

Magna Carta in Australia 1803–2015

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... the greatness of Magna Carta does not lie in what it meant to its framers. Its greatness emerges from what it has meant to political leaders and jurists down the ensuing centuries, during which the civil and political rights of the people have developed, and the rule of law has been established.¹

It's not so much what Magna Carta said or did as much as what it has come to represent: people's freedom to live the life they choose; and political authority chosen by the people and constrained by law.²

At the very heart of Magna Carta there was one idea in every word of the 63 clauses. It was the idea that, rather than settling the administration of a nation through conflict, through armies, through dictators and even through a benevolent monarchy, a group of words could explain to society how it is run. As Winston Churchill did indeed say, the Magna Carta represents the supreme law because it puts the rule of law above even the power of the monarch.³

Introduction

For a document that lasted barely nine weeks Magna Carta⁴ has had a long run. The secret to its survival has been its ability to adapt even though its authors in 1215 expected it to last in perpetuity.⁵ But from the beginning it was subject to change. Although Pope Innocent III annulled the charter in August 1215 it was reissued twice in the following year (including a special version for Ireland),⁶ once in 1217⁷ and

1 Commonwealth, *Parliamentary Debates*, Senate, 11 September 1952, p. 1281 (Senator O'Sullivan).

2 Tony Abbott, Magna Carta Lecture, Parliament House, Canberra, 24 June 2015.

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 June 2015, p. 6071 (Mr Shorten).

4 The charter was annulled by the pope on 24 August 1215: *Selected Letters of Pope Innocent III Concerning England (1198–1216)*, C.R. Cheney and W.H. Semple (eds), Thomas Nelson & Sons, London, 1953, pp. 212–19.

5 'Magna Carta, 1215' (Appendix 6) in J.C. Holt, *Magna Carta*, 3rd edn, revised and with a new introduction by George Garnett and John Hudson, Cambridge University Press, Cambridge, 2015, p. 397 citing chapter 63.

6 *Magna Carta Hiberniae*, 12 November 1216 may be found at http://ua_tuathal.tripod.com/magna.html (accessed 18 February 2015). For discussion see R.W. Dudley Edwards, 'Magna Carta Hiberniae' in John Ryan (ed.), *Essays and Studies Presented to Professor Eion MacNeill*, 1940, pp. 307–18; H.G. Richardson, 'Magna Carta Hiberniae', *Irish Historical Studies*, vol. 3, no. 9, 1942, pp. 31–3.

7 For the text of the various versions including the Articles of the Barons that preceded 1215 see Henry Rothwell (ed.), *English Historical Documents*, vol. 3, 1189–1327, Eyre and Spottiswoode, London, 1975, pp. 310–496.

became a statute in 1225⁸ and again in 1297.⁹ In the fourteenth century it was extended in several Acts of the English Parliament, most notably in the statutes that inserted the phrase due process of law into our constitutional vocabulary.¹⁰ It was continued in the medieval period by being both enforced by commissions of inquiry into alleged breaches¹¹ and also by being reaffirmed over 40 times by successive English parliaments.¹² Despite the attention given to Magna Carta it was not unique in Europe for it was part of a series of arrangements between the aristocracy and the Crown that eventually led to the rise of constitutionalism in the West.¹³ For instance, in 1222 the Golden Bull was issued in Hungary, sometimes called the Hungarian Magna Carta,¹⁴ while in 1188 arrangements were agreed to in Castile and Leon that parallel some of the ideas in Magna Carta.¹⁵

As historians have long known the charter has had a significant post-thirteenth-century history,¹⁶ especially in the seventeenth century where it was put to new uses and passed

8 9 Hen III c 1; 1 Statutes of the Realm 22–25.

9 Magna Carta 1297 (25 Edw I, c 1); 1 Statutes of the Realm 114. This is, of course, the statute acquired by the Commonwealth in 1952, a story told in *Australia's Magna Carta*, 2nd edn, Department of the Senate, Canberra, 2015. For the changes made by the different versions see Michael Evans and R. Ian Jack (eds), *Sources of English Legal and Constitutional History*, Butterworths, Sydney, 1984, pp. 55–60.

10 Liberty of the Subject (1354) (28 Edw 3 c 3); 1 Statutes of the Realm 345; Due Process of Law (1368) (42 Edw III, c 1); 1 Statutes of the Realm 388.

11 First authorised by *Articuli Super Cartas* 1300 (28 Edw 1 c 1); 1 Statutes of the Realm 136–7. For examples of such commissions see *Calendar of the Patent Rolls of Edward I, 1292–1301* (1895) 515; *Calendar of Patent Rolls, Edward III, 1327–1330* (1891) 150; 10 *Calendar of Patent Rolls, Edward IV, Edward V, Richard III, 1354–1358* (1909) 236, 396; *Calendar of Patent Rolls, Edward IV, Edward V, Richard III, 1476–1485* (1901) 23.

12 By the early seventeenth century the charter on one count had been confirmed above 30 times: *Chune v Piott* (1614) 2 Bulstrode 329; 80 ER 1161. For a fuller count see Faith Thompson, 'Parliamentary confirmations of the Great Charter', *American Historical Review*, vol. 38, no. 4, 1933, pp. 659–72. The parliamentary confirmation point was also made in 'Magna Charta: story of its origin', *Worker* (Brisbane), 30 April 1925, p. 2.

13 Brian M. Downing, 'Medieval origins of constitutional government in the west', *Theory & Society*, vol. 18, no. 2, 1989, p. 217; Francis Fukuyama, *The Origins of Political Order*, Profile Books, London, 2011, pp. 132, 326.

14 'Hungary's Golden Bull of 1222', www.hunsor.se/magyar1000ev/golden_bull1222.htm (accessed 1 October 2015).

15 Rafael Altamira, 'Magna Carta and Spanish medieval jurisprudence' in H.E. Malden (ed.), *Magna Carta Commemoration Essays*, [London], 1917, pp. 227–43.

16 The history of the charter between 1300 and 1629 is covered in Faith Thomson, *Magna Carta: Its Role in the Making of the English Constitution, 1300–1629*, University of Minnesota Press, Minneapolis, 1948. Ralph Turner, *Magna Carta: Through the Ages* (Longman, Harlow, 2003) takes the story up until the twentieth century.

into a mythology that in some ways has survived to this day.¹⁷ The greatest proponent of this mythology was of course Sir Edward Coke¹⁸ though he was not alone in this as other common lawyers of the age also reimagined Magna Carta and deployed it in contemporary debates.¹⁹

It was left to later generations to create written constitutions, control of the executive branch of government, trial by jury, an independent judiciary, parliamentary government, and electoral democracy based on the universal franchise via the secret ballot. None of these ideas or arrangements existed in 1215, which is why it is nonsense to attribute to the actors at Runnymede the capacity to have laid the foundations of the modern sense of the term rule of law. They were not prophets and they stipulated in chapter 63 of the charter that their agreement with King John would last forever. But of course that was not so, for as a judge pointed out in 1920, ‘Magna Carta has not remained untouched; and, like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and Persians’.²⁰ Most of the statutory version of Magna Carta 1297 was actually repealed by the British Parliament in 1863²¹ and today only three substantive chapters remain on the English statute book.²² Even the name did

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- 17 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* (1957, reissue 1987); Maurice Ashley, *Magna Carta in the Seventeenth Century* (1965); Sir Herbert Butterfield, *Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries* (1969); Paul Christianson, ‘Ancient Constitutions in the Age of Sir Edward Coke and John Selden’ in Ellis Sandoz (ed.), *The Roots of Liberty: Magna Carta, Ancient Constitution and the Anglo-American Tradition of the Rule of Law*, University of Missouri Press, Columbia, London, 1993, pp. 89–146. Magna Carta was also deployed in political arguments in other colonies, especially in America before 1776. See, for example, James Bowdoin, Joseph Warren and Samuel Pemberton, ‘A short narrative of the horrid massacre in Boston’ in Merrill Jensen (ed.), *Tracts of the American Revolution 1763–1776*, Hackett Publishing Company, Indianapolis, 1966, p. 211.
- 18 Edward Coke, *The Second Part of the Institutes of the Laws of England*, ed. W. Clarke, W. Clarke & Sons, London, 1817, p. 45. For his mythology see W.H. Dunning, ‘Truth in history’, *American Historical Review*, vol. 19, 1914, pp. 217, 224–5.
- 19 Such as John Selden in the *Case of the Five Knights (sub nom Darnel’s Case)* (1627) 3 Howell’s State Trials 1 and in debates on the Petition of Right 1628: John Guy, ‘The origins of the Petition of Right reconsidered’, *The Historical Journal*, vol. 25, no. 2, 1982, pp. 289–312. At page 302 Magna Carta is referred to.
- 20 *Chester v Bateson* [1920] 1 KB 829, 832 (KBD) (Darling J). I assume that the judge was alluding to Daniel 6:15.
- 21 *Statute Law Revision Act 1863* (26 & 27 Vict c 125) Schedule; 26 Statutes at Large 312, 317 where 17 of the 37 chapters of 1297 were repealed. For the present English status of Magna Carta 1297 see: www.bailii.org/uk/legis/num_act/1297/1517519.html (details the repeal legislation between 1863 and 1969); *The Mayor, Commonality and Citizens of London v Samede* [2012] 2 All ER 1039, 1049 [30] (CA).
- 22 *Halsbury’s Statutes of England and Wales*, 4th edn, Butterworths, London, 1985, pp. 14–18.

not emerge until 1217²³ and was for many centuries spelled Magna Charta until that was changed in the *British Museum Act 1946* (UK).²⁴

The two most famous chapters²⁵ of 1215 were chapters 39 and 40,²⁶ which were combined with a slight alteration into chapter 29 of 1297. Chapter 29 reads:

No Freeman shall be taken or imprisoned, or be disseised²⁷ of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor [condemn him] but by the lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.²⁸

Many of the arrangements we associate with the rule of law were initially denied to Australia on its settlement in 1788. A supreme court able to issue habeas corpus, for instance, did not begin operation until May 1824,²⁹ trial by civilian juries did not come in until 1832,³⁰ elected elements in the legislative councils were only introduced in the 1840s, and of course responsible government did not emerge until the 1850s. These are all elements of our constitutional arrangements that we call the rule of law. While Australia did not create most of these arrangements, other than voting by ballot, which was first legislated for in Tasmania in January 1856,³¹ we have both carried on the tradition and have shaped it to our own circumstances.

23 Albert White, 'Note on the name Magna Carta', *English Historical Review*, vol. 32, 1917, pp. 554–5.

24 'H cut out of Magna Charta', *News* (Adelaide), 10 May 1946, p. 5. For the argument in favour of the change see the speech by Lord Jowitt LC in United Kingdom, *Parliamentary Debates*, House of Lords, 9 May 1946, cols 117–20. The older spelling of Magna Charta was commonly found in early Australian references to the charter: *R v Sullivan* [1832] NSWSupC 78; 'Magna Charta', *The Australian* (Sydney), 19 July 1833, p. 4; *Abbott v Commissioner of the Caveat Board* [1841] TASSupC 19.

25 The name given to the parts unnumbered in the continuous Latin text of 1215, to the document by William Blackstone in 'The Great Charter and the Charter of the Forest' (1759) in William Blackstone, *Law Tracts*, vol. 2, Clarendon Press, Oxford, 1762, p. xxvi note.

26 Often reproduced in Parliament. See Commonwealth, *Parliamentary Debates*, Senate, 3 March 1927, pp. 45–6 (Senator Grant), 13 June 1950, p. 4099 (Senator Critchley), 12 February 2015, p. 711 (Senator Leyonhjelm), 15 June 2015, p. 3471 (Senator McGrath) and p. 3475 (Senator Milne); House of Representatives, 19 August 1952, p. 382 (Mr Menzies), 12 August 1999, p. 8597 (Mr McClelland), 11 August 2015, p. 47 (Mr Katter).

27 Disseised meant at the time the dispossession of real estate, often by violent means: W.S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John*, 2nd edn, Macleahose, Glasgow, 1914, pp. 274–5.

28 Magna Carta 1297 (25 Edw I c 29); 1 Statutes of the Realm 114–119, chapter 29.

29 *R v Johnson*, *Sydney Gazette and New South Wales Advertiser*, 8 July 1824, p. 2. Later that month an article entitled 'Anecdote of the Habeas Corpus Act' in the same newspaper dated 29 July 1824 at page 2 described habeas corpus as 'an another Magna Charta'.

30 *Jury Trials Act 1832* (NSW) (2 Will IV No 3) s 1.

31 Terry Newman, 'Tasmania and the secret ballot', *Australian Journal of Politics and History*, vol. 49, no. 1, 2003, pp. 93–101.

Nevertheless it is important to appreciate our present state. Australia ranks very highly on international indices of the rule of law. A 2015 ranking by the World Justice Project ranked Australia as tenth out of 99 countries behind New Zealand and several Scandinavian countries³² and in a democracy index published in 2012 Australia was ranked sixth out of 167 countries.³³ A 2010 study of the link between the rule of law and good governance rated Australia right at the top of world rankings.³⁴ Despite the attention given to corruption in recent years, especially with the creation of anti-corruption commissions in several states, Australia is a comparatively corruption free country. Transparency International of Berlin rates Australia as the eleventh least corrupt state in 2014.³⁵ As we would expect Australia is manifestly a free country, as Freedom House has consistently pointed out for many years.³⁶ One reason for this state of affairs has been our commitment to the rule of law and to democratic governance. We are, after all, one of the oldest democracies on the planet, having elected our legislatures since the 1850s, and we have been an innovator in the art of electoral efficiency. Australians ought to be aware that we taught the rest of the world how to vote in an effective and efficient manner.³⁷

My concern today is to account for the uses to which the charter was put in Australian history. As others will cover the law I will confine my remarks to the political and social uses of Magna Carta. By the nineteenth century the charter was beginning to be used in Australia and elsewhere in political and legal debates: uses that have continued in Australia right up to our own time. Opinions about the charter have varied from adulation and respect to dismissive irrelevance. One writer called it a secular relic³⁸ and it has been described as the keystone of English liberty.³⁹ Harry Evans wrote in 1998:

32 The Global Rule of Law Index, <http://worldjusticeproject.org/rule-law-around-world> (accessed 7 September 2015).

33 Democracy Index 2012: A Report from the Economist Intelligence Unit, www.eiu.com (accessed 7 September 2015).

34 Svend-Erik Skaaning, 'Measuring the rule of law', *Political Research Quarterly*, vol. 62, no. 2, 2010, pp. 449–60.

35 'Corruption by country/territory', Transparency International, www.transparency.org/country/#AUS (accessed 7 September 2015).

36 Freedom in the world, Freedom House, <https://freedomhouse.org/report/freedom-world/freedom-world-2015> (accessed 7 September 2015).

37 David Clark, 'Law reform as a legal transplant: the South Australian ballot in Australia and in America 1856–1910', *The Flinders Journal of Law Reform*, vol. 11, no. 2, 2009, pp. 293–325.

38 Stephanie Trigg, 'Parliamentary medievalism: the Australian Magna Carta as secular relic', *Australian Literary Studies*, vol. 26, no. 3–4, pp. 21–35.

39 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 April 1915, p. 2657 (Mr Riley). Or as the 'Bible of the Constitution', *Mercury* (Hobart), 19 June 1915, p. 4.

The actual content of Magna Carta is now not conducive to awe and reverence. Most of it consists of a lengthy and very tedious recital of feudal relationships which not only have no relevance to modern government but which would be of interest only to the most pedantic antiquarian.⁴⁰

General understanding: the common mistakes

The current Australian history curriculum initially did not include Magna Carta at all until protests made by at least one parliamentarian⁴¹ and others managed to get the charter into the curriculum. Still, inclusion in the curriculum does not guarantee that it will be properly taught. The textbooks written to implement the curriculum are one index of the contemporary knowledge of Magna Carta in Australia and are full of mistakes. The most common mistakes are:⁴²

That King John signed the document

This is the most common mistake made in the textbooks and often repeated by some members of the Commonwealth Parliament.⁴³ This is wrong for two reasons. First, while John could read there is serious doubt about whether he could write.⁴⁴ Second, and more to the point, kings did not sign these sorts of documents to signal their assent; rather they had others attach the royal seal to the document. This was done by attaching the seal to a ribbon, which was then put through a hole in the parchment. In 1924 and 1948 scholars who examined the four surviving copies of the 1215 version of Magna Carta established definitively that the charter was sealed not signed. Their detailed descriptions of the copies refer to three of the documents having a seal; in the case of the fourth copy the seal is missing though the place where it had been attached is clearly visible.⁴⁵ The practice was for the document to be drafted, before

40 Harry Evans, 'Bad King John and the Australian Constitution: commemorating the 700th anniversary of the 1297 issue of Magna Carta', *Papers on Parliament*, no. 31, 1998, p. 44. The 'pedantic antiquarians', i.e. medieval historians, have made great strides in recent years. See *Magna Carta*, with a new commentary by David Carpenter, Penguin Books, London, 2015.

41 Christopher Pyne, then opposition spokesman for education: *The Advertiser* (Adelaide), 1 March 2010, www.adelaidenow.com.au/news/christopher-pyne-slams-black-armband-national-education-curriculum/story-e6frea6u-1225835737539t (accessed 28 September 2015).

42 See my paper 'A confederacy of dunces: Magna Carta in the History 8 textbooks' at www.onlineopinion.com.au/view.asp?article=16029 (accessed 28 September 2015).

43 See, for example, Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 1912, p. 3357 (Dr Maloney), 5 April 1918, p. 3666 (Mr Catts), 14 November 1985, p. 2758 (Mr Hicks); Senate, 26 November 1941, p. 873 (Senator McLachlan), 23 March 1988, p. 1168 (Senator Coulter), 13 November 1990, p. 4076 (Senator McLean). Other parliamentarians have noticed that it was sealed: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 1948, p. 1993 (Mr Abbott), 20 August 1968, p. 294 (Mr Whitlam), 5 March 2014, p. 1794 (Mr Hutchinson).

44 'King did not sign Magna Carta', *Pittsworth Sentinel* (Qld), 19 August 1952, p. 1.

45 John C. Fox, 'The originals of the Great Charter of 1215', *English Historical Review*, vol. 39, no. 155, 1924, pp. 321–36; A.J. Collins, 'The documents of the Great Charter of 1215', *Proceedings of the British Academy*, vol. 34, 1948, pp. 233–79.

being sealed after which it was engrossed on parchment.⁴⁶ The only book to get this right is the Oxford Big Ideas: History 8⁴⁷ though the glossary at the back of the book contradicts this where it says that Magna Carta was signed by King John.⁴⁸ The MacMillan 8, the Nelson Cengage Learning 8, and the Pearson History 8 all claim that John signed the charter.

That the charter was published

The word published is misleading and might induce a reader to suppose that the charter was printed. The concept of publication in the thirteenth century did not include printing but copying by hand and by reading out the charter in churches. Now the obvious question here is did printing exist in England in the thirteenth century? The answer is no because movable type printing did not emerge until the publication of the Bible in Mainz, Germany, by Johannes Gutenberg in 1455⁴⁹ and in England when William Caxton printed the *Recuyell of the Historyes of Troye* in 1473.⁵⁰ In the era before printing, documents were copied by hand by clerks in the chancery.⁵¹

That the charter was the origin of democracy

This piece of nonsense appears in a paper issued by the Western Australian School Curriculum and Standards Authority 2012 and in several of the textbooks. Pearson History 8 states that:

These clauses represented the first steps towards political freedom for all and parliamentary democracy as they protected the rights of people and ensured that even the king was not above the law.⁵²

The Oxford Big Ideas, History 8 Teacher Kit also says that Magna Carta was ‘seen as one of the first steps towards the development of legal and political rights for “the people” and the start of modern democracy’.⁵³ These statements are potentially accurate only if they are properly explained. There is no reference to voting in the charter and it certainly was not about democracy. Elections did exist in the thirteenth

46 I.W. Rowlands, ‘The text and distribution of the writ for the publication of Magna Carta, 1215’, *English Historical Review*, vol. 124, no. 551, 2009, pp. 1422–31.

47 Mark Easton et al., *Oxford Big Ideas Geography History 8*, Victoria Oxford University Press, South Melbourne, 2013, p. 150.

48 *ibid.*, p. 333.

49 John Man, *The Gutenberg Revolution*, Review, London, 2002.

50 See ‘The first book printed in English’, *The Romance of the Middle Ages*, Bodleian Library, http://medievalromance.bodleian.ox.ac.uk/The_first_book_printed_in_English (accessed 10 October 2015).

51 Claire Brey, *Magna Carta: Manuscripts and Myths*, British Library, London, 2010, pp. 38–9.

52 Pearson History 8, p. 116. The claim that the charter was drawn up by the merchants (as well as the barons and bishops) is also completely wrong, though the rights of foreign merchants were mentioned in chapter 41.

53 Easton et al., *op. cit.*, p. 150.

century and were by a statute of 1275 meant to be free,⁵⁴ but the right to vote was only available for a tiny minority of male landholders, since the franchise was based on a property qualification.⁵⁵ It is a mistake to suggest that anyone at Runnymede thought about ideas such as democracy at all. The sentence is an example of the sin of reading present concepts into the past where they did not exist. The charter was not, as the Prime Minister pointed out to the House of Representatives in 1952, a charter of human rights or a democratic document.⁵⁶ It was an agreement between the king and his nobles about how certain medieval grievances would be handled.

That the king had to obey the law

According to the MacMillan History 8 ‘The *Magna Carta* stated that even the King had to obey the law’.⁵⁷ The charter stated no such thing. The king made a series of promises about how to deal with certain medieval matters, but there was no sweeping statement about obeying the law generally. The idea that even the king is not above the law emerged later in the thirteenth century in Henry de Bracton’s book circa 1280,⁵⁸ though it was hedged about with qualifications and, of course, was an idea not a reality. No one could sue the Crown in England until 1947⁵⁹ though it was possible to do so in the Australian colonies in the 1850s.⁶⁰ The king’s prerogative (that is, his common law executive powers) were in the thirteenth century extensive and could not be questioned in the courts as Bracton pointed out,⁶¹ a position that lasted at least until the early seventeenth century.⁶² Effective remedies to check the Crown, both legal and parliamentary, in other words only came into being in the seventeenth century. The problem is that while the rule of law did gradually emerge, especially with the Bill of Rights in 1689, it takes a knowledge of seventeenth-century constitutional history to understand this and that is not covered anywhere in the Australian history curriculum.⁶³

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- 54 *Statute of Westminster 1275* (Eng) (3 Edw I c 5); 1 Statutes of the Realm 28, which provided that elections ought to be free. An idea said to be at the root of all election law: *Kean v Kerby* (1920) 27 CLR 449, 459 (Isaacs J).
- 55 Ludwig Riess, *The History of the English Electoral Law in the Middle Ages*, Cambridge University Press, Cambridge, 1940, p. 64 referring to an election in 1283.
- 56 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 August 1952, p. 381: ‘The Barons knew nothing of democracy, and it is not supposed that they thought that they were establishing some form of democracy’.
- 57 Joanna Clyne et al., *MacMillan History 8*, MacMillan Education Australia, South Yarra, 2012, p. 83.
- 58 Henry de Bracton, *On the Laws and Customs of England*, translated by S.E. Thorne, Belknap Press of Harvard University Press, Cambridge, Mass., 1968, vol. 2, p. 33.
- 59 *Crown Proceedings Act 1947* (UK).
- 60 *Claims Against the Government Act 1852* (SA); *Claims Against the Government Act 1857* (NSW).
- 61 Bracton, op. cit., vol. 2, p. 33.
- 62 *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352.
- 63 David Clark, ‘Conniving in constitutional illiteracy’, *Quadrant*, vol. 58, no. 12, 2014, pp. 16–19.

Habeas corpus

A related misconception is that habeas corpus was somehow created by Magna Carta despite the fact that the term habeas corpus does not appear in the charter at all.⁶⁴ Actually there is a record of the term habeas corpus in 1206⁶⁵ and a case in 1214⁶⁶ and the history of the writ shows that it really expanded later in the thirteenth century and in its modern form as a writ of *habeas corpus ad subjiciendum* especially from the 1580s onwards.⁶⁷

Juries

There was also a view that Magna Carta 1215 created a right to trial by jury when it referred in chapter 39 to legal processes ‘except by the lawful judgment of his peers’.⁶⁸ Actually the modern jury did not then exist; rather persons were tried in the thirteenth century either by ordeal, battle or compurgation. The latter involved summoning oath helpers who were usually neighbours of the accused.⁶⁹ The view that Magna Carta either created or guaranteed trial by jury in the modern sense was forcefully asserted in the campaign for civilian juries in New South Wales in the 1820s and early 1830s, by linking the rights of Englishmen to trial by jury to Magna Carta.

The evidence shows that Australians are ignorant of most of this. Successive studies of civic knowledge show that knowledge of basic civics remains very weak while knowledge of the history that lies behind our institutions and values is even worse. The results of surveys suggest that there is cause for concern. In 1994, for example, a study of 15–19 year olds reported that:

- 90 per cent did not know what the Constitution covered
- 83 per cent did not know what the cabinet was
- 79 per cent did not feel they knew what the rights and responsibilities of citizens were.

64 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 October 1987, p. 1281 (Mr Reith).

65 *Tebaldus de Bilton v Wiltelmu fratrem suum*, Trin 8 John 1, 4 *Curia Regis Rolls* 153 r 41 m 8 (1206).

66 *Baldwin Tyrell's Case* (1214) in F.W. Maitland (ed.), *Select Pleas of the Crown*, Bernard Quaritch, London, 1887, p. 67.

67 Paul Halliday, *Habeas Corpus: From England to Empire*, Belknap Press of Harvard University Press, Cambridge, Mass., 2010, pp. 4–5.

68 Lay litigants often assert this and are rebuffed: *Stearman v Taylor* [2014] WASC 247 [14]. A proposal to create a Commissioner for Insolvency in nineteenth-century South Australia was attacked (unsuccessfully) because it denied a right to trial by jury created by Magna Charta: South Australia, *Parliamentary Debates*, House of Assembly, 11 September 1860, col. 820 (Mr Grundy).

69 *R v J*, SM (2013) 117 SASR 535, 541–542 [36]–[39] (Blue J); *R v Bryant* (1984) 15 DLR (4th) 66, 76–77 (Ont CA) (Blair JA). Innocent III abolished trial by ordeal in 1215: Finbarr McAuley, ‘Canon law and the end of the ordeal’, *Oxford Journal of Legal Studies*, vol. 26, no. 3, 2006, pp. 473–513.

Another study of 17 and 18 year olds, conducted around the same time, found that:

- nearly 50 per cent had ‘not much’ or ‘no’ interest in politics
- only 8 per cent had ‘a great deal’ of interest in politics.⁷⁰

An international survey of the knowledge and understanding of Magna Carta of 23 countries by a British polling organisation in January 2015 showed that only 53 per cent of the Australian sample had heard of Magna Carta. This ranked below the UK (79 per cent) and the US (65 per cent) and behind Hungary, Italy and Spain.⁷¹ In the 1920s and 1930s, in contrast, articles on Magna Carta were common in the press. The National Library digital newspaper database gives a total of 2048 articles on Magna Carta in the 30 years to 1949 but only 765 in the 40 years to 1990. Even allowing for repetitions, and the fact that there was a South Australian racehorse called Magna Carta in the 1930s⁷² that bumped up the number of citations of the term Magna Carta, there was far more coverage in earlier times than there is now. It was routine for newspapers, even those read by the working class, to regularly publish articles on the subject.⁷³

Nineteenth and twentieth century Australia

Magna Carta was used both in legal cases and in political arguments to criticise government policies and to assert rights that the colonialists thought they deserved, but which they thought had been infringed or withheld by the British-controlled executive.⁷⁴ This style of argument began early when Jeremy Bentham penned a critique of the government of New South Wales in 1803 in which one of his most damning observations was that the British had denied Magna Carta to the inhabitants

70 Kate Krinks, ‘Creating the active citizen? Recent developments in civics education’, Parliamentary Library Research Paper no. 15, 1998–99, www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9899/99RP15 (accessed 10 September 2015). For a recent study see S. Mellor, ‘Australian 14-year-olds’ civic knowledge and attitudes, and how teachers and schools might improve them’, 2002, www.researchgate.net/publication/41717985_Australian_14-Year-Olds_Civic_Knowledge_and_Attitudes_and_How_Teachers_and_Schools_Might_Improve_Them (accessed 1 October 2015).

71 Ipsos Mori, ‘Magna Carta International Public Opinion’, January 2015, <http://magnacarta800th.com/projects/international-poll/> (accessed 7 September 2015).

72 See ‘Magna Charta has a brilliant win’, *The Mail* (Adelaide), 1 October 1932, p. 8.

73 For example: *The Mount Barker Courier and Onkaparinga and Gumeracha Advertiser* (SA), 17 January 1930, p. 4 (reporting a Worker’s Education Association speech at Murray Bridge); *Westralian Worker* (Perth), 21 June 1940, p. 3; *Worker* (Qld), 2 June 1947, p. 10.

74 *Ex parte Nichols* [1939] NSWSupC 76 p. 5.

of the colony.⁷⁵ In the 1820s and 1830s the charter was regularly invoked to criticise the imposition of new taxes and restrictions on the press, to thwart attacks on the protection of private property, to raise objections to banishment and to criticise the denial of a right to trial by jury.⁷⁶

On occasion the Sydney magistrates deployed the charter in somewhat fanciful circumstances. One unfortunate guest at a wedding in 1827 was assaulted after singing a song that aroused others to an altercation. After the singer was rescued by the bride and groom the attackers were charged with assault. The magistrate who heard the case thought that the whole affair was an attack on the liberty of the subject. According to the press report:

His Worship gave it as his firm opinion that, by Magna Charta and the Bill of Rights, an Englishman had an undoubted right to sing, and he who attempted to abnegate or even abridge this admirable privilege, could be no true friend to the constitution, and must be a radical from top to bottom.⁷⁷

The magistrate then committed the accused to be tried at the quarter sessions after expressing his opinion on the virtues of the songs that had provoked the attack. Clearly matters had moved on from the transactions at Runnymede and by now the charter stood for an idea of general liberty rather than as a document.

This use of Magna Carta to fashion or underpin contemporary arguments was evident during the debates over the demand for responsible government in the late 1840s and early 1850s. In 1848 a resolution was moved in the New South Wales Legislative Council in favour of responsible government that included the assertion that the Crown was attempting to deprive the colony of the elective franchise, which, it was claimed, was an immemorial right ‘asserted in Magna Charta’.⁷⁸ References to Magna Carta as part of a larger argument in favour of responsible government during this period were evidence of a style of argument, an appeal to history, however inaccurate, and a testament to the power of Magna Carta as emblematic of English liberties that the colonialists thought that they had brought with them to Australia.⁷⁹ One would-be

75 Jeremy Bentham, ‘Plea for a constitution’ in *Historical Records of Australia*, Library Committee of the Commonwealth Parliament, Sydney, series IV, vol. 1, 1922, pp. 896–7. For the diffusion of the Magna Carta throughout the British Empire see B.H. McPherson, *The Reception of English Law Abroad*, Supreme Court of Queensland Library, Brisbane, 2007, pp. 206–18.

76 *The Monitor* (Sydney), 11 May 1827, pp. 3, 4; *R v Sullivan* [1832] NSWSupC 78; *O’Connell v Bell* [1839] NSWSupC 74; *Walker v Hughes* [1839] NSWSupC 71.

77 *The Sydney Gazette and New South Wales Advertiser*, 10 August 1827, p. 3.

78 New South Wales, *Votes and Proceedings of the Legislative Council*, 26 April 1849, 681 internal page 9, enclosure A1.

79 For example, ‘Representative government—public meeting’, *Australasian Chronicle*, 17 February 1842, p. 2; ‘The new constitution—public meeting’, *The Maitland Mercury and Hunter River General Advertiser*, 12 February 1848, p. 4.

poet in Tasmania, for instance, saw the charter as a touchstone of freedom and called on the present generation to ‘Prove—prove, that you are worthy to be free’.⁸⁰

The charter was also sometimes invoked for less idealistic reasons when Catholics and Protestants cited it in arguments against each other that went on and off between the 1840s and the early 1950s. The issue was whether the Catholics could take credit for Magna Carta given that Archbishop Stephen Langton led the barons at Runnymede and, of course, in the thirteenth century England was still a Catholic country.⁸¹ Protestant controversialists tried to refute the claim of credit by arguing that the pope had actually annulled the charter and that Langton was in reality a patriotic Englishman.⁸² The squabble did no one any credit and involved much distortion on both sides as each strove to prove that they were the true friends of liberty and that the other was its enemy.

Lastly, Magna Carta and inherited constitutional landmarks were part of the education system for both school students and the legal profession in the nineteenth century. There is abundant evidence that educated Australians and lawyers were aware of the accumulated constitutional landmarks that had emerged since 1215. This was in part a consequence of their education in history, which meant then constitutional history.⁸³ Australians seeking admission to the profession also had to study English constitutional history.⁸⁴ The books they read all included chapters from works that extolled Magna Carta in the Whiggish manner of the history-writing of the time such as Henry Hallam’s *The Constitutional History of England*, Hallam’s, *View of the State of Europe During the Middle Ages*, Herbert Broom’s, *Constitutional Law* and of course Sir William Blackstone’s, *Commentaries on the Laws of England*.⁸⁵ Public lectures also covered constitutional history and linked Magna Carta with other constitutional landmarks including the Petition of Right 1628, the Bill of Rights

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- 80 ‘Magna Charta’, *Colonial Times* (Hobart), 11 February 1851, p. 2. For other poems praising Magna Carta see *The Australian* (Sydney), 19 July 1833, p. 4; Rudyard Kipling, ‘Reeds of Runnymede’ (1915) in *Rudyard Kipling’s Verse: Definitive Edition*, Hodder and Stoughton, London, 1940, pp. 719–20.
- 81 *South Australian* (Adelaide), 11 November 1845, p. 3; *The Catholic Press* (Sydney), 23 May 1912, p. 52, 18 October 1928, p. 15; *Catholic Freeman’s Journal*, 26 November 1936, p. 10.
- 82 *Sydney Morning Herald*, 28 March 1884, p. 3; *Watchman* (Sydney), 18 March 1915, p. 2, 7 October 1915, p. 5; *Castlemaine Mail*, 6 October 1917, p. 2.
- 83 For example, *The Monitor* (Sydney), 15 October 1827, p. 6; *The Age* (Melbourne), 7 December 1854, p. 9; *South Australian Register*, 25 May 1886, p. 5; *Advocate* (Burnie), 9 June 1924, p. 2; *Morning Bulletin* (Rockhampton), 18 July 1931, p. 6. For a detailed list of the topics covered including medieval history see ‘History exams’, *The Maitland Daily Mercury*, 17 February 1934, p. 2.
- 84 Victoria, *Rules of the Supreme Court of Victoria 1865*, Parliamentary Papers 1866 no A4, 4 [40]; South Australia, *Rules for Admission of Practitioners of Supreme Court*, Parliamentary Paper no. 202 of 1876, 2 [17]; Queensland, *Regulae Generales 1879*, Parliamentary Papers, 1880, 489 [43].
- 85 ‘The Chief Justice’s examination papers’ in *Colonial Law Journal*, Henry Wise & Co., Dunedin, 1875, pp. 34, 35.

and even the struggle by John Hampden against ship money.⁸⁶ Some of the claims were fanciful but telling. One speaker at a dinner for the members of the South Australian Parliament in 1857 stated that:

The right to vote money and levy taxes by the representatives of the people seemed to be based upon a principle laid down in Magna Charta, that the people could not be taxed except by their own representatives.⁸⁷

This was of course nonsense since the principle only emerged later when parliaments met regularly, as they did not in 1215.⁸⁸

There is abundant evidence that this knowledge and appreciation of the English constitutional tradition survived well into the twentieth century amongst members of the Commonwealth Parliament⁸⁹ and was until recently a mark of ‘most educated persons in the Anglo-Saxon world’.⁹⁰ In the nineteenth century and during the first half of the twentieth century students studied constitutional history usually by examining Magna Carta, the Bill of Rights, habeas corpus, and the Act of Settlement amongst the main constitutional landmarks. On the occasion of the 720th anniversary of Magna Carta in 1935, for example, special lessons were given in West Australian state schools on the significance of the charter. A very useful article entitled ‘Magna Charta’ appeared in the West Australian press at the same time that debunked many of the commonly held myths about 1215.⁹¹

86 *South Australian Register*, 3 October 1861, p. 2.

87 ‘Public dinner at Myponga’, *Adelaide Observer*, 25 July 1857, p. 3. The principle that taxes on the laity (people) must be introduced by the Commons was only established in the late 1390s and affirmed in (1407) 3 Rotuli Parliamentorum 611 translated in A.R. Myers (ed.), *English Historical Documents*, vol. 4, 1327–1485, Eyre and Spottiswoode, London, 1969, pp. 460–1. The principle remains part of the law of the states with a bicameral legislature: *Constitution Act 1975* (Vic) s 62(1); *Constitution Act 1902* (NSW) s 5; *Constitution Act 1934* (SA) s 61; *Constitution Act 1899* (WA) s 46(1); *Constitution Act 1934* (Tas) s 37(1) and of the Commonwealth: Commonwealth Constitution s 53.

88 For the emergence of the commons in the fourteenth century see UK Parliament, ‘Birth of the English Parliament’, www.parliament.uk/about/living-heritage/evolutionofparliament/originsofparliament/birthofparliament/overview/riseofcommons/ (accessed 11 April 2015). The term parliament was first used officially in 1236: H.G. Richardson and G.O. Sayles, ‘The earliest known official use of the term “parliament”’, *English Historical Review*, vol. 82, 1967, pp. 747–50. Knights were summoned in 1254 and the model parliament of 1265 involved the commons representatives from each county: J.R. Maddicott, *The Origins of the English Parliament*, Selden Society, London, 2013, pp. 9–13.

89 Draft preamble, Australian Labor Party, May 1953 in Patrick Weller and Beverley Lloyd (eds), *Federal Executive Minutes 1915–1955*, Melbourne University Press, Carlton, Vic., 1978, pp. 525–6; Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 1972, p. 1681 (Mr Enderby), 20 September 1973, p. 1389 (Mr Killen); *Senate*, 15 June 1989, pp. 4190–1 (Senator Baum).

90 Lois G. Schworer, *The Declaration of Rights, 1689*, John Hopkins University Press, Baltimore, 1981, p. 4.

91 *Northern Times* (Carnarvon, WA), 29 June 1935, p. 3. In the same vein see Ernest Scott, ‘The myth of Magna Carta’, *The Argus* (Melbourne), 27 November 1920, p. 6.

Whether what was taught during that era was properly learned is another matter. According to a list of schoolboy howlers from the examination papers, published in 1905, one student actually wrote:⁹² ‘The chief clause of Magna Charta was that no free man should be put to death or imprisoned without his own consent’. One schoolboy thought in 1914 that the king was forced to sing the charter,⁹³ while another thought that the charter provided that no free man could be hanged twice for the same offence.⁹⁴ Perhaps the prize for such mistakes should be awarded to a student who wrote in 1953 that: ‘Magna Charta said that the King could not order taxis without the consent of Parliament’.⁹⁵

In the aftermath of the 700th anniversary a distinctly sceptical view of Magna Carta emerged based on modern scholarship. In one of the most influential Australian contributions Ernest Scott penned an article in a Melbourne newspaper entitled the ‘Myth of Magna Carta’ in which he argued against the modern myths about the origins of our liberties and in favour of an understanding of the medieval circumstances at the time the charter was concluded.⁹⁶

Notwithstanding this, in the 1920s an international Magna Carta day to be celebrated on 15 June each year was launched in the United States⁹⁷ and the movement quickly spread to other English-speaking countries including Australia.⁹⁸ The American founder, J.W. Hamilton of St Paul, Minnesota, wrote to the *Mercury* newspaper in 1935 thanking it for its support of the idea and noted that the common heritage should become the main tie of English-speaking nations and cited Chief Justice Hughes of the United States Supreme Court to the effect that Anglo–American unity was ‘the cornerstone of international peace’.⁹⁹ The celebration of the day was mandated by state education departments, which required all schools to teach students about the charter

92 *Northern Star* (Lismore, NSW), 13 February 1905, p. 4.

93 *Newcastle Morning Herald and Miners’ Advocate*, 22 August 1914, p. 7.

94 *Burra Record* (SA), 5 April 1938, p. 1.

95 *The Scone Advocate* (NSW), 20 November 1953, p. 11.

96 *The Argus* (Melbourne), 27 November 1920, p. 6. This provoked a reply by J.J.K. Mills, *The Argus*, 4 December 1920, p. 4 and a riposte by Scott: *The Argus*, 6 December 1920, p. 9. See the earlier ‘Common errors about Magna Charta’, *Westralian Worker* (Perth), 19 February 1915, p. 1. For other critical views see Fred Alexander, ‘Myth makes history’, *The West Australian* (Perth), 29 June 1929, p. 4; L.C. Dodd, ‘Magna Carta: the critical viewpoint’, *Sydney Morning Herald*, 16 June 1934, p. 11; *Northern Territory Times and Gazette* (Darwin), 25 October 1921, p. 2. This contextualisation of the charter has continued: James Spigelman, ‘Magna Carta in its medieval context’, *Australian Law Journal*, vol. 89, no. 6, 2015, pp. 383–96.

97 J.W. Hamilton, ‘International Magna Carta Day Association’, *Central Law Journal*, vol. 99, April 1926, pp. 132–4.

98 *The Advertiser* (Adelaide), 14 June 1923, p. 11, 11 September 1924, p. 23.

99 *The Mercury* (Hobart), 17 September 1935, p. 6. See also ‘Magna Carta Day’, *Sydney Morning Herald*, 26 May 1941, p. 4. Hamilton was born in Canada but was a naturalised US citizen: *Gippsland Times* (Vic.), 5 January 1939, p. 5.

on the 15th of June.¹⁰⁰ There were also public celebrations arranged by the Magna Carta Day Association and the Australian–American Cooperative Movement in 1946 when the Governor-General Richard Casey gave an address devoted to the charter at St Andrew’s Cathedral in Sydney.¹⁰¹

By now, as Justice Isaacs pointed out in 1925, Magna Carta had developed beyond its medieval roots to stand for three major principles:

Namely, (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will.¹⁰²

Justice Isaacs went on to notice two corollaries of these propositions: that there is always an initial presumption in favour of liberty and that it is the duty of the courts to see that this obligation is strictly and completely fulfilled. For us then Magna Carta is not so much a medieval document expressed, as Hegel once put it, in archaic phraseology,¹⁰³ as standing for both a constitutional tradition and for certain key values.¹⁰⁴ These values include the rule of law,¹⁰⁵ democratic governance, the general right to liberty and property, and civic equality. Civic equality includes the absence of discrimination in public matters as prohibited by the anti-discrimination and equal opportunity legislation at both the state, territory and Commonwealth levels of government.

100 ‘Magna Carta Day’, *The Advertiser*, 14 June 1935, p. 24. See also ‘Observance of Magna Carta Day’, *The Courier-Mail* (Brisbane), 10 June 1937, p. 14.

101 *Sydney Morning Herald*, 15 June 1946, p. 13. For the text see ‘Magna Carta’ in R.G. Casey, *Double or Quit*, Hawthorn Press, Melbourne, 1949, pp. 90–3.

102 *Ex parte Walsh and Johnson, In re Yates* (1925) 37 CLR 36, 79 (Isaacs J). See also *Clough v Leahy* (1905) 2 CLR 139, 157 (Griffith CJ): ‘We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice. That is the general principle’. Sheller JA agreed with this statement but thought it was not ‘necessary to invoke an event which occurred in 1215 to support them’: *Prisoners A-XX (Inclusive) v State of NSW* (1995) 38 NSWLR 622, 634F-G (CA).

103 G.W.F. Hegel, *Outlines of the Philosophy of Right*, translated by T.M. Knox, Oxford University Press, Oxford, 2008, p. 233. Frederick Pollock and Fredric Maitland, *The History of English Law*, 2nd edn, Cambridge University Press, London, 1968, p. 171 describe its contents ‘as a long and miscellaneous code of laws’.

104 A point made by distinguished medievalists. See, for example: Elsie Smith, *The Sarum Magna Carta*, 1972, p. 5.

105 See references to Magna Carta in this context in: South Australia, *Parliamentary Debates*, House of Assembly, 17 June 2015, p. 1697; New South Wales, *Parliamentary Debates*, Legislative Council, 23 June 2015, p. 1611; Victoria, Parliament, ‘Recognising Magna Carta’s enduring legacy: joint statement by the presiding officers’, 23 June 2015, www.parliament.vic.gov.au/about/news/2693-recognising-magna-cartas-enduring-legacy (accessed 10 September 2015).

The charter as a reference point in political debates

To advance an argument: the human rights debate

The term human rights first made its appearance in the English language in 1629¹⁰⁶ and in Australia in a newspaper in 1817.¹⁰⁷ King O'Malley mentioned the term during the debate on the Conciliation and Arbitration Bill in 1904.¹⁰⁸ There is a distinctive Australian approach to human rights protection that consists of passing specific statutes to deal with specific problems, in contrast to the adoption of a bill or charter of rights that resorts to language of high generality. This was first in evidence in the adoption of the *Catholic Relief Act 1829* (UK) in New South Wales in 1830. Other examples are legion and are documented in my review of the book *Human Rights under the Australian Constitution* (2013) by George Williams and David Hume.¹⁰⁹

Nevertheless the advocates and opponents of a human rights Act have both used Magna Carta in support of their arguments. The proponents have argued that as there is a tradition of liberty stemming from the charter and that the extension to include a human rights Act, for example, is just another logical step in this progression.¹¹⁰ To take a contemporary example, proponents of a bill of rights for Queensland have recently linked the bill of rights idea to the Magna Carta tradition.¹¹¹ The opponents of a bill of rights have argued that the existing arrangements in the same tradition are perfectly adequate. The use of the charter by both sides of the argument is a testament to its chameleon-like quality.

To resist an argument: emergency legislation

While the 800th anniversary of Magna Carta has been overshadowed by the 100th anniversary of the Gallipoli landings, the First World War was partly about preserving rule of law values. In August 1915 Joseph Cook pointed out that the British Empire, of which Australia was a part, stood for its 'love of liberty and of law'. He added 'Our own Australia is at stake, too, with all its freedom, its sunshine, its prospects, and all that it connotes for a wider, wiser, and more humane civilization than this world has yet seen'.¹¹² But during periods of crisis when laws were passed to give the state more power to deal with the emergency, those who sought to resist these changes invoked the charter and claimed that the *War Measures Act 1915* (Cth), for example, was an infringement of Magna Carta. Opponents of emergency measures have often invoked

106 *Oxford English Dictionary*, 3rd edn (online).

107 *The Sydney Gazette and New South Wales Advertiser*, 22 February 1817, p. 3.

108 Commonwealth, *Parliamentary Debates*, House of Representatives, 11 August 1904, p. 4179.

109 *University of New South Wales Law Journal*, vol. 31, no. 1, 2014, pp. 231–3.

110 South Australia, *Parliamentary Debates*, House of Assembly, 13 September 1972, p. 1276 (Mr Millhouse).

111 Queensland Association of Independent Legal Services, 'A new Magna Carta: the case for a Queensland Human Rights Act', 13 May 2015, http://qails.org.au/02_cal/details.asp?ID=64 (accessed 28 September 2015).

112 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 August 1915, p. 5558 (Mr Cook).

Magna Carta as part of their argument. In April 1915, for instance, soldiers in Rabaul, then subject to British military law, were tried by court martial. One member of the Commonwealth Parliament, Member for Brisbane W.F. Finlayson, objected to the Defence of the Realm Act (UK) saying: ‘All that the people enjoyed under Magna Charta, *habeas corpus*, and the Bill of Rights was given away under this measure’.¹¹³ After noting that the measure was reversed after objections in the House of Lords, Mr Finlayson added ‘We are in danger of doing something of the same kind here’.¹¹⁴ The advocates of such powers usually pointed out that a war cannot be conducted according to Magna Carta¹¹⁵ and that the defence of our liberties may require a curtailment of some of them in order to protect the greater good.¹¹⁶ I need hardly point out to this audience that these arguments from 1915 resonate today. Arguments of this sort are also a feature of twenty-first-century debate over anti-terrorism laws, as many of you here today well know.¹¹⁷

The charter as a foundational document

Another use of the charter was to label as a Magna Carta any foundational document. Thus the future *Constitution Act 1856* (SA) was described as the Magna Carta of the colony in 1853,¹¹⁸ as the Commonwealth Constitution was once described as the ‘Magna Carta of Australia’.¹¹⁹ The refugee convention was described as the ‘Refugee Magna Carta’ in 1954,¹²⁰ and a major tariff agreement in 1961 was written about as a ‘Magna Carta for World Trade’.¹²¹ There are currently calls in England for a new Magna Carta; that is, a new constitution.¹²² The charter was also used in policy advocacy as in 1908 when the call went out to eliminate the legal disabilities under which women laboured in the name of a ‘Women’s Magna Carta’. The author argued that the language of the charter was meant to include women and noted that women of high birth did occupy some offices in medieval times and that in this spirit the law should change to recognise the work and contribution made by women to society.¹²³

113 Commonwealth, *Parliamentary Debates*, House of Representatives, 22 April 1915, p. 2539 (Mr Finlayson).

114 *ibid.*

115 *Ronnfeldt v Phillips* (1918) 35 TLR 46, 47 (CA) (Scrutton LJ).

116 Commonwealth, *Parliamentary Debates*, House of Representatives, 7 November 2005, p. 72 (Mr Ciobo).

117 For example: Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 2005, p. 104 (Dr Lawrence); Senate, 12 December 2002, p. 7928 (Senator Nettle).

118 ‘The new constitution’, *South Australian Register*, 5 August 1853, p. 3.

119 *The Sydney Morning Herald*, 1 March 1911, p. 12. A South Australian delegate to the constitutional convention made the same claim: *Official Record of the Debates of the Australasian Federal Convention*, 3rd session, Melbourne, 1898, vol. II, p. 2507 (Mr J.H. Symon).

120 *Cairns Post*, 20 February 1954, p. 2.

121 *The Canberra Times*, 2 December 1961, p. 5.

122 UK Parliament, ‘Major consultation by Parliament on ‘a new Magna Carta’, 10 July 2014, www.parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/news/report-a-new-magna-carta/ (accessed 16 April 2015).

123 *Herald* (Adelaide), 10 October 1908, p. 15. See also *Woman Voter* (Melbourne), 18 May 1915, p. 3.

There were other examples of this, in particular, the ‘Open Letter to Members of the Federal Parliament’ by Vida Goldstein in 1912 which called for the franchise and noted that Magna Carta was the result of a rebellion.¹²⁴ In 1943 a women’s charter was launched in Sydney in which Magna Carta was specifically invoked.¹²⁵ The fact that the term charter was used at all is also an echo of the Great Charter language.

The charter in popular culture

Lastly, Magna Carta has been the subject of popular culture in various ways. Magna Carta was the subject of a poem by Rudyard Kipling in 1915,¹²⁶ a cantata by Henry Coward first created in 1884,¹²⁷ and a play by John Arden in 1965.¹²⁸ Even modern music has taken on the name. In 1969 a rock group called Magna Carta was formed in the United Kingdom and in July 2013 the American singer Jay-Z released an album entitled *Magna Carta Holy Grail* and in that same month visited Salisbury Cathedral to see a copy of the 1215 charter. The Cathedral displayed the album cover alongside the original.¹²⁹ In 1942 at the Constitutional Convention Robert Menzies referred to a phonograph skit on Magna Carta that said we were free to do what we like as long as we do as we are told.¹³⁰ There are YouTube skits on the charter and even an episode of *The Simpsons* in which Lisa sings a ditty devoted to Magna Carta.¹³¹

Conclusion

At a time when there are misgivings about the integration of certain communities and at a time when citizenship and its responsibilities are being debated, it is worth reflecting on the meaning of the citizenship pledge. It includes the words ‘I pledge my loyalty to Australia and its people whose democratic beliefs I share, whose rights and liberties I respect and whose laws I will uphold and obey’.¹³² These are Magna Carta themes as that tradition has developed since 1215. If that tradition is to continue then,

124 *Woman Voter* (Melbourne), 10 August 1912, p. 1; ‘Your Right to Vote’ urged women to exercise their rights and called to mind the Magna Carta tradition: *The Australian Women’s Weekly*, 28 September 1946, p. 10.

125 *Argus* (Melbourne), 27 November 1943, p. 8. For the text see ‘Australian Women’s Charter’, *Townsville Daily Bulletin*, 25 November 1943, p. 3. See also ‘Juries today: why not women’ in which the absence of women on juries was attacked and Magna Carta invoked: *Daily Advertiser* (Wagga Wagga), 13 July 1942, p. 3.

126 Kipling, ‘Reeds of Runnymede’, op. cit.

127 ‘Magna Carta’, *Marlborough Express* (NZ), 26 October 1909, p. 8.

128 John Arden, *Left Handed Liberty: A Play About Magna Carta*, Methuen, London, 1965.

129 ‘Magna Carta and Jay Z’, Salisbury Cathedral, www.salisburycathedral.org.uk/magna-carta/magna-carta-and-jay-z (accessed 1 October 2015). The link with the holy grail is explored by Lord Neuberger, ‘Magna Carta and the Holy Grail’, *The Judicial Review*, vol., 12, 2015, pp. 268–84.

130 *Convention of Representatives of the Commonwealth and State Parliaments on Proposed Alteration of the Commonwealth Constitution, Held at Canberra 24th November to 2nd December, 1942: Record of Proceedings*, 25 November 1942, p. 26.

131 www.youtube.com/watch?v=ZaIxNXygpB4 (accessed 1 October 2015); www.lyricsmania.com/magna_carta_song_lyrics_simpsons_the.html (accessed 1 October 2015).

132 *Australian Citizenship Act 2007* (Cth) s 27 and Schedule.

in my opinion, civic education, including knowledge of our constitutional heritage, ought to be a compulsory subject in our schools in the way that American civics and history are taught in the United States.

While Magna Carta was a medieval document it was the work of later generations that broke the charter free of its thirteenth-century limitations and established legal principles that today are integral to the rule of law. The first and greatest of these principles is that everyone (including the highest in the land) is bound by the law of the land. This principle lies at the heart of constitutional government. The second principle flows from the first, and was also extended by subsequent constitutional developments, namely that legal proceedings are to be conducted in accordance with established laws and these laws are to be consistent with the Constitution. Third, that the state cannot interfere with private property except by the law of the land. Fourth, that a tradition of liberty emerged that struck a balance between order and freedom under the law.

A tradition, as this paper has shown, is not static and survives precisely because it is able to change while retaining, in the arresting imagery of a former justice of the High Court of Australia, a skeleton of principle.¹³³ Although some of the claims about the charter are mythic, it should be remembered that a tradition can be invented and transformed to fit later circumstances. It is this capacity for renewal that has allowed Magna Carta as an idea to survive and explains why people and lawyers in common law countries continue to refer to it 800 years after it was concluded in a meadow called Runnymede at a time when the countries to which it spread were then unknown in Europe. That this transformation took place in different ways in different places is itself a tribute to the flexible adaption of the law to new circumstances, while retaining a familial resemblance that allows people of diverse backgrounds to meet on common ground through a shared constitutional vocabulary.

A legal or constitutional instrument may remain an animating presence and a source of inspiration long after the particular details of the document have either been removed from the law or have faded with the change of historical circumstances. In the case of Magna Carta our interest lies in what was made of the document in later centuries and its relationship to a wider constitutional tradition that has grown up since 1215. Most of the elements of the rule of law—itsself a combination of history, statutory interpretation and political philosophy¹³⁴—simply did not exist in the thirteenth century, but we are heirs to that tradition and are also its beneficiaries. It represents an historic achievement that was hard won and, though not now a rarity, it is an achievement that Australia may claim to have both added to and to have improved upon. In a world where there are peoples and states that have not mastered the arts of civil peace, as we have, it is fitting to reflect on the past and to appreciate in a clear-eyed way the results of the eight centuries of constitutional and political struggles since 1215.

133 See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 43 (HCA).

134 *Shaw v MIMA* (2003) 218 CLR 28, 37 [12] (Gleeson CJ, Gummow J, Hayne J).