

## Rights Claims and Precedent in British Common Law

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Common law judges normally decide cases by precedents, by ruling that the case before them is an example of a rule given by an earlier case cited as precedent. However, the use of precedent in common law adjudication changed over time. In the eighteenth century, there was a significant crisis in this history characterized by changes in historical consciousness and changes in law reporting. More reported precedents (more examples) created problems because they could seem contradictory.

Common law precedents often stood in the way of desired enlightenment reforms. The anti-impressment campaign illustrates how the invocation of precedent and an attack on precedent functioned in a typical enlightenment rights campaign. Research into legal history could be used to support Crown prerogatives, as it was by Michael Foster in his opinion in *Broadfoot*, a case declaring that the crown had a common law right to impress mariners. However, legal history was also used to challenge the authority of precedent, both by contesting the historical meaning of cited precedents and, more fundamentally, by attacking the idea that the past was sufficiently continuous with the present that past precedents should determine present cases. Thus, critics of Foster's opinion attacked his precedents as relics of a feudal period that ought not to have authority in a modern commercial society. In rights cases, radical lawyers also pleaded the authority of Magna Carta, seen as declaring ancient "Saxon" freedom, as yielding good precedents, in contrast to the "bad" precedents from periods of feudalism or Stuart absolutism.

Past precedents as determined by eighteenth-century judges often blocked enlightenment rights campaigns. Rights campaigners, consequently, used two very different—and seemingly logically contradictory—strategies. On the one hand, they professed deep reverence for law, especially common law precedent, and developed strategies they thought could have immediate effect in contemporary courts. Thus, in the anti-impressment campaign, cases were brought to force officials to adhere strictly to the terms of press warrants and other test cases tried to exempt from impressment as many categories of men as possible. On the other hand, radical lawyers attacked some common law precedents in court, then went outside of common law courts to attack existing law, mobilize public opposition; they also appealed to Parliament to pass statutes overturning rules announced by common law judges. Opposition lawyers became heroic exemplars in these rights struggles, contrasting themselves with "court lawyers" more concerned with catering to ministerial desires than with articulating good law. Their desires to have courts rule on fundamental rights issues were repeatedly frustrated by judges' defining issues more narrowly and by allowing proceedings to end inconclusively. Parliament proved a more hospitable venue for reformers than the courts were; policy arguments and supporting data about modern social reality were more easily presented in Parliament than in common law courts, where judges looked back into history for precedents. Even in Parliament, though, crown law officers often helped block reform efforts, in part by defenses of the government's position as based on sound legal precedent and warnings to members that lay politicians would do more harm than good by interfering with the legal rules and mysterious, interconnected chains of precedent that only professional lawyers could properly understand.