insistence that 'extensive' powers always be justified by clear legal authority—unlike Mansfield, who was at least in principle prepared to fudge if public utility and the common good required it.[147] It is also remarkable that Camden, despite his preference for legislative over judicial change, bucked the contemporary tendency toward parliamentary sovereignty, arguing that even Parliament was bound by fundamental constitutional principles, including natural law, even if they were not justiciable.[148]

[142] See also ibid 305.

[143] Indeed, an attempt to insist on the legality of such a practice might justify a strong judicial reaction: in *Huckle v Money* (1763) 2 Wils KB 205, 207; 95 ER 768, 769, Camden held that it justified the award of exemplary damages; Joseph Sayer, *The Law of Damages* (W Strahan and M Woodfall 1770) 221 (citing a contemporary manuscript report); TT Arvind and J Steele, '*Huckle v Money*: Exemplary Damages and Liberty of the Subject' in E Katsampouka and J Goudkamp (eds), *Landmark Cases in the Law of Punitive Damages* (Hart Publishing 2023).

[144] Thus, he denied precedential weight to the case of the Seven Bishops, because history revealed the judges to have been royal stooges and, in one instance, 'a rigid and professed Papist'. He placed more weight on the arguments 'of the defendants' counsel, who were all of them lovers of liberty'. *The Case of John Wilkes* (1763) 19 St Tr 990, 991, 993.

[145] See eg Arvind and Burset (n 76) 290.

[146] *Entick v Carrington*, BL Add MS 36206, f 37, printed in Arvind and Burset (n 76).

[147] cf Endicott's identification of Blackstone and Mansfield with a 'positive conception' of the executive's powers: T Endicott, 'Was *Entick v Carrington* a Landmark?' in A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing 2015) 122.

[148] See John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Northern Illinois UP 2004); Lord Camden, 'Speech on the Declaratory Act' in Simmons and Thomas (n 106).

C. A Further Example: The Jurisdiction of English Courts

The gap between Patriot and Tory legal traditions, and the impact of political traditions on legal counterparts, is seen most clearly in how competing political approaches to empire influenced an area of law as technical as the jurisdiction of the central courts. Mansfield repeatedly found that the tribunals of Westminster Hall, particularly his own court of King's Bench, had power to decide cases arising outside of England. Camden was generally more sceptical.

Consider two cases from Minorca—both trespass actions by Minorcans against British officials who abused their power. The first, *Pons v Johnston* (1765), was heard by Camden at *nisi prius*.[149] Although the case was unreported, the defendant, Lt Gov James Johnston, remembered Camden as declaring 'that the Tribunals in Westminster Hall had nothing to do with what happen'd in the Island of Minorca'.[150] That was probably an exaggeration. The barrister Francis Buller recalled *Pons* as articulating a more limited rule: that an action could not be brought in which 'the *lex loci* is so intermixed with the case as to alter the case, and vary the legality of the transaction'.[151] Johnston had apparently argued that his actions, although possibly unjustifiable under English law, had been authorised by the old laws of Minorca, which remained in force after Britain's conquest of the island. Camden (in Buller's telling) thought that English judges could only apply English law, and that he therefore could not hear the case.[152] But either way, *Pons* suggested a limited role for English courts in colonial cases. Nearly a decade later, Mansfield took a different approach in the more famous case of *Mostyn v Fabrigas*, which affirmed that colonial officials could indeed be sued in Westminster Hall for torts committed in Britain's colonies—even if those cases involved the application of non-English law.[153]

These decisions reflected each judge's more general attitude toward the role of the central courts. As early as 1747, Camden had written an anonymous tract criticising attempts to extend the jurisdiction of King's Bench into Wales.[154] (His view initially prevailed, but was rejected by Parliament and King's Bench in the 1770s.[155]) Mansfield, in contrast, consistently projected his court's jurisdiction outside of England—whether by issuing *habeas corpus* and other prerogative writs,[156] or by hearing transitory actions arising overseas.[157] Indeed, he seemed

[149] He also heard a companion case, *Ballister v Johnston*.
[150] James Johnston to Lord Dartmouth (12 January 1774), TNA CO 174/8, 49.
[151] 20 St Tr 196–7 (argument of Francis Buller in *Mostyn v Fabrigas*).
[152] Camden's jurisdictional musings were probably dicta. News, *Lloyd's Evening Post* (3–5 July 1765); 20 St Tr 197; 20 St Tr 213.
[153] *Mostyn v Fabrigas* (1775) 1 Cowp 161; 98 ER 1021.
[154] Pratt (n 140) 422. For the authorship of that tract, see Camden to Francis Hargrave (14 May 1789), BL Hargrave MS 513, 25v–26r.
[155] *Penry v Jones* (1779) 1 Douglas 213; 99 ER 139; *Lampley v Thomas* Wils KB 193, 206; 95 ER 568, 576; Frivolous Suits Act 1773, 13 Geo 3, c 51.
[156] See eg *R v Cowle* (1759) 2 Burrow 834, 853–4; 97 ER 587, 598; Paul D Halliday, *Habeas Corpus: From England to Empire* (Belknap Press 2010) 77.
[157] See eg *Wall v McNamara* (1779) (unreported but quoted in *Sutton v Johnstone* (1786) 1 Term Rep 493, 536–7; 99 ER 1215, 1239).

eager to inject his court into colonial cases. For example, *Perrin v Blake*, a prominent case involving the construction of wills, originated in Jamaica and came to England via an appeal to the Privy Council. Mansfield happened to be the only judge present when *Perrin* came before the Council's committee for colonial appeals, which meant that the case was his to decide. But rather than resolving it himself, he persuaded the parties to stay their appeal and instead bring a feigned action in King's Bench.[158]

Critics sometimes depicted these manoeuvres as politically motivated—a product, perhaps, of Mansfield's zeal for policing the colonies.[159] But that was only half right. The two judges' approach to jurisdiction did reflect their politics, but not in a crude, results-oriented way. Jurisdiction was both highly technical (because it involved nice questions about the scope of writs) and politically salient (because of its implication for the structure of imperial governance). In at least one respect, it ran against political type for Camden to take a more restricted view than Mansfield of the jurisdiction of the Westminster courts. Of the two, Camden was generally seen as more suspicious of Crown power, while Mansfield was thought to be more comfortable with the royal prerogative (as discussed above). But the effect of Camden's jurisdictional scepticism was to push colonial disputes into the hands of the Crown. When Minorcans were unable to obtain relief from Common Pleas in *Pons v Johnston*, they turned instead to the Privy Council—a prerogative body.[160] Conversely, it was Mansfield who sought to shift colonial cases away from the Privy Council and into Westminster Hall.

Nonetheless, Camden's approach to jurisdiction aligned with his politics in several ways, including Patriots' suspicion of centralised power and their preference for channelling authority through traditional institutions. Starting at least in the 1730s, Patriots sought to devolve some measure of political control to the localities of the British Empire, both overseas and within Britain. Their commitment to decentralisation extended to courts; Watson has described Patriots as 'proposing a protofederalist model of an imperial judiciary that balanced British

[158] The use of a feigned action itself was not itself unusual; courts of equity had directed them since the seventeenth century. JH Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (OUP 2001) 51–2. But it was apparently unusual for the Privy Council to send a case to King's Bench: as Mansfield noted at the time, 'I don't know it ever was done'. Joseph Henry Smith, *Appeals to the Privy Council from the American Plantations* (Columbia UP 1950) 325, fn 338 (quoting WO 1/404/55). The novelty of the reference is further suggested by the procedural hiccups that accompanied it. Mansfield first tried to certify the question to King's Bench; only after his colleagues rejected that device was a feigned action of trespass instituted. ibid 326.

[159] See eg Cannon (n 35) 212. In *Barry v Nugent* (1782), which came to King's Bench on a writ of error from Ireland, Mansfield's willingness to hear the case suggested to some observers that he meant to maintain English jurisdiction over Ireland despite Parliament's recent repeal of the Declaratory Act (1719). But the writ had been brought before the repeal, and Mansfield's actions were consistent with the legislation in force at the time. Peter Jupp, 'Earl Temple's Viceroyalty and the Question of Renunciation, 1782–3' (1971) 17 Irish Historical Studies 499, 511–12; Andrew Lyall, 'The Irish House of Lords as a Judicial Body, 1783–1800' (1993) 28/30 Irish Jurist 314, 324; Historical Manuscripts Commission, *The Manuscripts of the Earl of Buckinghamshire, the Earl of Lindsey, the Earl of Onslow, Lord Emly, Theodore J. Hare, Esq, and James Round, Esq* (HM Stationery Office 1895) 175.

[160] Pratt announced his decision on 25 June; the Privy Council authorised the taking of depositions concerning Johnston on 17 July. TNA PC 2/111/284–5, 294–5.

authority with local autonomy'.[161] This decentralised model of judging could take various forms, but it encouraged Camden to be sceptical about Westminster courts' efforts to expand their geographic reach.

Camden accepted that the central government would need to superintend local courts, but the 'natural and proper' institution for that role was the Privy Council.[162] Channelling litigation through the Privy Council would ensure that the central government exercised a merely appellate role, allowing local judges and juries to determine cases in the first instance.[163] It also reflected the common dignity of all constituent parts of the British Empire, each of which might claim with equal authority to administer justice in the name of the king.[164]

Camden's limited view of jurisdiction also reflected the legal conservatism of the Patriot tradition: 'what never has been done ought not to be done now', as he approvingly quoted a maxim of Littleton.[165] As he told it, the courts of Westminster Hall had not previously meddled in colonial or Welsh affairs, and that was enough reason for them not to start. This was not traditionalism for its own sake, but rather a reflection of Patriots' insistence on popular accountability. For them, custom was a source of law because it reflected the consent of the kingdom.[166] It could only be overturned, therefore, by the kingdom's own representatives in Parliament. Without legislative authorisation, any new exercise of jurisdiction was to 'usurp' new power unlawfully.[167]

Mansfield worked from different assumptions. Both the 'court Whigs', to whom he owed his early career, and the 'Tories', with whom he later aligned, were committed to a more centralised and hierarchical empire.[168] This was reflected in a number of programmes starting in the 1740s: more aggressive attempts to anglicise Scotland; the professionalisation of government, particularly the armed forces; and tightening control over the American colonies.[169] From this perspective, local institutions and participatory government had less value, and there was no reason to elevate provincial courts over the technically superior justice administered in Westminster Hall.

[161] Watson (n 115) 37; see also [Benjamin Franklin], 'Subjects of Subjects' (January 1768), National Archives <https://founders.archives.gov/documents/Franklin/01-15-02-0019>.

[162] Pratt (n 140). Camden and Mansfield both saw jurisdiction over Wales as conceptually related to jurisdiction over the colonies. ibid 389; *Mostyn* (n 153).

[163] Patriots' commitment to imperial federalism explains why they sometimes spoke favourably of the prerogative despite their general distrust of executive power: properly understood, the Crown could unite a federation of locally representative institutions. See Steilen (n 102) 575–7.

[164] Thomas Jefferson, who shared Camden's Patriot politics, expressed a similar view. See Thomas Jefferson, *A Summary View of the Rights of British America* (Reprinted for G Kearsly 1774) 5–6, 41–2. For Jefferson's self-conscious emulation of Patriot jurists, see text at n 190.

[165] Pratt (n 140) 419.

[166] See Bl Comm I, 74; David Lieberman, 'The Legal Needs of a Commercial Society: The Jurisprudence of Lord Kames' in Istvan Hont and Michael Ignatieff (eds), *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* (CUP 1986) 239.

[167] Pratt (n 140) 419.

[168] See Browning (n 112) 151–74.

[169] Text at n 127.

This is perhaps why Mansfield steered *Perrin v Blake* from the Privy Council, which lacked a reputation for judicial excellence, to King's Bench.[170] The representative character and constitutional history of an institution mattered less than the quality of its work. This pragmatic emphasis on the technocratic excellence of government and its effectiveness at maintaining order was characteristic of the Tory legal tradition; and it stands in sharp contrast to the Patriot preference for rules and methods that strengthened representative institutions and maintained strong checks both on the concentration of power and its inevitable abuse.

D. A Final Example: *Campbell v Hall*

One final example will serve to encapsulate and pull together the different strands of the duelling traditions. *Campbell v Hall* (1774) challenged a tax in Grenada, which Britain had taken from France in 1763.[171] The Crown had imposed the tax by letters patent without the authorisation of Parliament or the colonial assembly. The case presented two questions: whether the Crown had the prerogative power to impose such a tax; and whether, if the Crown did have such a power, it had relinquished it by promising English law to Grenada's inhabitants.[172] Mansfield tried the case and delivered the opinion for King's Bench.

Mansfield thought the first question was easy. Conquerors could generally 'make new laws for a conquered country', such as Grenada.[173] In the case of Britain, the king exercised this right of conquest subject to the supremacy of Parliament and to the requirement that he not violate 'fundamental principles'. Such principles included a principle of generality: in each colony, every law must 'equally affect … all persons and property within the limits thereof'.[174] Because the challenged tax did not violate that or any other fundamental principle, the king could impose it by prerogative. This led to the second question. George III had promised English-style government to Grenada in several earlier instruments, including the well-known Proclamation of 1763. In doing so, Mansfield explained, the king had divested himself of the unilateral power to tax, which could henceforth be exercised only by the island's assembly or the imperial Parliament.[175] The tax, therefore, was void.

Camden agreed with the outcome in *Campbell*, and cited it favourably during a subsequent debate in Parliament over the system of government instituted by the Quebec Act 1774.[176] But he gave it a distinctively Patriot spin, mischaracterising its reasoning (perhaps deliberately) so as to suggest a very different theory of the prerogative's place in the empire. Mansfield had suggested that the Crown exercised a plenary legislative power over conquered colonies, subject

[170] For the deterioration of the Privy Council as a judicial body, see PA Howell, *The Judicial Committee of the Privy Council 1833–1876: Its Origins, Structure, and Development* (CUP 1979) 8–15; Smith (n 158) 655–64.
[171] 20 St Tr 239.
[172] 20 St Tr 322.
[173] ibid 323.
[174] ibid
[175] ibid 329–30.
[176] 18 Parl Hist 659.

only to a thin set of 'fundamental principles' and the ultimate superintendence of Parliament. Camden, in contrast, insisted that the king was 'constitutionally … required to extend to' conquered colonies 'the laws of England, and the benefit of' an English-style constitution.[177] The Crown's 'legislative' power was merely ministerial. It permitted neither new laws nor new taxes, but only the introduction of English institutions: any other type of institution, such as a legislature less independent of the governor, would be unconstitutional.[178]

Both accounts were plausible. Mansfield's approach reflected the long-standing consensus that conquerors 'may indeed alter and change' the laws of conquered countries.[179] But Camden was equally correct to claim that British monarchs had historically exercised their right of conquest by introducing English law.[180] As the judges did elsewhere, each resolved the tensions within the English legal tradition by emphasising the parts that were easiest to square with his politics. Camden's approach, which insisted on the king's duty to transplant English law, aligned with Patriots' distrust of executive discretion, as well as their fondness for traditional English institutions.[181] It also aligned with Patriot political economy, which emphasised the developmental benefits of transplanting English law.[182] Finally, it reflected Patriots' emphasis on custom and consent. As one like-minded lawyer put it, when the Crown transplanted English law to a conquered colony, it transmitted a set of 'rights and privileges' that 'may well be presumed to have the approbation of the conquering nation, though done without an express concurrence of their parliament'.[183] In the immediate aftermath of conquest, it might be impractical for Grenada to govern itself, or even for Parliament to prescribe a system of government. But that did not mean the Crown could disregard the consent of the governed. Instead, by imposing the common law, it ensured that Grenada would be governed by laws to which the people of England had consented.[184] And since Patriots insisted that metropolitan and colonial subjects were equally British,[185] that was close to saying that Grenadians themselves had consented.

These considerations had less appeal for Mansfield. Like other paternalists, he was relatively comfortable with executive discretion. That discretion had to satisfy basic requirements of justice—'fundamental principles'—but those were not identical to the demands of English law.[186] Indeed, paternalists believed that good governance and basic fairness sometimes required that English law be withheld

[177] ibid; see also Richard Bourke, 'Edmund Burke and the Politics of Conquest' (2007) 4 Modern Intellectual History 403, 412–13.
[178] 18 Parl Hist 657, 660.
[179] See eg 1 Bl Comm 107.
[180] See Burset, *Empire of Laws* (n 31) 15–38.
[181] See John Phillip Reid, *Constitutional History of the American Revolution* (University of Wisconsin Press 1986) vol 1, 155–8.
[182] Burset, *Empire of Laws* (n 31) 64–89.
[183] This is from an extended critique of *Campbell* in Francis Maseres, *The Canadian Freeholder: Volume II* (B White 1779) 67.
[184] See Postema (n 14) 16 (describing the consensual basis of the common law in Blackstone's theory).
[185] See eg Reid, *Constitutional History of the American Revolution* (n 181) vol 4, 120; Watson (n 115) 36.
[186] See Burset, 'Redefining the Rule of Law' (n 139).

from colonies with non-English majorities.[187] So, too, did the wider interests of Empire, which sometimes demanded policies that retarded the development of certain colonies.[188] Such an approach was anathema to Patriots like Camden, but it was central to paternalists like Mansfield. Parliament, the Crown and imperial bureaucrats—not English law or local institutions—would hold the empire together and ensure its prosperity.[189]

4. Conclusion

As Thomas Jefferson neared his death in 1826, his mind turned to the vacant chair of law at the University of Virginia. 'In selecting our Law-Professor', he told James Madison, 'we must be rigorously attentive to his political principles'. The reason, he explained to his old friend, was that one's approach to the common law was inevitably coloured by partisan politics. Before the American Revolution, 'our lawyers were … all whigs' trained in the 'orthodox doctrines' of Coke. More recently, however, American law students had been seduced by 'the honied Mansfieldism of Blackstone' and 'began to slide into toryism'. Although America's young lawyers still 'suppose[d] themselves indeed to be whigs', their jurisprudence had acquired a very different tint.[190]

Although we might dispute the details of Jefferson's story, his general approach holds lessons for legal scholars. The common law in the later 18th century was riven by party politics. To be sure, many propositions commanded a consensus across the political spectrum, and conscientious judges treated the law as a matter of precedent and principle, not party whim. But party shaped judges' views of the principles themselves. There were distinct 'Tory' and 'Patriot' traditions of common law.

This insight has several implications. First, the partisan fracturing of common law jurisprudence might explain certain aspects of legal change in the later 18th century. Historians have documented a number of transformations in the common law after 1760: an increasing attention to (and anxiety about) the nature of legal authority; a rise in the quantity and quality of legal literature; a thinner, more formal conception of legality; and an increasingly 'top-down' sense of law

[187] See *Campbell* 20 St Tr 325; Burset, *Empire of Laws* (n 31) 119–48.

[188] Christian R Burset, 'Quebec, Bengal, and the Rise of Authoritarian Legal Pluralism' in Ollivier Hubert and François Furstenberg (eds), *Entangling the Quebec Act: Transnational Contexts, Meanings, and Legacies in North America and the British Empire* (McGill-Queen's UP 2020) 138–41.

[189] cf Ford (n 125).

[190] Jefferson to Madison, 17 February 1826, in *Founders Online*, US National Archives <https://founders.archives.gov/documents/Madison/04-03-02-0712> accessed 1 February 2024; see also James R Stoner, 'Sound Whigs or Honeyed Tories? Jefferson and the Common Law Tradition' in Gary L McDowell and Sharon L Noble (eds), *Reason and Republicanism: Thomas Jefferson's Legacy of Liberty* (Rowman & Littlefield 1997); David T Konig, 'Whig Lawyering in the Legal Education of Thomas Jefferson' in Robert C Baron and Conrad Edick Wright (eds), *The Libraries, Leadership, & Legacy of John Adams and Thomas Jefferson* (Fulcrum 2010); Matthew Steilen, 'Genteel Culture, Legal Education, and Constitutional Controversy in Early National Virginia' (2023) 41 Law & Hist Rev 709; Robert R Livingston to Jefferson, 31 May 1801, in *Founders Online*, US National Archives <https://founders.archives.gov/documents/Jefferson/01-34-02-0178> accessed 1 February 2024 ('It is true that many of the whig Lawyers have been of opinion that truth cannot be a libel, & this was strenuously maintained by Lord Camden against Lord Mansfield').

as command.[191] Explaining these changes is a task for future work, and we doubt that any single factor is responsible for them. But we suspect that the fractious nature of 18th-century politics is part of the story. As the basic principles of law increasingly became matters of partisan contestation, long-standing assumptions about legal authority came under pressure, and legal commentators were driven to think more carefully about how to rebuild a workable legal consensus.

More fundamentally, recovering partisan legal traditions helps us make better sense of why it can be so challenging to make late 18th-century sources speak with one voice. The sources can be read to support an understanding of the law as a flexible system, grounded in customary practice and the common good;[192] but also as a system of artificial reason, oriented towards resolving disputes through adjudication.[193] Similarly, they can be read as supporting a view of executive power as capacious in the pursuit of public utility, or as limited and strictly controlled by the common law.[194]

The fragmentation of the 18th-century common law tradition discussed in this article helps explain why this is so; but it also offers a way for scholars to navigate the challenge. Unlike historians, who seek primarily to understand the contours and causes of past events, doctrinal and theoretical scholars need a past that is usable as well as intelligible.[195] The difficulty of weaving a coherent account of 18th-century jurisprudence poses several challenges to that endeavour. Although courts and commentators sometimes pretend that Hanoverian lawyers agreed about everything, they usually know better.[196] But they have not been sure what to do with that insight. Sometimes, doctrinal tools let us pick a clear winner by demonstrating that one side of the debate was simply wrong as a matter of law.[197] But that is not always possible. Sometimes this is because the sources are imprecise or unreliable, or because 18th-century notions of legal authority were messier and less hierarchical than ours today.[198]

More often, however, it is because it is not possible to declare one tradition's view of the law as correct in a purely doctrinal sense. Indeed, a rigidly doctrinal

[191] See eg Burset, 'Advisory Opinions' (n 120) 661–5; Burset, 'Redefining the Rule of Law' (n 139); Michael Lobban, 'The English Legal Treatise and English Law in the Eighteenth Century' in Serge Dauchy, Jos Monballyu and Alain Wijffels (eds), *Auctoritates: xenia R C Van Caenegem oblata* (Peeters 1997); Lemmings, *Law and Government in England during the Long Eighteenth Century* (n 27).

[192] See eg Postema (n 14) 6–13, 30–8.

[193] See eg Michael Lobban, 'Postema and the Common Law Tradition' (2022) 35 Ratio Juris 71, 73–6 (reviewing Postema).

[194] Compare Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press 2014) with Paul Craig, 'The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight' (2016) Oxford Legal Studies Research Paper 44/2016 <https://ssrn.com/abstract=2802784> (reviewing Hamburger).

[195] cf Annette Gordon-Reed, 'Writing About the Past That Made Us: Scholars, Civic Culture, and the American Present and Future' (2022) 131 Yale LJ 948, 955 (reviewing Akhil Reed Amar, *The Words That Made Us: America's Constitutional Conversation, 1760–1840* (Basic Books 2021)); Lawrence B Solum and Randy E Barnett, 'Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition' (2023) 118 Northwestern University Law Review 433, 445.

[196] See eg *Gamble v United States* 139 S Ct 1960, 1973 (2019) (citing an 18th-century decision as evidence that 'the common law' had not 'made up its mind' on a particular question).

[197] cf Baude and Sachs (n 4).

[198] See eg James Oldham, 'Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries' (2011) 29 Law & Hist Rev 181, 198–9.

approach to the past can lead to situations where researchers seem to be using history to avoid responsibility for the positions they take in relation to the present.[199] In contrast, recognising the plurality of traditions allows us to see that engaging with the past requires us not only to interpret a canon of texts, but also to resolve contested positions about the normative core those texts represent. This wider focus arguably fits better with what lawyers seek from the past. Whilst lawyers sometimes want to know how 18th-century courts would have handled a particular case, their invocations of the past usually seek more than positive legal authority;[200] lawyers crave the sanction not just of the common law, but of the common law *tradition*.[201]

Discerning that tradition requires a degree of professional judgment, and its boundaries can therefore seem contestable and even arbitrary.[202] Nevertheless, understanding that the past of English law was characterised by divergent traditions which were interwoven with the history of partisan political thought can offer some guidance. A primary implication of our analysis is that in choosing whether Camden or Mansfield provides a better account of the common law, a lawyer is not just weighing legal authorities, but also engaging with a *political* tradition. Reflecting on the common law's partisan history gives us a better sense of what traditions we are at least implicitly accepting.

[199] cf Anne Orford, *International Law and the Politics of History* (CUP 2021) 10. Some historians have disputed the extent to which scholars actually use history in this way. See eg Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 Journal of the History of International Law 7.

[200] See eg Jeffrey A Pojanowski and Kevin C Walsh, 'Enduring Originalism' (2016) 105 Geo LJ 97.

[201] This can be true of formalists and nonformalists alike. See Jiménez (n 6) 69; Pojanowski (n 12) 1413.

[202] See Jiménez (n 6) 78–9.