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Department of the Senate and the  
Rule of Law Institute of Australia  
to commemorate the 800th anniversary  
of the sealing of Magna Carta

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# Contributors

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**Nicholas Cowdery AM QC** is the chair of the Magna Carta Committee of the Rule of Law Institute of Australia.

**Senator the Hon. Concetta Fierravanti-Wells** is the Minister for International Development and the Pacific. Her paper was delivered on behalf of the Attorney-General, Senator the Hon. George Brandis QC.

**Professor Martin Krygier** is the Gordon Samuels Professor of Law and Social Theory at the University of New South Wales and Adjunct Professor at the Regulatory Institutions Network of the Australian National University. He is a fellow of the Australian Academy of Social Sciences and is on the editorial board of the *Hague Journal on the Rule of Law* and the editorial committee of the *Annual Review of Law and Social Science*.

**The Hon. James Spigelman AC QC** was the Chief Justice of the Supreme Court of New South Wales and Lieutenant-Governor of New South Wales from 1998 to 2011. Between 1980 and 1998 he practised as a barrister in Sydney and was appointed QC in 1986. Between 1972 and 1976 he served as senior adviser and principal private secretary to the Prime Minister of Australia and as permanent secretary of the Commonwealth Department of the Media. From 1976 to 1979 he was a member of the Australian Law Reform Commission. Justice Spigelman has served on the boards and as chair of a number of cultural and educational institutions. In November 2012 he was appointed a Director of the Board of the Lowy Institute for International Policy. In 2013 he was appointed a Non-Permanent Judge of the Court of Final Appeal of Hong Kong. He is currently ABC chairman.

**Professor David Clark** is Professor of Law at Flinders University in Adelaide. He first published on Magna Carta in the *Melbourne University Law Review* in 2000. Since then he has contributed to the American Bar Association's 2014 book *Magna Carta and the Rule of Law* and published a paper on Magna Carta and court delay in the Pacific in *Magna Carta and Its Modern Legacy* (2015), edited by Robert Hazell and James Melton. A paper on Magna Carta in New Zealand will appear in the *Canterbury Law Review* in 2016. Professor Clark has delivered lectures on the charter at the State Library of New South Wales and at the Law Society of South Australia, both in June 2015. He has published on the history of constitutional landmarks such as habeas corpus and the Bill of Rights 1689. He is interested in how earlier legal instruments come to be reinterpreted and applied in modern circumstances.

**Professor Desmond Manderson** is jointly appointed in the ANU College of Law and the College of Arts and Social Sciences, Australian National University. After ten years as Canada Research Chair in Law and Discourse at McGill University, Montreal, he returned to Australia in 2012 to take up an ARC Future Fellowship, researching the relationship between law and the image. Two major outcomes of this research will appear in 2016: *Law and Visual Studies: Representations, Technologies and Critique* (Toronto) and *Concepts of Time and of Law in the Visual Arts* (Cambridge). He commences as foundation Director of the Centre for Law, Art and the Humanities at the ANU this year.

**Professor Nicholas Vincent\*** is a Professor of Medieval History at the School of History, University of East Anglia. He has published a dozen books and some hundred academic articles on various aspects of English and European history of the twelfth and thirteenth centuries, including *Magna Carta: The Foundation of Freedom, 1215–2015* (2015). He is a major contributor to the Department of the Senate publication *Australia's Magna Carta* (second edition, 2015) where he documents the history and provenance of the Australian Parliament's 1297 Magna Carta. He currently leads the UK's major research project on Magna Carta. He is a fellow of the British Academy.

**Professor Stephanie Trigg** is Professor of English Literature in the School of Culture and Communication in the Faculty of Arts of the University of Melbourne. She was the editor of *Medievalism and the Gothic in Australian Culture* (2005) and author of a paper 'Parliamentary Medievalism: The Australian Magna Carta as Secular Relic' (*Australian Literary Studies*, 2011). She is currently a chief investigator and a program leader in the Australian Research Council Centre of Excellence for the History of Emotions.

**Dr Kathleen Neal** lectures in medieval history in the School of Philosophical, Historical and International Studies in the Faculty of Arts at Monash University. Dr Neal's recent research has focused on the role of letters in political communication between the royal government and its subjects in thirteenth-century England. She also has a highly regarded academic blog, *In Thirteenth Century England*.

**Professor Andrew Lynch** is a Professor in English and Cultural Studies at the University of Western Australia and Director of the Australian Research Council Centre of Excellence for the History of Emotions. In 2015 he published *Understanding Emotions in Early Europe*, co-edited with Michael Champion, and *Emotions and War: Medieval to Romantic Literature*, co-edited with Stephanie Downes and Katrina O'Loughlin.

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\* Professor Vincent provided a pre-recorded video presentation to the symposium which included extensive images. While a transcript is unavailable in this volume, the video can be viewed on the Parliament of Australia website at [www.aph.gov.au/magnacarta-symposium](http://www.aph.gov.au/magnacarta-symposium)

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**Dr David Headon** is a Visiting Fellow in the Research School of Arts and Humanities at the Australian National University and a Parliamentary Library Associate. He was formerly Director of the Centre for Australian Cultural Studies in Canberra, Cultural Adviser to the National Capital Authority and the History and Heritage Adviser for the Centenary of Canberra.

# Welcome

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## *Rosemary Laing and Nicholas Cowdery*

**Rosemary Laing** — Ladies and gentlemen, distinguished guests, thank you very much for coming today. It is a great crowd. In welcoming you I would like to acknowledge the traditional custodians of the land where we meet and pay respect to all Indigenous elders past and present.

Can I say at the outset that the President of the Senate, Senator the Hon. Stephen Parry, sends his apologies for not being able to be here this morning. Unfortunately urgent matters intervened.

This year we cannot have escaped the fact that it is the 800th anniversary of the sealing of Magna Carta in 1215 by King John of England. The Parliament of Australia is proud to be the custodian of one of only four surviving copies of the 1297 exemplification of Magna Carta and one of only two thirteenth-century copies held outside the United Kingdom.

The Parliament's acquisition of its Magna Carta in 1952 was the result of a rather unlikely and quite fortuitous alignment of events involving a determined and energetic Parliamentary Librarian seeking to build a national collection; a Magna Carta from the county of Surrey separated from its companion documents, which were later destined for the British Library; an impoverished Somerset private school seeking to capitalise on an unexplained Magna Carta that it found in its midst; a warm regard for Australia in post-World War II Britain and, at the time, much looser export controls than exist now; and an Australian prime minister willing to make £12,500 sterling available from his own department to purchase the manuscript for the nation.

Once Magna Carta arrived in Australia, it was housed in an argon-gassed enclosure built by the CSIRO. It was state of the art technology for the time and it has lasted well. It is still in that original casing with the original argon gas. It was then put on more or less permanent display in King's Hall in Old Parliament House from 1961.

Magna Carta soon became a parliamentary fixture. Critics of the purchase suddenly became defenders. Claims by the National Library to ownership were fended off and Magna Carta was committed to the care and responsibility of the Presiding Officers of Parliament in 2005.

There is much about Magna Carta to capture the imagination of those who have inhabited this building. Prime Minister Menzies declared it 'one of the great documents of our history' and marvelled that it could be 'how old and yet how

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modern'.<sup>1</sup> Leader of the Opposition, the Hon. Bert Evatt said it was 'a priceless possession' that embodied the rule of liberty under law and 'the hatred of arbitrary government or despotism'.<sup>2</sup>

Former Clerk of the Senate, the late Harry Evans, wrote of Magna Carta that 'all written constitutions, including our own, and all declarations of rights, are its descendants'.<sup>3</sup> Sir Kenneth Anderson said in 1968, 'Parliament is the most precious thing in our way of life and it stems initially from the Magna Carta'.<sup>4</sup>

This might not literally be true, with many finding that the antecedents of parliament lie elsewhere in assemblies of magnates and high churchmen from Anglo-Saxon times, but there is much in Magna Carta for modern parliamentarians to ponder, including that the levying of taxes by rulers requires the consent of the realm and the need for avenues for the redress of grievances—functions that the parliament continues to perform today.

Former President of the Senate the Hon. Sir Alister McMullin and Speaker of the House the Hon. John McLeay, wrote in 1959, remarking that, in tracing the evolution of a thousand years of parliamentary government:

one will find the emphasis remains always on one clear principle, namely, that of the Monarch acting with counsel and consent. In its more modern form, that great principle is epitomized in the immortal words of Abraham Lincoln—"government of the people, by the people, for the people".<sup>5</sup>

In today's symposium we consider Magna Carta's journey through the centuries and what it means to us in modern Australia. Does it deserve awe and reverence? Are there grounds for the lofty ideals attributed to it? What does it mean for the law, the parliament and the executive? How has it appeared in print, in translation, in visual representation and in the popular imagination? We will cover all this today.

Today's symposium on Magna Carta is the final public event in the Parliament's year-long celebration of this very important document. It is also the result of collaboration between the Department of the Senate and the Rule of Law Institute of Australia. I would like to thank Nicholas Cowdery, Robin Speed and Richard Gilbert for their very generous assistance in arranging today's symposium. The colourful Magna Carta banners around the room are also the work of the Rule of Law Institute and I encourage you all to take a closer look.

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1 Commonwealth, *Parliamentary debates*, House of Representatives, 19 August 1952, p. 382 (Mr Menzies).

2 *ibid.*, (Dr Evatt).

3 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, June 1998, p. 51.

4 Commonwealth, *Parliamentary debates*, Senate, 27 November 1968, p. 2452.

5 Foreword to *An Introduction to the Australian Federal Parliament*, Angus & Robertson, Sydney, 1959.



I would now like to hand over to Nicholas Cowdery, chair of the Magna Carta Committee of the Rule of Law Institute of Australia, to also say a few words to get us going this morning.

**Nicholas Cowdery** — Ladies and gentlemen, distinguished guests, it is my pleasure also to welcome you to today’s symposium. In this Magna Carta anniversary year it has been my privilege to serve as chair of the Magna Carta Committee of the Rule of Law Institute of Australia, of which I am also a board member. The institute, founded in 2009, is the only national body of its kind. It is an independent, politically non-partisan, not-for-profit association formed to uphold the rule of law in Australia. It aims to promote discussion and understanding of the importance of the principles which underpin the rule of law by engaging with the community and with government. It operates a very active website, comments on bills before Parliament, writes media articles and reports, holds an annual conference on current rule of law issues and provides speakers at other conferences and meetings. I acknowledge the presence here of two pivotal players in the institute’s development, Robin Speed and Richard Gilbert.

Importantly, the institute operates education programs in schools, principally in New South Wales and Queensland, but occasionally elsewhere. It pursues initiatives to provide school and university students with an understanding of the importance of rule of law principles and how they relate to contemporary issues. It employs three full-time qualified teachers for these purposes.

With the 800th anniversary of the Magna Carta of 1215, well at least 800 years of the idea of Magna Carta, the institute saw a crucial opportunity to reinforce those principles through the celebration of the events of that year and their legacy through the ages in so many parts of the world. It has featured prominently in our education programs this year and the institute’s teachers have been speaking about the importance of ideas from Magna Carta in schools throughout the states that we have contacted and there are few legal studies classrooms that do not now have a poster copy of our Magna Carta hanging on the wall.

We have held and supported many other events throughout the year and it is a great pleasure to be joining with the Department of the Senate to host today’s symposium. The Senate has been an enthusiastic partner in this commemoration year. As an aside, you may also be interested to know that the International Bar Association, which is based in London, is holding three Magna Carta conferences this year, with the next one in a fortnight’s time in São Paulo in Brazil. You can see that the idea of the essential characteristics of a free society, traceable back in many respects to Magna Carta, is an idea that has taken hold in all parts of the globe.

I shall have the pleasure of chairing the morning session of this symposium. There will be four speakers focusing in various ways on Magna Carta and the law. I shall

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introduce them in turn as they come to speak. Before I do, I would also like to draw your attention to the exhibition the Rule of Law Institute has displayed. Pay no attention to the quill pen in this one over here. The document in 1215 was never signed by a quill pen or by any other means of course; it was sealed by the king's seal. One of our education officers, Jackie Charles, is here and she will be available to discuss any matters relating to Magna Carta that you might like to raise with her during the breaks in the course of today's proceedings.

You also have a poster provided, left on your seats. It is a copy of a reproduction of the original Salisbury Cathedral Charter of Liberties of 1215, one of the four surviving original 1215 documents. That reproduction was made for the institute by a very talented calligrapher in Sydney, Mrs Margaret Layson, who has had the hobby of calligraphy throughout her life. She is a lady in her eighties now. She was a professional engineer and I understand the first female engineer to serve on an oil rig in the North Sea—a very interesting connection between her professional occupation and her hobby of calligraphy. Late last year she made the reproduction of the Salisbury Cathedral document in the same size and an identical reproduction. That reproduction is presently on display in the Supreme Court of Victoria in Melbourne until the end of this month. It has been travelling around to various places for people to see.

You will see from the poster that you have that there are many lines of medieval Latin script with many abbreviations in the words that are contained in it. Mrs Layson, I am told, was able to do three lines at a sitting on a table in her garage in Sydney and it took her about 40 minutes to do a line. So a lot of work and a lot of care has gone into the reproduction. The posters that have been taken from that reproduction have some of the chapters highlighted with a short commentary at the bottom to emphasise the important ones for you. Jackie will have additional posters for you if you would like to take some extras away to give to other people.

With that introduction, it is now my great pleasure to welcome the Assistant Minister for Multicultural Affairs, Senator the Hon. Concetta Fierravanti-Wells, to deliver the keynote address this morning. I am going to tell you something about the senator that she does not want me to tell you, so she will no doubt be squirming as I do this. We learnt just as we were beginning this morning that when she was performing in a school play which related to the Magna Carta she played one of the barons. Senator, the floor is yours.

# Magna Carta: Enduring Values for Modern Australia

*Concetta Fierravanti-Wells*

2015 is a year rich with important centennial anniversaries. It is, of course, the centenary of Gallipoli. It is the bicentenary of Waterloo and 25 October marked the 600th anniversary of another great English victory at the expense of the French: the Battle of Agincourt. It is also the 250th anniversary of William Blackstone's *Commentaries on the Laws of England*, a seminal treatise on the common law of England.

This morning, we gather to mark the 800th anniversary of an event which has attained mythical status in the centuries since: the genesis of Magna Carta.

As we celebrate this symbolic charter, we reflect upon how far modern society, in particular Australia, has come since the rather unremarkable day when King John affixed his seal to the Magna Carta in Runnymede, England, on 19 June 1215.

In the eight hundred years that have passed, Magna Carta has provided inspiration and support for progressive developments in democratic governance worldwide. It has been looked to symbolically as a guarantor of freedom and a regulator of arbitrary executive power:

- it was invoked through the constitutional struggles in Britain in the seventeenth century between the Crown and parliament culminating in the Bill of Rights of 1689 and the Act of Settlement of 1701
- it influenced the American Constitution and Bill of Rights in the eighteenth century, and
- it was reasserted in the twentieth century in the Universal Declaration of Human Rights and Covenant on Civil and Political Rights.

In 1948, Eleanor Roosevelt, chair of the Human Rights Commission responsible for drafting the Universal Declaration, proclaimed:

We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind ... This declaration may well become the international Magna Carta of all men everywhere.<sup>1</sup>

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1 Eleanor Roosevelt, 'Statement to the United Nations' General Assembly on the Universal Declaration of Human Rights', 9 December 1948, The Eleanor Roosevelt Papers Project, [www.gwu.edu/~erpapers/documents/displaydoc.cfm?\\_t=speeches&\\_docid=spc057137](http://www.gwu.edu/~erpapers/documents/displaydoc.cfm?_t=speeches&_docid=spc057137).

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Australia has inherited the traditions which have evolved through constitutional struggles abroad and has been a leader in the advancement of human rights in the modern day. Following the aftermath of World War II, Australia played a key role in the development of the United Nations. Australia's President of the UN General Assembly, H.V. Evatt, played a major role in drafting the Universal Declaration of Human Rights.

As we celebrate the 70th anniversary of the United Nations and prepare for our upcoming appearance for Australia's second Universal Periodic Review, we reflect upon Australia's strong engagement with the UN system. We are lucky to be a liberal democracy founded on the rule of law, but not all countries share this experience. This is why Australia is seeking a seat on the UN Human Rights Council for the 2018–20 term: to strengthen our global leadership role and to share the benefit of our strong liberal democratic traditions.

We have long been a leader for global abolition of the death penalty, and would seek to use a seat on the Council to further this work. We would also play a leadership role on five other key themes:

- freedom of expression
- good governance
- gender equality
- rights of indigenous peoples, and
- strong national human rights institutions and capacity building.

And so, as we commemorate the anniversary of Magna Carta and the United Nations, we also celebrate the liberal democratic principles and values that underpin our modern society—the separation of powers, representative and responsible government, the rule of law, individual liberties and the independence of the judiciary.

Just as these common values are enshrined in the UN Charter and the Universal Declaration of Human Rights, so are they in Magna Carta.

How, then, did a single event in English history so long ago, come to be so influential? We must begin with the story of the events of that day, on 15 June 1215, when a group of aggrieved English barons rode to meet King John on a grassy stretch of meadow beside the River Thames. King John was desperate to put an end to the rebellion that had seen the city of London fall to rebel barons. The barons, in turn, hoped to extract concessions from the king on a host of issues.

The document we call Magna Carta today is considered to be both a restatement of the old laws of the English past and a treaty of peace between these rebel barons, the church, and the king.

Magna Carta was heavily influenced by the Coronation Charter confirmed by Henry I in 1100. The Coronation Charter was an earlier peace treaty which set a strong precedent for further royal concessions and set a course towards modern constitutional democracy.

The original Magna Carta was over 3,500 words and 63 clauses long. The first clause granted liberties to the church and subsequent clauses granted liberties to ‘free men’, referring to a limited class of powerful elite, barons and subjects of the church at the time. While the class of ‘free men’ may appear narrow by today’s standards, the liberties granted to them nonetheless represented a significant restriction on the power of the monarchy.

While not the only formal charter of liberties granted by a medieval monarch, Magna Carta is the most detailed and long-lasting of all such documents.

Lord Denning, one of the most influential judicial minds of the twentieth century, and a favourite of all law students the world over, has said that it was ‘the greatest constitutional document of all time’.<sup>2</sup>

More recently, Lord Judge described Magna Carta as ‘the most important single document in the development of constitutional and legal freedom and adherence to the rule of law in the common law world’.<sup>3</sup>

Our own former Chief Justice of Australia, Murray Gleeson, has described it as a defining document in a ‘long history’ of legal constraint upon ‘law-making capacity’.<sup>4</sup>

Important though Magna Carta is, it has also been the victim of many exaggerated claims. In reality, Magna Carta was a failed treaty. Barely nine weeks after it was confirmed, at Runnymede, King John had it quashed by Pope Innocent III. It was reissued on King John’s death in 1216, then 1217, again in 1225 and was finally made into statute law in 1297.

As one of the great fathers of English legal history, Frederic Maitland, famously said, ‘it is never enough to refer to Magna Carta without saying which edition you mean’.<sup>5</sup>

Indeed, it was named the ‘Great Charter’, several years after the initial 1215 settlement, not in recognition of its importance, but because it was long.

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2 *The Times* (London), 9 June 1965, p. 13.

3 Lord Judge, ‘Magna Carta: some reflections’, Sir Robert Rede’s Lecture, University of Cambridge, 10 February 2014, p. 3.

4 Murray Gleeson, ‘Legality—spirit and principle’, Second Magna Carta Lecture, NSW Parliament House, Sydney, 20 November 2003, [www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj\\_20nov.html](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_20nov.html).

5 F.W. Maitland, *The Constitutional History of England*, Cambridge University Press, Cambridge, 1908, p. 15.

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Irrespective of historical contests and differing interpretations of the significance of Magna Carta, its continuing status as a symbol of individual liberty and the supremacy of the law is a testament to its continued contemporary relevance.

And so, what is the continuing importance of Magna Carta for us here in Australia in 2015?

Magna Carta continues to be considered by the Australian courts in cases concerning issues ranging from bankruptcy, criminal matters, and native title. While there has been some judicial disagreement as to the contemporary relevance of Magna Carta in Australia, there can be no disagreement with Justice Isaacs' observation in the High Court of Australia in 1925, when he proclaimed Magna Carta to be 'the groundwork of all our Constitutions'.<sup>6</sup>

Magna Carta's enduring relevance to Western democracy can be explained in large part by our shared constitutional heritage. From England, we have inherited history, constitutional forms and traditions and political values. And with them, a system of democratic government, the rule of law and the principle of legality.

Unlike other nations, our Constitution was not drafted in the context of rebellion and revolt, but we share common roots in Magna Carta. It is some of these legacies which I would like to reflect on now.

It is said that Magna Carta represented a grant of liberties to 'all free men' of the kingdom.<sup>7</sup> While some have been hasty to point out that the term 'free men' carried a very different meaning in 1215, its mere existence was evidence of an early conception of the principle of the rule of law—the principle that all authority is subject to, and constrained by, law.

The most oft-cited clause of the charter, clause 39, is said to embody this principle:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Magna Carta asserted that the powers of even a king ruling by divine right were still subject to some limitation and—to use a modern word—some form of accountability.

And, in doing so, it marked a fundamental change in attitudes to the Crown which, over subsequent centuries, would develop into limitations on government more broadly.

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6 *Ex parte Walsh and Johnson* (1925) 37 CLR 36, 79.

7 Clause 1, 1215 Magna Carta.

In modern day Australia, this principle of accountability applies to the executive arm of government. To quote Robert Menzies:

to ignore the Constitution, to treat its structure and the limitations it imposes upon the powers of the Commonwealth Parliament as of no account, to endeavour by clamour to prevent recourse to the courts for its interpretation, is to violate the whole conception of the rule of law.<sup>8</sup>

In Australia, executive accountability is guaranteed in part by the diffusion of power through:

- separate arms of government,
- parliamentary scrutiny mechanisms, and, importantly,
- scrutiny by the Australian people, through the right to engage in vigorous debate and the right to vote.

Indeed, Australia was one of the first countries to implement secret ballots for elections—a system that is at the core of the democratic process and system, which can be traced back to the principles embodied in Magna Carta.

The legacy of Magna Carta has also been inherited by Australia through the common law and the principle of legality.

The time of Magna Carta was marked by tyranny and rebellion, in which individual rights, in particular rights against the state, were not well understood. Magna Carta was pivotal to the establishment of these rights.

During the seventeenth century, perceptions of Magna Carta evolved from being a compact between the monarchy and rebel barons to an affirmation of individual liberty.

Perhaps the most famous parliamentarian of the period who espoused this interpretation of the charter was Sir Edward Coke. As Attorney-General in the front line of the conflict between parliament and James I, in the early seventeenth century, Coke argued that the imposition of constraints on the king's power was consistent with notions of personal liberty.

The rights and freedoms implied and inspired by Magna Carta—due process, fair trial, the presumption of innocence and equality before the law—are now firmly entrenched in our Constitution and common law. The principles of precedence and legality have provided strong protections for common law rights and freedoms in Australia. Statutory provisions are not to be construed as abrogating important or fundamental common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

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8 Robert Menzies, *The Forgotten People*, Angus & Robertson, Sydney, 1943, p. 167.

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While we are fortunate to live in times where individual liberties are well protected, this anniversary serves as a reminder that we must hold firm to these rights and freedoms, which were conceived long before Australia came to be.

This year, as we celebrate the 40th anniversary of the Australian Law Reform Commission, the commission is reviewing the Commonwealth statute book for consistency with traditional rights and freedoms. In keeping with the spirit of Magna Carta, this review will seek to prevent any improper curtailment of these fundamental rights and freedoms.

As the Prime Minister recently noted, it may seem paradoxical that we celebrate the 800th anniversary of Magna Carta at a time when laws are being adjusted, sometimes controversially, to ensure the security of our nation.

But it is in these challenging times, as it has been throughout the course of history, that it is most important to look to enduring values and principles: those of Magna Carta.

It is incumbent upon all of us to ensure that its values and its vision are preserved for the next generation, and for every generation thereafter.



# Magna Carta and the Rule of Law Tradition

*Martin Krygier*

Today, and for much of this year, we celebrate the 800th anniversary of a very old document, or bunch of documents, that few of us have read and few of those few fully understand. Even among those who do understand, there is considerable controversy about their meanings, significance(s), and what connections, if any, exist between then and now. A simple question, which is nevertheless very hard to answer, is: What have these ancient documents got to do with us? My answer is: less, more, and different than many people believe.

The argument has five parts. First I sketch two opposed views, those of Magna Carta votaries, true believers, on the one hand, and sceptics, on the other. I believe both are mistaken, indeed both make the same mistake on the way to opposite conclusions. Second, I introduce a theme that I think is less banal than it sounds (I hope that is true, because it does sound pretty banal): Everyone is from somewhere. Then I move from the first part of my title, Magna Carta, to the second part, the rule of law tradition. I treat it in three stages, by saying something first about tradition, then about legal tradition, and finally about rule of law tradition. My conclusion supports two cheers for Magna Carta and three for rule of law tradition.

## I Votaries and sceptics

On one side, we have those I will call votaries, for whom the brightest jewels of our contemporary constitutional framework—the rule of law, habeas corpus, jury trial, equality before the law, the independence of the judiciary and, more ambitiously, democracy and representative government—are products of this long distant agreement between King John and some of his barons. Thus in 1988, Baroness Thatcher declared in Bruges, the heart of (non-British) Europe, that ‘We in Britain are rightly proud of the way in which, since Magna Carta in the year 1215, we have pioneered and developed representative institutions to stand as bastions of freedom’.<sup>1</sup> On 15 June this year, a successor of the Baroness, David Cameron, called the charter ‘a document that would change the world ... back then it was revolutionary, altering forever the balance of power between the governed and the government’. Lest we wonder why a conservative politician should be so fond of such a revolutionary document, Mr Cameron explains that ‘the great charter shaped the world for the best part of a millennium helping to promote arguments for justice and freedom’:

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1 Margaret Thatcher, Speech to the College of Europe (‘The Bruges Speech’), 20 September 1988, [www.margaretthatcher.org/document/107332](http://www.margaretthatcher.org/document/107332).

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Magna Carta is something every person in Britain should be proud of. Its remaining copies may be faded, but its principles shine as brightly as ever, in every courtroom and every classroom, from palace to Parliament to parish church. Liberty, justice, democracy, the rule of law—we hold these things dear, and we should hold them even dearer for the fact that they took shape right here, on the banks of the Thames.<sup>2</sup>

And it is not just on the banks of the Thames that they are proud. Our own Rule of Law Institute declares that the ‘passion that led people to create the Magna Carta in pursuit of justice lives on in our society and leads us to do the same’. On their reproduction of the Salisbury Cathedral 1215 Magna Carta they write, ‘The document is important because it is the foundation of the rule of law, due process, and many other legal principles that we take for granted today. The idea that those who have power must follow the rules has developed over 800 years and has come to represent equality and liberty before and through the law’. And while our Chief Justice, Robert French, acknowledges the distance, not merely geographical and temporal but also of expectations and interpretations, between then and now, he avers that:

despite the myth and its often overlooked early history, the Magna Carta has transmitted through the centuries the idea that all official power is subject to the law ... its enduring legacy—the lesson that no power is absolute. It informs our constitutional heritage of the rule of law under which Australians can enjoy their freedoms, develop their talents and pursue their opportunities.<sup>3</sup>

His predecessor as Chief Justice, Sir Gerard Brennan, similarly acknowledges that though the current symbolic significance of Magna Carta might outrun its meaning as originally understood, it is ‘an incantation of the spirit of liberty’.<sup>4</sup>

Such tributes from the great and the good are in virtually unlimited supply, particularly in this octocentenary year, but we didn’t invent them. At least from the seventeenth century onwards, in Britain and its colonial and ex-colonial tributaries, perhaps above all the United States, Magna Carta has had what these days we like to call *iconic* significance.

And yet, there are some who think it a false icon. Thus in an op-ed piece for the *New York Times* earlier this year, Professor Tom Ginsburg, eminent constitutional scholar

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2 David Cameron, ‘Magna Carta 800th anniversary: PM’s speech’, delivered at Runnymede, Surrey, on 15 June 2015, [www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech](http://www.gov.uk/government/speeches/magna-carta-800th-anniversary-pms-speech).

3 Museum of Australian Democracy, ‘Quotes from eminent Australians’, *Magna Carta and Modern Australia*, <http://magnacarta.moadoph.gov.au/quotes/>.

4 Gerard Brennan, ‘An address on the occasion of the naming of Magna Carta Place, Langton Crescent, Canberra’, 12 October 1997, [www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj\\_magna.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_magna.htm).

from the University of Chicago, implores us to ‘Stop Revering Magna Carta’,<sup>5</sup> and rebuts many of the ‘myths’ that have come to encrust the ‘Great Charter’. It was not the first document of its type, though that is often alleged; it was ineffectual, its first incarnation quickly provoking civil war rather than restraining the king; and it was not, he insists, the ‘ringing endorsement of liberty’ it is so often claimed to be. Instead, some of its less hallowed but more precise clauses include one preventing Jews from charging interest on certain debts, another barring a woman’s testimony from leading to the imprisonment of anyone for killing anyone except her husband, and another removing fish traps from the Thames and other waterways (save on the sea coast). Even its most famous clauses that grant ‘the lawful judgment of his peers or ... the law of the land’ and timely legal justice to every ‘free man’, particularly chapters 39 and 40,<sup>6</sup> are limited in their substantive scope and social reach. They didn’t enunciate habeas corpus or found trial by jury, still less representative government or democracy. They certainly had little to say for those, most of the population then and now, who lacked any of the privileges of those dead white male barons who did the deal.

Similar complaints are even made by people as close to the Thames as Mr Cameron. The historian, novelist, and former London barrister Dominic Selwood thinks no more than Ginsburg does of either the purpose, the beneficiaries, or the contents of the charter. In a blog beguilingly titled, ‘The Cult of Magna Carta is Historical Nonsense. No Wonder Oliver Cromwell Called It “Magna Farta” ’, he argues that the:

widespread worship of Magna Carta as one of the planks of an English person’s rights has no basis in law or history. In fact, almost everything commonly attributed to Magna Carta is wrong ... Despite widespread beliefs about the charter’s contents, it actually contained very little of significance ... did not guarantee freedom to all true-born English people, subject the king to Parliament, enshrine the notion of trial by jury, guarantee freedom of speech, embed the concept of no taxation without representation, or anything along these lines.<sup>7</sup>

Anyway the original agreement ‘was only honoured by the barons and King John for a total of nine weeks, before being ignored and consigned to the midden heap’. And what of today? Though the charter is older than any other English statute, ‘It

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5 Tom Ginsburg, ‘Stop revering Magna Carta’, 14 June 2015, The Opinion Pages, *New York Times*, [www.nytimes.com/2015/06/15/opinion/stop-revering-magna-carta.html?\\_r=0](http://www.nytimes.com/2015/06/15/opinion/stop-revering-magna-carta.html?_r=0).

6 1215 Magna Carta, chapter 39: No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. Chapter 40: To no one will we sell, to no one will we deny or delay right or justice. (Later versions of the charter collapsed these two chapters into one, chapter 29.)

7 Dominic Selwood, ‘The cult of Magna Carta is historical nonsense. No wonder Oliver Cromwell called it “Magna Farta” ’, *The Telegraph*, 17 June 2014, <http://blogs.telegraph.co.uk/news/dominic selwood/100276672/the-cult-of-magna-carta-is-historical-nonsense-no-wonder-oliver-cromwell-called-it-magna-farta/>.

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should perhaps come as no surprise that the [three] articles of Magna Carta that do remain on today's statute book are all so vague and undefined that they are largely legally meaningless'.

Equally sceptical, and more intriguing because of the eminence and expertise of its source, is the view of Lord Sumption of the United Kingdom Supreme Court, who is mega-distinguished both as a lawyer and a medieval historian. He begins an address on 'Magna Carta Then and Now' with what might be construed as a self-denying ordinance:

It is impossible to say anything new about Magna Carta, unless you say something mad. In fact, even if you say something mad, the likelihood is that it will have been said before, probably quite recently. So you must not expect any startling new line from me, least of all in a centenary year in which something portentous is said about Magna Carta every day.<sup>8</sup>

Nevertheless Lord Sumption perseveres, in terms which don't seem to be mad and do seem to be novel, or at least to run against the laudatory current. He contrasts two views of the charter:

the lawyer's view [which] holds the charter to be a major constitutional document, the foundation of the rule of law and the liberty of the subject in England. The other is the historian's view, which has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter's constitutional significance.<sup>9</sup>

On this matter, while he concedes that 'the lawyers have been more successful in propagating their views than the historians', Lord Sumption considers the lawyers' claims for the foundational significance of Magna Carta to be 'high-minded tosh'. I guess that's better than low-minded tosh, but it doesn't seem much better.<sup>10</sup>

To Lord Sumption, the charter was in no way a constitutional document but one dealing with minor incidents of feudal law, of interest only to King John and the 150 to 180 barons who took part in the negotiations. It spoke not to the future, in which these matters lost their importance due to changing political and social circumstances, but to the quickly vanishing past, in relation to which it said little new. That is why, 'Gradually the English forgot about Magna Carta'. It had its days in the thirteenth and fourteenth centuries, largely disappeared from view in the fifteenth and sixteenth, and owed its reincarnation to the myth-making enthusiasms and embellishments of one seventeenth-century judge and politician, Sir Edward Coke. His newly mythologised reanimation of the charter was 'swallowed wholesale by the early American

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8 Jonathan Sumption, 'Magna Carta then and now', address to Friends of the British Library, 9 March 2015, [www.supremecourt.uk/docs/speech-150309.pdf](http://www.supremecourt.uk/docs/speech-150309.pdf), p. 1.

9 *ibid.*

10 *ibid.*, pp. 3–4.

colonists', and following them, one might add, large swathes of what became the English-speaking world. So if Magna Carta does matter today, as Sumption concedes, it does so not as a medieval document but rather as 'a chapter in the constitutional history of seventeenth century England and eighteenth century America'.<sup>11</sup>

Why then should we be interested in the original today? No reason really:

when we commemorate Magna Carta, perhaps the first question that we should ask ourselves is this: do we really need the force of myth to sustain our belief in democracy? Do we need to derive our belief in democracy and the rule of law from a group of muscular conservative millionaires from the north of England, who thought in French, knew no Latin or English, and died more than three quarters of a millennium ago? I rather hope not.<sup>12</sup>

Of course, neither side—neither votaries nor sceptics—is ignorant of what the other is saying. The votaries are well aware that we find much more and much different in Magna Carta today than did its makers in 1215. They know that many of the chapters of the 1215 charter do not even hint at the large principles we revere, and that no mention of 'habeas corpus, prohibition of torture, trial by jury, and the rule of law' can be found even in the charter's most famous chapter 39. They are likely to say, as does the historian Peter Linebaugh, that these have all been 'derived'<sup>13</sup> from that chapter. And they often commonly qualify their encomia to the 'triumph' of Magna Carta<sup>14</sup> with riders such as 'or more accurately, the ideas for which Magna Carta was the inspiration'.<sup>15</sup> They are fond of metaphors of organic development: the charter was full of 'germs'<sup>16</sup> of future blessings such as due process and representative government. What we have now was there 'in embryonic form' even though for long periods of time these embryos must have seemed stillborn.

Sceptics in turn, though they are likelier to speak of 'myths' rather than embryos and germs, don't deny that these myths have come to be used to significant effect many times and in many places. Both sides, in other words, acknowledge that something has happened between 1215 and 2015, to give the charter the significance it now is thought to have. It is just that votaries attribute this to the growth and blossoming of seeds already sown in 1215, while sceptics think its present significance has nothing much to do with the original charter itself, but, centuries on, with myth-making exploiters and gullible enthusiasts for old fairy stories that support new purposes.

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11 *ibid.*, pp. 14, 17.

12 *ibid.*, p. 18.

13 Peter Linebaugh, *The Magna Carta Manifesto*, University of California Press, Berkeley, 2008, p. 28.

14 Anthony Arlidge and Igor Judge, *Magna Carta Uncovered*, Hart Publishing, Oxford, 2014, p. 154.

15 *ibid.*, pp. 154, 161.

16 *ibid.*, p. 78.

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Moreover, another curious feature of these arguments is that, notwithstanding the distance between votaries and sceptics, there doesn't seem much disagreement about the actual facts of the matter: when the charter was negotiated, between whom, what was in it, how it was amended, how many versions appeared, who made something of it and when, how it featured in later celebrated invocations, and so on. Rather the disagreements are interpretive: conflicting interpretations of what we already know. In particular, how to characterise the relationship between the original charter, later invocations, and whatever else has been said by votaries to have been 'germinating' in its provisions or, by sceptics, to have been retrospectively read into them. Does the charter, like some documentary Rip van Winkle, come to bestir itself in later ages, or is it just an old relic, that would have been (should have been?) forgotten had it not been disinterred by later generations, to dignify their new concerns and more specifically to provide an attractive origin myth for them?

In disputes of this sort, no newly discovered fact is going to sway anyone. We know all we need to know. But we might be aided by reminders of things so obvious that, while no one could consider them revelations, few take them into account. They are treated as obvious background, and so unobserved. The point is less to point out that they exist, which no one doubted, but point to their significance, which not everyone has noted. And so, to my next revelation.

## II Everyone is from somewhere

Some thirty years ago, I was writing a piece on revolutions and the continuity of law, with Adam Czarnota, a Polish colleague and friend. He tried to persuade me that until the advent of Communism, no so-called revolution had ever led to anything truly new. I demurred shyly, suggesting that something might be said to have come out of eighteenth-century America and France. 'Bah,' he replied dismissively. 'Once we learned we were all equal in the sight of God, the rest was interpretation'. This is not much of an explanation, since, as we know, what might now seem the Bible's self-evident implications were rejected and/or violated with good conscience by most of the Judeo-Christian world for millennia. One might say ignored, except that for many these implications were not even conceived or conceivable. Christians were Crusaders, Inquisitors, slave owners, and condescending colonialists, and their consciences were rarely torn apart by contradictions between their faith and their practices. Indeed their understandings of their faiths often spurred their practices. Moreover, both those who did and those who didn't think celestial equality might have some implications for the profane here-and-now, often quoted the same texts. In any event, as the sociologist and theologian, Hans Joas puts it, 'Maturation across centuries is not a sociological category';<sup>17</sup> it is a metaphor which, without more, explains nothing.

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17 Hans Joas, *The Sacredness of the Person: A New Genealogy of Human Rights*, Georgetown University Press, Washington DC, 2013, p. 5.

That is why airy talk of embryos, gestation, germs and inspirations is all too swift. It is also why it is so easy to be a sceptic about suggestions that there are any links between Magna Carta then and now. Picking up differences between how it was understood by its framers and its inheritors is like shooting fish in a barrel; easy sport. On the other hand, the sceptic who sees only free manipulative myth-making in the reiterated references to Magna Carta over centuries is blind to an important point that votaries rightly see, but do not have the concepts to express.

For Czarnota's observation is far from empty. As the sociologist Edward Shils has observed, 'Every human action and belief has a career behind it'.<sup>18</sup> No one starts from nowhere, and where we start, influences where we might go. Equally to the point, it influences who and how many might come with us. That is as true of the first charter itself as it is of its subsequent appropriations by people such as Sir Edward Coke centuries later. None was putting their quill on a blank piece of parchment. Thus the sceptical claim that the charter was not the first to express the ideas it contains is far less interesting than sceptics think. Of course it was not. A public document, intended to settle a fierce dispute between warring parties here on earth could not be written by Martians in the language of Mars. It had to be written in terms that made sense to those who were to agree to them. Not only because people would not agree to things they hadn't thought of, but because to a significant degree they couldn't even *think* much that hadn't already been thought, or at least that didn't make sense in terms of what was already thought.

It is thus not an accident that other countries whose legal traditions stemmed from the same sources saw similar documents with similar provisions at similar times, among them the Hungarian Golden Bull of 1222 and the German Statute in Favour of Princes of 1232.<sup>19</sup> Nor that contemporary legal writings expressed similar principles, notably Henry de Bracton's *On the Laws and Customs of England*, arguably more influential on the development of the rule of law tradition in England than was Magna Carta.<sup>20</sup> That doesn't mean that the charter was not distinctive, either in origin or content. Though the language and concepts were available, they didn't dictate the precise terms of the agreements reached and recorded, which were specific results of the negotiations between king, church and barons, hammered out in dramatic circumstances where the king was forced to make public concessions in legal form, endorsed as a statute by successive monarchs. The charter became a notable, identifiable part of English law, for lawyers to interpret and in interpreting adapt, over centuries. I just point out what is a natural fact about the history of ideas, that its creators were creatures of their time and place.

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18 Edward Shils, *Tradition*, University of Chicago Press, Chicago, 1981, p. 43.

19 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, Harvard University Press, Cambridge, Mass., 1983, p. 515.

20 John Philip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, Northern Illinois University Press, DeKalb, 2004, p. 11ff.

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Nor does the fact that generations who have drawn upon the charter find different implications than those that could have been apparent to the original participants deny links between them. The interpreters too lived sometime in some place, not any time anywhere. It is not an accident that specific later histories and traditions in Hungary and German states meant that the fates of their thirteenth-century ‘charters’ were very different from that of the English one. Yes, Coke was spurred by novel annoyances to find things in the charter that could not have occurred to your average thirteenth-century baron, but could speak to audiences among seventeenth-century English lawyers and parliamentarians. Yes, Kings James I and Charles I bitterly, and by all accounts sincerely, rejected his arguments, and had their own arguments, which were also not invented out of whole cloth by them and spoke to many of their supporters.

On the other hand, had Coke been trying to speak to the Mongol invaders who conquered Russia only a few years after Magna Carta, or to Aleksandr Nevsky who ruled Russia as their vassal for much of the rest of that century, or to the tsar in the seventeenth century, or even to Mr Putin today, he would have had less traction than he did, even if he had somehow been able to bring himself to make the same arguments about the same texts as the original Coke did. Because for an argument to strike root the soil must be receptive. It is not always or everywhere so. Russia has for centuries had very different legal and political traditions than western Europe generally, and England more particularly. Indeed it makes more sense to speak of Russian *state* traditions rather than specifically *legal* ones, and certainly not rule of law ones.<sup>21</sup> The Russian tradition made no room for constraints on the tsar, who did not merely rule but *owned* the Russian lands, and whose ‘barons’ served him but could not resist him. There was rule without reciprocity in the Russian tradition, whereas European (not just English) feudalism was full of rule and reciprocity and productive tensions between them which generations of lawyers could exploit, and many political thinkers sought to resolve. In these circumstances, over centuries, what I will call a rule of law tradition was largely absent from Russia. In England, such a tradition was never the only game in town. It had many participants saying many things, and its implications were never predetermined, but it was hugely significant and connected Magna Carta to Edward Coke, and that came to matter.

So I will now turn to the second part of my title: ‘rule of law tradition’. Of course, when we talk of Magna Carta, we are already simplifying since, as everyone knows, there were several different texts produced in the thirteenth century and it came to stand for many different things. But that is as nothing to the simplification involved in invoking a rule of law tradition, which is an altogether more amorphous, plural, and variegated phenomenon. Still, there is something in it, and it is a key part of the context which explains Magna Carta, explains its survival, contributions and adaptations, explains much of what we value in our legal order, and connects them all. It is the elephant in the room: rather large, rather old, and rather rare. We would

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21 Richard Pipes, *Russia Under the Old Regime*, Peregrine Books, Harmondsworth, 1977.



do well to take it into account. I will try to do so, first with some observations about traditions in general, then about legal traditions more particularly, and finally about rule of law traditions, more specifically still.

### III Tradition

Michael Oakeshott has observed that ‘a tradition of behaviour is a tricky thing to get to know’.<sup>22</sup> Quite so. Partly because, typically, a significant tradition is rarely one thing, but rather an intricate order of interrelated elements. Some of these elements are explicit but many are implicitly assumed. Some contain injunctions about matters of substance while others instruct participants how to regard, read, or respond to such injunctions, including what questions are appropriate to ask and what answers are appropriate to give. Not only are traditions highly complex but theirs is a layered complexity where insiders learn from some layers (e.g. rules of interpretation) authorised ways of understanding how to deal with other layers (e.g. rules of behaviour). It is also tricky because so much that matters in complex traditions is not explicit, but just part of the background, or tacit knowledge, that novices in traditions are required to learn in order to become adepts. To return to Oakeshott:

All actual conduct, all specific activity springs up within an already existing idiom of activity ... The questions and the problems ... spring from the knowledge we have of how to solve them, spring from the activity itself.<sup>23</sup>

The idiom of activity *within which*—not simply with which—lawyers learn to think and speak is that of their particular legal order and it is transmitted in the traditions of that order, sometimes for an extraordinarily long time. Learning to ‘think like a lawyer’—which is what law schools profess to teach when they despair of teaching anything specific, and which is perhaps the only important thing they do manage to teach—is only a particular way of saying ‘learning the idiom of activity of a tradition’, though even then the phrase is not absolutely accurate. One does not learn to think like *any* lawyer, but rather like a lawyer from a specific legal tradition, one at home in a particular legal idiom.

Too often traditions are thought of as static and past. More realistically they are commonly dynamic and ever-present, though always connected to the past. Again, think languages, idioms, not relics. And another fact that should be obvious, but is often missed: *argument* stands at the core of vibrant traditions. As one of the most perceptive observers of traditions, the philosopher Alasdair MacIntyre has remarked: ‘a tradition is an argument extended through time’<sup>24</sup>:

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22 Michael Oakeshott, *Rationalism in Politics and Other Essays*, Methuen & Co., London, 1962, p. 88.

23 *ibid.*, pp. 101–2.

24 Alasdair MacIntyre, *Whose Justice? Which Rationality?*, University of Notre Dame Press, Notre Dame, Ind., 1988, p. 12.

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Traditions, when vital, embody continuities of conflict ... A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations.<sup>25</sup>

Given this, one of the commonest misunderstandings of complex, normative—particularly legal—traditions is to imagine that they are or indeed can be unchanging. In a tradition of any longevity and significance, argument meets counter-argument, and both are modified continually. Change is not inconsistent with continuity but an element of it.

Let us return to the charter. In what is widely accepted as the classic text on Magna Carta, Professor J.C. Holt makes a profound observation, about the charter specifically but of much more general significance as well:

The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking.<sup>26</sup>

Moreover, this was an argument that did not start in the thirteenth century but had begun at least in ancient Greece, and Rome, and by the time of the charter was not merely going on in England but throughout western Europe. If David Cameron's litany of 'liberty, justice, democracy, the rule of law' was in some way the result, Magna Carta can hardly have been the single cause, because its elements are thriving in France, Switzerland, Denmark, and numerous other countries where the Thames does not flow. And even where it does, in such enduring arguments even the most hallowed symbolic contributions, Magna Carta among them, are never the only moving parts. They are embedded in traditions where there is always a lot else going on, particularly where traditions mix arguments from many sources, and when different traditions mix. A document that is part of a significant tradition will draw upon arguments already made, will contribute its own, and will be reinterpreted by later participants in the tradition, in the light both of what they find in it and what they bring to it. For traditions of thought are not mere neutral vehicles for the passage of sacred relics, even when that is what they say they are.

If there is all this arguing going on, does this necessarily support Lord Sumption's preference for scepticism about the seminal significance of Magna Carta? I think not. Rather, it exposes the false choice we are invited to make by votaries on the one hand and sceptics on the other. Both are right and wrong at the same time, for the same

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25 Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2nd edn, Duckworth, London, 1985, p. 222.

26 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. 46.

reasons, and in ways typical of argumentative traditions. Interweaving of inheritance, present response and continuing reception and transformation lies at the heart of enduring traditions and makes them so tangled, absorbing and important in social life. Inheritance is not sovereign, responses are not autonomous. On the one hand, traditions provide contexts and resources for action and thought; often they provide *scripts* for adepts to follow. Think of written constitutions, even those that purport to bind. They never determine how they will be interpreted over time, but in serious constitutional cultures they are rarely irrelevant to the ongoing arguments about proper interpretation either. Interpreters embroider, improvise and innovate within these framing idioms, and the resources and limitations they provide. More broadly, we can adopt another felicitous observation of MacIntyre's. St Thomas Aquinas, a not insignificant near contemporary (1225–1274) of Magna Carta, 'writes out of a tradition',<sup>27</sup> and the expression is a good one, both for Magna Carta itself and what came to be made of it. They were written out of, and also into, a tradition.

Interpretive traditions and the arguments they embody and transmit are often as important as they are unnoticed; interpreters develop them, often in unprecedented ways. Inheritances from, and versions of, the past are continually being refashioned for present purposes. In all complex and enduring traditions, there is constant interplay between inherited layers which pervade and—often unrecognised—mould the present, and the constant renewals and reshapings of the purported past in which authorised interpreters and guardians of the tradition and lay participants indulge. In such a context creativity is inescapable and pervasive but it is conducted 'within an already existing idiom of activity',<sup>28</sup> often of considerable power and complexity. Magna Carta only has importance within the traditions to which it did, and was made to, contribute. It itself was no 'unmoved mover' both because it was not unmoved—it came from somewhere particular and embodied particular concerns—and on its own it couldn't move much at all. It needed to be absorbed, invoked and argued about. It was in the thirteenth and fourteenth centuries when it was repeatedly confirmed, less so in the two centuries that followed, and was picked up again in the seventeenth. It now remains as a symbol rather than an argument most of the time, since at least at the level of rhetoric the argument has been won.

#### IV Legal traditions

What has been said about arguments and traditions is true of all sorts of traditions. But it is not irrelevant to the career of Magna Carta that it was a legal document generated within a developing legal tradition and interpreted and reinterpreted by lawyers over centuries. For it matters that lawyers have been particularly central in the animation and reanimation of the charter. Law is one of the most self-consciously traditional of practices, and lawyers have a distinctive preoccupation with the legal pasts. They

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27 MacIntyre, *Whose Justice? Which Rationality?*, op. cit., p. 164.

28 Oakeshott, op. cit., p. 101.

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are always mining the past for *authorities* they can deploy in the present; that is something engineers, for example, don't do in the same way—their tradition has a thinner presently active past than does law—and it is characteristic of the profession. Lawyers are not expected to recommend a result simply because it would be a great idea, they recommend it because they claim it flows from the existing law, some of it—particularly in the common law—very long-existing law. That law has *authority*, and it also contains ideas, arguments and resources for thought. Lawyers are expected to take the legal past seriously.

So lawyers have a special interest in the past, but it is different from an historian's interest. It is not primarily to establish what happened but to draw on the present-past of law to deal with present legal problems. This gives lawyers a distinctive way with the past, captured by the great historian, F.W. Maitland's remark, in seeking to explain 'Why the History of English Law is Not Written' (though he did a lot to write it), that the lawyer is less interested in 'medieval law as it was in the middle ages, but rather ... [in] medieval law as interpreted by modern courts to suit modern facts'.<sup>29</sup>

This is not a modern foible that needs to be cured; it is part of what it means to interpret the law for lawyerly ends, to 'think like a lawyer', and it has always been so. Returning to our context, what the master, Holt, observes in response to ultra-literalists' criticisms of deviation from the sacred text of Magna Carta applies equally to sceptics' claim that its influence is 'mythical' because such deviations have occurred:

it is quite invalid to treat Magna Carta as a kind of datum from which all subsequent departure was unjustified. Magna Carta was simply a stage in an argument and bore all the characteristic features of the argument—the erection of interests into law, the selection and interpretation of convenient precedent, the readiness to assert agreed custom where none existed. It was not only law: it was also propaganda. Hence to accuse Coke or anyone else of 'distortion' is scarcely illuminating, for to distort a distortion is little more than venial.<sup>30</sup>

To ask whether these processes of affirmation and transformation are either unaltered transmission or prefiguration, on the one hand, or myth-making on the other, is simply to misunderstand the enterprise. Though we never start from nowhere, once we do start we are unlikely to end up in the same place. If we were to start somewhere else, thirteenth or seventeenth-century Russia, to recall my earlier examples, the questions we would put to our sources, and the answers we would glean from them, would be different from beginning to end, even if the sources were the same.

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29 Frederic William Maitland, *The Collected Papers*, ed. H.A.L. Fisher, vol. 1, Cambridge University Press, Cambridge, 1911, p. 490.

30 Holt, *op. cit.*, p. 48.

The present of any complex and enduring tradition is profoundly influenced by what comes down to it from the past, but little that is important remains without change. What has to be stressed is the constant *interplay* between inherited layers which pervade and—often unrecognised—mould the present, and the constant renewals and reshapings of these inheritances, in which authorised interpreters and guardians of the tradition and lay participants in it indulge, and cannot indulge. So the traditionality of a highly traditional practice such as the common law, or a revered icon within it, such as Magna Carta, does not depend upon the identification of perennially enduring essential elements, objective carriers of meaning—the same meaning—from distant forebears to us. Nor does the absence of such elements by itself point to the absence or unimportance of continuity in any social practice. Nor, finally, can traditions survive without continuous change, addition or innovation.

Within any legal tradition, authoritative documents do not merely contribute arguments of their own; they often become the foci of arguments by other participants, foci that it is necessary to appropriate and reappropriate, interpret and reinterpret. That makes them at once central to the argument and malleable, because subject to interpretation. Documents that were treated as central within a tradition can cease to be so treated, as Lord Sumption (somewhat controversially) alleges happened to Magna Carta in the fifteenth and sixteenth centuries; certainly there were fewer public and official invocations then. When such changes occur, it seems odd to attribute them to the document itself which had not changed since when it was everywhere, and did not change again when it was nowhere, nor when it reappeared. But it was part of the legal tradition, it did not disappear, and it could be revived by partisans whose interpretations suited their aims. And so, Sir Edward Coke, the great reviver, and the greatest of all votaries of Magna Carta and the supremacy of law.

It might be true that Coke, who Lord Sumption takes above all and virtually single-handedly to have fashioned our ‘myth’ of the Magna Carta, was a fundamentalist votary in my sense about Magna Carta, and saw it as an unchanged bequest, that inherited, encoded and transmitted elements of the ‘ancient constitution’ of England. That was the original interpretation of Coke by J.G.A. Pocock, our most famous interpreter of his thought. According to Pocock, Coke saw the common law as a kind of unextinguished flame which, once lit in ‘time immemorial’ had burnt ‘throughout the centuries and derives its authority from its having survived unchanged all changes of circumstances’.<sup>31</sup> As a result, ‘the men of 1628 could believe that they were not only repeating the solemn act of 1215, but taking part in a recurrent drama of English history at least as old as the Conquest’.<sup>32</sup> On this interpretation, Coke saw himself as keeper of the flame against blowhards like James and Charles I, who were seeking to snuff it out.

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31 J.G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century. A Reissue with Retrospect*, Cambridge University Press, Cambridge, 1987, p. 37.

32 *ibid.*, p. 45.

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But this is not the only way to attribute significance to elements in a long legal tradition, and it was neither the only nor the dominant interpretation in Coke's own seventeenth century, when Magna Carta was revived. More recent interpreters have argued that this image of the common law, and within it Magna Carta, as an unchanging deposit transmitted over centuries, even if true of Coke's version, was never the interpretation widespread among the most distinguished and sophisticated common lawyers. Such lawyers, among them in the seventeenth century Sir Henry Spelman, Sir John Vaughan, John Selden and Sir Matthew Hale, in the eighteenth Sir William Blackstone and Lord Mansfield, had no time for immemorial origins. Since evidence was poor and incomplete, they argued, there was no way of knowing such origins with any exactness. In any event it is not in the nature of law to remain unchanged:

From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do insensibly grow upon the People, so many times there grows insensibly a Variation of Laws, especially in a long tract of Time.<sup>33</sup>

Indeed, Hale thought it absurd to imagine that the law should remain unchanged:

The matter changeth the custom; the contracts the commerce; the dispositions, educations and tempers of men and societies change in a long tract of time; and so must their lawes in some measure be changed, or they will not be useful for their state and condition.<sup>34</sup>

If there was all the adding, subtracting, altering and creating that Hale describes, what held things together, in the absence of the glue of identity?; what made all these different laws part of the same 'common law'? For Hale, and the common law tradition more broadly, change was an intrinsic characteristic of a legal order in constant organic evolution. Like a person, the law maintained its continuity through a process of continual change and growth. Or, to change the metaphor as several of them did, the common law survived change just as 'the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials'.<sup>35</sup> What made all its elements part of the same law was not their changelessness but their continuity. And this continuity had more to do with the continuing authority and reception of the law than it did with any demonstrable objective longevity of all its elements.

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33 Matthew Hale, *The History of the Common Law of England*, ed. C.M. Gray, University of Chicago Press, Chicago, 1971, p. 39.

34 Matthew Hale, 'Considerations touching the amendment or alteration of lawes' (first published 1665) in F. Hargrave (ed.), *A Collection of Tracts Relating to the Law of England*, vol. 1, 1787, pp. 249–89; repr. Professional Books, Oxford, 1982, pp. 269–70.

35 Hale, *The History of the Common Law of England*, op. cit., p. 40.

I think this is not a bad rendition of what typically happens in argumentative traditions, where an authoritative past is debated in ever changing presents. It is not faithfully rendered by a picture of Magna Carta either as some sort of magician's hat out of which ever more attractive rabbits pop over time, or as a simple *ex post facto* bit of politically driven myth-making on the other. It is more complex than either of those options; more noble than either too. Noble, not simply because it is traditional, since there are plenty of obnoxious traditions faithfully observed, but because it is a tradition of a particular sort, a rule of law tradition. And that makes Magna Carta noble, too, since it was a plausible—and has been taken to be an actual—emblem of and contributor to that tradition.

## V A rule of law tradition

Unless it is five minutes old, every society that has law has legal traditions. But they differ, and not just in their particular rules and institutions. Enduring legal traditions come to be manifest, not simply as particular precepts of law, or particular canons of interpretation or even in particular ideals, but in something broader and more overarching. Comparative lawyers have noted that beyond particulars of machinery and rules, legal traditions embody characteristic and distinctive 'styles'<sup>36</sup> and even 'visions'<sup>37</sup> of law. More deeply, a number of authors have emphasised the extent to which particular legal orders embody and presuppose distinctive ideologies in a broad sense, distinctive 'ways of viewing both law and the world',<sup>38</sup> which incorporate particular constellations of values, particular 'legal views of reality' through which lawyers see the world, particular 'legal sensibilities'<sup>39</sup> which are pervasive and inform legal goals, means, doctrines, and machinery. These sensibilities are not seamless or monolithic, and they are subject to strain and to change, but again it is typical that this change has deep roots in what has gone before. And finally it is not merely values and sensibilities *within* the law that matter. Societies differ in the importance and value that they place on law, and such differences also endure. As the American comparativist, J.H. Merryman, has noted:

A legal tradition ... is not a set of rules of law about contracts, corporations, and crimes, although such rules will almost always be in some sense a reflection of that tradition. Rather it is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role

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36 K. Zweigert and H. Kötz, *Introduction to Comparative Law*, 2nd revised edn, Clarendon Press, Oxford, 1987, p. 69.

37 Patrick Atiyah and Robert Summers, *Form and Substance in Anglo-American Law*, Clarendon Press, Oxford, 1987, p. 411.

38 Eugene Kamenka and Alice Erh-Soon Tay, 'Beyond bourgeois individualism: the contemporary crisis in law and legal ideology' in Eugene Kamenka and R.S. Neale (eds), *Feudalism, Capitalism and Beyond*, Edward Arnold, London, 1975, p. 128.

39 Clifford Geertz, *Local Knowledge: Further Essay in Interpretive Anthropology*, Basic Books, New York, 1983, p. 215.

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of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught.<sup>40</sup>

One such ‘set of deeply rooted, historically conditioned attitudes’ has to do with the rule of law. It is true, significant and has widely been thought appropriate in Western legal traditions that law be an independently significant aider *and* constrainer of the exercise of power in society. That has not been the only stream in the tradition; it has mixed choppily with other streams and its significance is often exaggerated, but by comparison with many other legal orders, there has been something significant there to exaggerate. That has not always or everywhere been so. I will be brief here, since elsewhere I have not been.<sup>41</sup> In such a tradition, the exercise of power is viewed as a central problem, and the institutionalised *tempering* of power a central part of the solution. Power is a problem because left to their own devices, power-holders cannot be relied on to avoid exercising it capriciously, and at worst wildly. And as too many people over too many centuries have not only observed but experienced, capricious power is terribly unsettling and wild power is simply terrible. More generally, the potential is alive even when power is not wild but merely, to use the more commonly identified term for this order of vice, arbitrary. Arbitrary power is not necessarily wild but it is usually and already objectionable. That is because, to put briefly what I have argued at length elsewhere: arbitrary power diminishes our freedom, causes our lives to be fearful, denies our dignity, and destroys possibilities of fruitful cooperation among citizens and between citizens and states.<sup>42</sup>

And what makes power arbitrary? When power-wielders are not adequately controlled, the grounds for their exercise of power are unspecified and untestable, and that power is beyond serious question or review, there is a problem. Even if you have that, but power-wielders are inclined and able to use their power without any need to provide space for its targets to be heard, to question, to inform, or to affect the exercise of power over them, there is another problem. Neither problem is a good one to have.

Within rule of law traditions arguments have raged over generations about whose and what sorts of power need to be tempered, how and by what institutional structures, in what circumstances and with what institutional devices. Answers have differed within different rule of law traditions and over time in the same ones. Their sources are many, varied, intertwined and at times in tension with each other, but they matter. If they

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40 J.H. Merryman, *The Civil Law Tradition*, 2nd edn, Stanford University Press, Stanford, 1985, p. 2.

41 Martin Krygier, ‘Rule of law (and Rechtsstaat)’ in James D. Wright (editor-in-chief), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd edn, vol. 20, Elsevier, Oxford, 2015, pp. 780–7; Martin Krygier, ‘Four puzzles about the rule of law: why, what, where? and who cares?’ in James E. Fleming (ed.), *Getting to the Rule of Law*, Nomos no. 50, New York University Press, New York, 2011, pp. 64–104.

42 Krygier, ‘Four puzzles about the rule of law’, op. cit.



are effective, that is a good thing. If not, the rule of law stands as a critical principle, available to be invoked when political power-wielders seek to evade the constraints of the rule of law, which they are often inclined to do.

Anyway, that is the argument. It is quite an achievement to get rulers to agree; who but masochists voluntarily bind themselves? But in some places the argument has pretty well won the day, so effectively indeed that it need hardly be made. Unlike Henry VIII or James I, their contemporary successors have no counter-arguments, though they still chafe from time to time, and seek to evade the implications of arguments they do not have room to deny.

Not only is the rule of law never the only game in town, it never wins every game. Nor should it, since there are other things we value that might be in tension with it and might require compromise. But a tradition in which the rule of law has been an animating value shared—always unevenly but still significantly—among initiates, lay people and institutions, is a good one to have. It is not universal. On the contrary, as the German political theorist, Heinrich Popitz has noted:

Only rarely has it been possible even just to pose the question of how to constrain institutionalized violence, in a systematic and effective manner. This has only taken place with the Greek *polis*, republican Rome, a few city-states, and the constitutional state of the modern era. The answers have been surprisingly similar: the principle of the primacy of the law and of the equality of all before the law (*isonomia*); the idea of setting boundaries to all legislation (basic rights), norms of competence (separation of powers, federalism), procedural norms (decisions to be taken by organs, their publicity, appeal to higher organs), norms concerning the distribution of political responsibilities (turn-taking, elections), public norms (freedom of opinion and of assembly).<sup>43</sup>

Distinctive and strong rule of law traditions are, then, not natural facts. In the Russian imperial state tradition, to which I have referred, law was not a central cultural symbol, and to the extent that it counted, it did so as an arm of central power. The notion that power should be restrained by law, that law should have a power-tempering role, both *horizontally* among members of the society and *vertically* between political power-holders and their ‘subjects’, or that it should do anything but transmit central orders, was for long periods unknown, then heretical, more commonly alien, and late and weak in developing. Here law was viewed primarily as properly a subordinate—indeed servile—branch of political, administrative and, at times, theocratic power.

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43 Heinrich Popitz quoted in Gianfranco Poggi, *Varieties of Political Experience: Power Phenomena in Modern Society*, ECPR Press, Colchester, UK, 2014, p. 48.

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This is not ancient history. Apart from the countries I have mentioned, many recent and contemporary legal orders, for example those of Myanmar and Sudan over the last decades,<sup>44</sup> make use of law systematically to serve ends contradictory to those of the rule of law. Tempering power is simply not the name of any official game. Other polities still have some rule of law values and practices but they are weak in comparison with other values, or are overborne in times of crisis.

In some legal traditions, however, rule of law values are strong. They are evident in the practices of law and more generally the exercise of power, and they matter and are thought to matter in the everyday workings of a society. Where that is so, it is only partly traceable to the activities of contemporary actors, or to particular rules and institutions, though these matter too. It is buttressed, made to endure, made part of the legal culture, by less obvious but no less important, indeed indispensable, legal traditions which underpin and transmit the values and practices (many unwritten) that accompany them.

And that leads me to my two and three cheers. Whatever the detailed targets and beneficiaries of Magna Carta, hostility to the arbitrary exercise of power by the king was manifest in many of its provisions. It might not have been a general thought among the barons who negotiated the particular provisions of the charter, but many of its chapters exemplified a general principle. That principle was already part of arguments found in Western, among them English, legal traditions, and it continued to be a matter of argument and institutional experimentation. The line was not straight, the arguments were often lost, power and interest trumped them and co-opted them often enough. However, there were victories, many of them coming to be institutionalised in our legal systems, and our expectations of them. That seems to me more than enough reason to celebrate the contribution of Magna Carta to the rule of law tradition, without which it wouldn't have existed, which made of it what it has become, but to which it gave argument, momentum and heft that was both symbolic and real. That does not make me a votary, since the document would have been of no account without the tradition and there is much else to look to for the rule of law features of our tradition, but it also does not make me a sceptic. The rule of law, to repeat, is a noble achievement, and the (indeterminate) contribution of Magna Carta to it deserves celebration. It didn't do it on its own, but then who of us does anything much good on our own?



**Question** — That was a fantastic presentation. You mentioned a whole lot of other cultures and legal systems across the world. Do any of them have an 800th, a 500th or a 600th celebration?

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44 See Nick Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order*, Cambridge University Press, Cambridge, 2015; Mark Massoud, *Law's Fragile State: Colonial, Authoritarian and Humanitarian Legacies in Sudan*, Cambridge University Press, Cambridge and New York, 2013, p. 201.

**Martin Krygier** — Paradoxically the Hungarians are now wheeling out the Golden Bull, but not for the right purposes. I do not want to go on too much about Hungary; it is a sad story. After the collapse of Communism in 1989, for a brief period of nine years, the Hungarian constitutional court, newly formed, was the strongest, or at least the most ambitious and active, constitutional court in the world, certainly in the post-Communist world. The then president of the court was trying to draw on, in a country which after all has very long authoritarian traditions, the Golden Bull to say, ‘Look, we have got that’. Actually I think it does support my argument. Sumption is a very clever fellow, so I am sure he has got his facts right. But to forget or ignore or deny the significance of this just because people exaggerate it is I think an error.

I do not know enough about comparative legal history. I do know that you could find in western European countries, several of them, a whole lot of prior history which could be drawn on to distinguish, maybe not France from Britain, but France from Russia. They certainly looked different to the famous Marquis de Custine, who went to Russia in the nineteenth century and was just amazed by the lack of law there. He went from France. He just could not find it. What the Tsar said seemed to go without saying.

I work on screwed up countries, or ex-screwed up countries, trying to think how you could actually generate some rule of law values. It is not an easy job and part of the reason it is not an easy job is not that you do not have the document—you may or may not—but you have had traditions where these arguments do not have purchase.

**Comment** — Thank you very much for this widespread look beyond Britain to the Continent and Europe. I can add the arrangements in the Kingdom of Aragon, which was around 1300, and in Denmark you had a similar development. Much of that really goes back to the arrangement between the conquering Germanic tribes in northern Italy facing highly developed urban societies. They did not exist anywhere else in Europe but they had survived the fall of the Roman Empire and the rulers had to accept that these cities were ruling themselves. Later on, of course, you get the development of the free cities in many parts of the Continent.

**Martin Krygier** — I am grateful for that.



# Magna Carta and the Executive

*James Spigelman*

In 1215, Genghis Khan conquered Beijing on the way to creating the Mongol Empire. The 23rd of September 2015 was the 800th anniversary of the birth of his grandson, Kublai Khan, under whose imperial rule, as the founder of the Yuan dynasty, the extent of the China we know today was determined. 1215 was a big year for executive power. This 800th anniversary of Magna Carta should be approached with a degree of humility.

## Underlying themes

In two earlier addresses during this year's caravanserai of celebration,<sup>1</sup> I have set out certain themes, each recognisably of constitutional significance, which underlie Magna Carta.

In this address I wish to focus on four of those themes, as they developed over subsequent centuries, and to do so with a focus on the executive authority of the monarchy. The themes are:

First, the king is subject to the law and also subject to custom which was, during that very period, in the process of being hardened into law.

Secondly, the king is obliged to consult the political nation on important issues.

Thirdly, the acts of the king are not simply personal acts. The king's acts have an official character and, accordingly, are to be exercised in accordance with certain processes, and within certain constraints.

Fourthly, the king must provide a judicial system for the administration of justice and all free men are entitled to due process of law.

In my opinion, the long-term significance of Magna Carta does not lie in its status as a sacred text—almost all of which gradually became irrelevant. It lies in these underlying themes, as they were further developed over the centuries in the course of English constitutional history, sometimes with reference to Magna Carta and sometimes without such reference.

## The charters and successor documents

Magna Carta, and the almost equally significant Forest Charter (into which four clauses of the 1215 text were expanded), are intensely practical documents. They list and resolve a range of specific grievances, and are almost devoid of statements of high principle. The charters are the first of a long line of similar documents in English

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1 James Spigelman, 'Magna Carta in its medieval context', *Australian Law Journal*, vol. 89, no. 6, 2015, p. 383; James Spigelman, 'Magna Carta: the rule of law and liberty', *Australian Bar Review*, vol. 40, no. 3, 2015, p. 212.

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constitutional history, many of which refer to or replicate provisions of the charters. Almost immediately the charters acquired a totemic state as a statement of proper conduct on the part of the king. However, in its detail each charter was a pragmatic, time-bound statement.

The 1215 Magna Carta was preceded by statements of the grievances on the part of the barons, including in writing. Similarly, over the course of later centuries, the nobles, for as long as they constituted the political nation, then the broader political nation as that developed, demanded resolution of specific grievances to restore compliance with proper conduct and, sometimes, for reforms to the processes or policies of government. Often this took the form of a similarly pragmatic, written list of demands. Some of those were granted, some were granted only to be abjured, and some of those re-granted, in whole or part later. Sometimes the process was accompanied by violence against, and even the deposition of, the monarch of the day.

The process that led to Magna Carta was eventually subsumed in parliamentary procedure. As parliament acquired a recognisable shape, the process took the form of a petition to the king to remedy specific grievances.

The charters themselves were the contemporary equivalent of what came to be called statutes—as the two charters were subsequently confirmed to be. The word ‘statute’ was first used in 1236. It was the 1297 version of Magna Carta, the very version that we have in this Parliament House, that became the first entry in the official compilation of statutes.

The following is a select list of demands by the political nation, and responsive charters/statutes over the course of two centuries after 1215. It is selective because the stream of parliamentary petitions which commenced under Edward I grew substantially in later years. Those referencing Magna Carta are identified by asterisk:

1215	Unknown Charter
1215	Articles of the Barons
1215–25	Magna Carta
1217–25	Forest Charter
1258	Provisions of Oxford*
1259	Provisions of Westminster*
1265	Annulment of the Provisions of Oxford and of Westminster
1266	Dictum of Kenilworth*
1267	Statute of Marlborough 52 Henry III*
1275	Statute of Westminster 3 Edw I
1285	Second Statute of Westminster
1297	Remonstrance of the Barons*
1297	List of demands: <i>De Tallagio Non Concedendo</i>

1297	Confirmation of the Charters*
1300	Articles upon the Charters*
1301	Parliamentary Petition, known as Henry Keighley's Bill *
1306	Henry Keighley imprisoned for presenting the 1301 Petition
1308	The Boulogne Agreement on separation of Crown and royal person
1311	Ordinances of Edward II*
1322	Revocation of the Ordinances of 1311 by the Statute of York
1327	Articles of deposition, abdication and murder of Edward II
1330	Statute establishing annual parliaments 4 Edw III
1331	Statute enforcing Magna Carta 5 Edw III 9*
1341	Parliamentary Petition accepted by Edw III 4*
1342–43	Revocation and annulment of 1341 Petition
1351	Statute on Administration of Justice, 25 Edw III 4*
1354	Statute on due process 28 Edw III 3
1362	Statute on Pleas in English enacted 36 Edw III 22* (The statutes of 1331, 1351, 1354, 1362, 1363 and 1368, are referred to as 'The Six Statutes' and were designed to reinforce the Magna Carta provisions on the administration of justice.)
1362	Petition (later called a statute) for enforcement of the Charters*
1363	Statute on allegations of breach of Magna Carta 37 Edw III 18*
1368	Parliamentary Petition on false accusations, and statute enforcing due process 42 Edw III 2
1381	Parliamentary Remonstrance to Richard II after Peasants' Revolt
1386	Petitions of the Commons appointing a commission to supervise the government of Richard II
1388	Execution and banishment of Richard II's supporters by the 'Merciless Parliament'
1389	Reassertion of authority by Richard II
1397	Renunciation of the reforms of 1386 and of the acts of the Merciless Parliament plus execution or banishment of their proponents
1399	Deposition and murder of Richard II, including Articles of Impeachment*
1404 & 1406	Petition of the Commons on defects in elections
1406	Statute on succession to the throne and elections to parliament 7 Henry IV
1406	Petition of Thirty One Articles 8 Henry IV

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Just as the 1215 version of Magna Carta was almost immediately abrogated, only to be revived in a somewhat different form in the 1216 and 1217 charters, culminating in the final texts of 1225, some of the later concessions were similarly abrogated. I refer, for example, to:

- the annulment of the Provisions of Oxford, and of the Provisions of Westminster, after the death of Simon de Montfort and the restoration of Henry III's authority;
- the renunciation in 1306 by Edward I of his agreement to the bill of 1301, which had declared void all statutes contrary to the charters;
- the revocation, in 1322, by Edward II of his promises to remedy a long list of grievances, called 'The Ordinances', of 1311, leading to his campaign against the nobles, which culminated in his deposition and murder; and
- the revocation, in 1342, of specific demands which Edward III was forced to accept under duress by the parliament the previous year.

Under the Tudors, the process of the political nation making formal demands was largely in abeyance. This was a function of the settled state, and the strength, of the monarchy during that era. That changed under the Stuarts.

The interaction between the political nation and the Stuart kings is too long to try to summarise in a lecture. The political nation in parliament was often in conflict with the king. This climaxed in the death of a king, as had occurred in the fourteenth century to Edward II and Richard II.

The parliamentary petitions, resolutions and bills of this era are numerous. The principal characteristic of the charters—as pragmatic documents resolving specific grievances, bereft of statements of high principle—is reflected in several landmark documents, under the Stuarts:

1610	Petition of Grievances
1628	Petition of Right*
1640	The Root and Branch Petition
1641	The Ten Propositions
1641	The Grand Remonstrance
1641	The King's Answer to the Grand Remonstrance
1642	The Nineteen Propositions
1642	The King's Answer to the Nineteen Propositions
1649	The trial and execution of Charles I*
1689	Bill of Rights

Some years ago I drew on Francis Bacon, to distinguish the common law legal tradition from the civil law legal tradition, by reference to two schools of epistemology—empiricists, most of whom were British philosophers, and rationalists,



most of whom were Continental philosophers. Bacon said: ‘empiricists, are like ants; they collect and put to use, but rationalists are like spiders, they spin threads out of themselves’.<sup>2</sup>

In the case of the political and legal development of the Constitution, the process has a combination of the ant and the spider, which Bacon, in his *The New Organon*, described as the approach of the bee. After the reference to the ant and the spider metaphor, he added: ‘But the bee takes a middle course: it gathers its material from the flowers of the garden and of the field, but it transforms and digests it by a power of its own’.

### **Theme one: the rule of law**

The great English legal historian, Frederic Maitland, characterised the import of Magna Carta thus: ‘in brief it means this, that the king is and shall be below the law’.<sup>3</sup> This principle is the essential foundation for the rule of law.

The contribution of the charters to the rule of law is of considerable significance across the centuries. The proposition that the king was subject to the law was not established by Magna Carta. Royal autocracy was not a feature of early medieval Europe. Subsequent iconic legal texts—of Henry de Bracton and Sir John Fortescue—would state the proposition without reference to the charter. However, the charter was the earliest written affirmation of the principle, although it was not expressly stated in these terms in the text. It was a theme which underlay the actual provisions of both charters. It is similarly implicit in the larger number of successor texts that I have listed.

The refusal of the political nation to countenance an absolutist monarch is best exemplified in the lengthy record of the deposition of Richard II, including 50 Articles of Impeachment. The record asserted that Richard would ‘at his own arbitrary will ... do whatever appealed to his desires ... and ... expressly said, with an austere and determined countenance, that his laws were in his own mouth or, occasionally, in his own breast; and that he alone could establish and change the laws of his realm’.<sup>4</sup>

Shakespeare captured the idea in the lament of Richard: ‘The breath of worldly men cannot depose the deputy elected by the Lord’.<sup>5</sup> Early in Richard’s reign, in a compilation of precedents which his most recent biographer has called a ‘manifesto

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2 See Spigelman, ‘The truth can cost too much: the principle of a fair trial’, *Australian Law Journal*, vol. 78, no. 1, 2004, p. 49, reprinted in Tim Castle (ed.), *Speeches of a Chief Justice: James Spigelman 1998–2008*, CS2N Publishing, Sydney, 2008.

3 F. Pollock and F.W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd edn, Cambridge University Press, Cambridge, 1911, p. 173.

4 Carl Stephenson and Frederick Marcham (eds), *Sources of English Constitutional History*, Harper & Bros, New York, 1937, p. 252.

5 *Richard II*, Act 3, Scene 2, lines 56–7.

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for the reassertion of royal power’, the king had listed Edward I’s Articles upon the Charters and Edward II’s humiliating Ordinances of 1311, amongst the concessions that must be extirpated.<sup>6</sup>

Such views returned with the Stuarts, in what came to be called the divine right theory of monarchy. James I had written in defence of this approach in learned and literate texts when still only James VI of Scotland. He understood, when he assumed the throne of England, that this theory, or rather theology, was not accepted there. Whilst he maintained that the king was above the law, he accepted the long established restraints. However, he was determined not to permit any expansion of, and to exploit any ambiguity in, the restraints on the scope of his authority. His son did not accept the restraints and shared the fate of Richard II.

As is well known, the principal mythologist of Magna Carta, and the source of the prominence lawyers continue to give it today, was Sir Edward Coke as both judge and parliamentarian. Coke’s adoption of the mythology of the charter, as Exhibit A in the theory of an ‘ancient’ English constitution, constituted an alternative to James I’s belief that royal authority came directly from God.

James said: ‘Kings were the makers of laws—not the laws of the Kings’.<sup>7</sup> For Coke, the law preceded the king. Therefore, the king was subject to the law. He believed that the prerogative was created by the common law.

Coke’s writings invoked a bizarre range of alleged historical events and not infrequent fabrications. However, Magna Carta was real enough and, to some degree, was based on tradition as well as making reforms. Coke’s contemporary, John Selden, was more measured and intellectually honest in proclaiming the significance of the charters. For parliamentarians, the issue was where sovereignty lay: with the king or with the king in parliament. For lawyers, the issue was not sovereignty, but the source of governance legitimacy: with the sovereign or an organic legitimacy from the development of institutions over the centuries.

Both of the distinct approaches of parliamentarians and of lawyers invoked Magna Carta. It was the totemic state of the document, rather than its detail, upon which reliance was placed. The text invoked during these debates included clauses of the 1215 text that were extirpated in all subsequent reissues and confirmations. Parliamentarians sometimes relied on the provision for the ‘consent of the realm’ for certain taxes—a provision of the 1215 text which disappeared. Lawyers invested the concept of the ‘law of the land’ in clause 29 with later developments, namely reforms of what we have come to call ‘due process’. Nevertheless, the invocation of Magna Carta, even if unhistorical, was a centrepiece of the affirmation of the rule of law in the conflicts of the seventeenth century.

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6 Nigel Saul, *Richard II*, Yale University Press, New Haven, 1999, p. 237.

7 Quoted in James S. Hart, *The Rule of Law 1603–1660*, Pearson, Longman, London, 2003, p. 80.

Rule of law issues under the Stuarts included the assertion of a royal prerogative not to enforce the law, indeed to dispense with an enacted law. That one of the steps leading to the 1688 Revolution was a purported exercise by James II to suspend the operation of legislation discriminating against Catholics, should give pause to those who take Magna Carta as a direct source of liberties, which it was not.<sup>8</sup>

The import of Magna Carta as a source of the principle that the king is subject to the law was superseded by the Bill of Rights of 1689. It is entirely appropriate that that document took the same form of a list of specific, practical grievances, pragmatically resolved without statements of high principle. The English approach of developing the common law by incremental steps, based on real life disputes, is also a feature of the development of the English Constitution.

This is the way the English Constitution developed from Magna Carta through its successor documents.

### **Theme two: duty to consult**

The king's obligation to consult had a feudal origin. What was sought, at least in England after the Norman invasion, was assent, not consent. Nevertheless, particularly with respect to taxation, the strength of the monarchy, which varied considerably, determined how close assent had to be to consent.

The original Magna Carta of 1215 imposed restraints in numerous respects. However, it implicitly gave, or affirmed, consent to the limits some clauses permitted and to the practices it did not change.

The express provision in the 1215 text, requiring the consent of the realm for a form of taxation including precise detail as to how the 'realm' would be summoned to give consent, was deleted in all subsequent issues and confirmations. The barons who had been loyal to John, apparently regarded this as one of the provisions that insulted royal dignity. No doubt it was inserted by the more radical of the rebel barons of 1215. The necessity to consult before imposing taxes was not stated expressly. However, that was the very process that led to the charters, particularly the reissues and confirmations.

This duty to consult was what we would now call a constitutional convention. During the thirteenth century, under John's son and grandson, Henry III and Edward I, the charters were confirmed on numerous occasions, often accompanied with an additional document remedying new grievances. This occurred in express exchange for a grant of taxation. The principle that assent of a council—eventually parliament—was required for taxation was reinforced frequently by this systematic practice.

It was not until Edward I's Confirmation of the Charters in 1297—our very copy—to which the 1225 text was annexed, that the king made the express promise that certain taxes would only be imposed with 'the common assent of all the realm and

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8 For other examples see Spigelman, 'Magna Carta: the rule of law and liberty', op. cit.

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for the common profit thereof'. Traditional feudal impositions were excluded and, more significantly, the promise did not encompass every conceivable source of royal revenue. Nevertheless, one of the most significant themes underlying the charters was now in writing.

The struggle of succeeding monarchs to find sources of revenue which did not need consent was perhaps the most basic political dynamic over the course of the five centuries after the charters. Advisers to the Crown kept dreaming up new tricks to raise revenue, which led to resistance. Some things don't change over the centuries.

Complaints about such matters arose often. For example: in the Statute of Westminster of 1275, the 1297 Remonstrance to Edward I and in his response in 1297 by the Confirmation of the Charters, in the 1300 Articles upon the Charters, and in the Ordinances forced on Edward II in 1311.

Such complaints became particularly intense under the Stuarts. James I exploited to the limit his power to extract revenue in the exercise of prerogative power, without parliamentary approval, for example, by levies on imports or the grant of monopolies.<sup>9</sup>

Charles I continued this practice, perhaps most famously by extending the obligation to pay ship money from coastal regions to the whole nation and making it an annual levy. He also revived long lost battles to expand Crown revenue, for example, by trying to extend the Royal Forest contrary to the Forest Charter, as implemented under Edward I over three centuries before.

When Charles I failed to get parliamentary approval for additional taxation, he proceeded to force his subjects to advance loans. Those who refused were imprisoned. When five of them sought habeas corpus, they were met with a Crown submission that the king had the power to imprison without cause. The prosecution did not want to admit that their imprisonment was based on a demand for money that had no lawful basis. This came to be known as the *Five Knights Case*, to which I will return. It appears that Charles I ignored the fact that it was the demand of Richard II in 1297 for forced loans that began the conflict that led to his deposition and death.<sup>10</sup>

Of fundamental significance during the Stuarts was the transformation of the duty to consult into a right of concurrence. This process began when parliament was transformed, during the fourteenth century, from an event into an institution. There could be no doubt about the position after the Revolution of 1688. The duty to consult under Magna Carta had been superseded. The monarch no longer consulted the political nation. In most major respects s/he required parliamentary consent. The scope of residual executive power remained, however, contentious. It still is.

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9 See my analysis of impositions in Spigelman, 'Lions in conflict: Ellesmere, Bacon and Coke—the prerogative battles', *Australian Bar Review*, vol. 38, no. 1, 2013, pp. 11–13.

10 See for example, Saul, *op. cit.*, pp. 366 ff.

### Theme three: the scope of the prerogative

In 1215, and for centuries thereafter, kings and queens of England found it difficult to distinguish the personal role of the monarch and his or her formal status as a disembodied Crown. At its most dangerous, this proclivity took the form of an assertion of divine authority, not subject to restraint. This frequently led to tension and even conflict with the political nation.

As early as 1308, a group of barons promulgated a written declaration, known as The Boulogne Agreement, distinguishing between the Crown and the person of the king. That treatment of the king was not then common in Europe. As the Lancastrian warrior turned Chief Justice, Sir John Fortescue, put it in the late fifteenth century, in France the king was 'regal', but in England the king was both 'regal' and 'political'.

It was the 'political' monarch who was subject to constraints. Gradually, over the centuries, the extent of the prerogative, the 'regal' monarchy, was restricted in scope. However, a remnant of unrestrained power still exists and is relied upon from time to time to this day. That is another lecture.

The largest number of clauses in Magna Carta, and virtually the whole of the Forest Charter, are directed to overturning the past abuse of power by the king, particularly the extraction of revenue through exploitation of the incidents of feudal tenure.<sup>11</sup> These abuses appear, to an unknown extent, to have breached customs on the proper limits of the exercise of royal power. However, in this and in the successor documents, not all were longstanding limits. The agreement reflected in these documents constituted changes to what was regarded as proper, or even fair.

The problem was always enforcing the political promises in the charters. Over the first century from the 1225 reissue, the focus of most frequent complaint was that the king failed to honour his promises of the Forest Charter.<sup>12</sup>

After a century of evasion by Henry III and Edward I, by the Articles upon the Charters of 1300, the latter was forced to agree to an independent commission of inquiry into the proper boundaries of the Royal Forest. The king lost virtually every point in that process.

Gradually, over time, these provisions became less important. In the case of the Forest Charter, the one quarter to one third of England, where an absolutist monarchy existed, was substantially reduced in size. Social and economic changes rendered many other provisions of the charters irrelevant. However, as the successor documents show, there were always new grievances.

There were intermittent attempts to override the king's authority, with little effect. The 1215 text of Magna Carta established a committee of 25 barons which would,

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11 For a list see Spigelman, 'Magna Carta in its medieval context', *op. cit.*, p. 390.

12 *ibid.*, pp. 391–3.

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in effect, take over the government if the king failed to honour his promises. This disappeared in the next version of 1216, never to return.

Under the Provisions of Oxford of 1258, to which Henry III was forced to agree, a council of 24—half nominated by the king, half by the barons—was established to reform the government. A panel of 12 barons, under the leadership of Simon de Montfort, took effective control of the government. This arrangement collapsed with Simon de Montfort's defeat and death in 1265.

Proposals to impose a committee of barons to supervise the government were revived under both Edward II and also, after the long reign of Edward III, under Richard II. The Ordinances of 1311, while they lasted, gave considerable executive authority to a committee of 25 barons, called the 'Ordainers'. In 1386, Richard was forced to accept supervision by a baronial committee, called the 'Appellants'.

Conflict over the scope of the prerogative was, as is well known, a feature of the reign of the Stuarts. I have discussed this at some length for the early years of James I, when Coke was a judge.<sup>13</sup> The Stuart view was that the prerogative reflected the divine mandate of the kings. In the view of Sir Edward Coke, the prerogative was a principle of the common law.

The focus at first was on the interaction of the common law courts with prerogative courts—Admiralty, High Commission, Chancery—and the king's power to act without parliamentary approval, including to raise revenue and to make new law by mere proclamation. Whilst acknowledging the restraints of English custom by the creation of the parliament—an institution which he deplored—James I, asserting his divine authority, emphasised that the established restraints could not extend into what he called 'matters important'.

Even Oliver Cromwell rejected parliamentary intrusion into his authority with a crude, dismissive reference to 'Magna Farta'. In more demure mode, proponents of executive power over the centuries characterised the charter as a concession by the king in the exercise of his prerogative discretion. The approach of lawyers and parliamentarians, to what they had come to call a charter of liberties, characterised it as a written recognition of tradition.

In modern democracies, the sovereign people have replaced an individual hereditary sovereign as the source of political legitimacy. However, the scope of permissible executive conduct, unsupported by legislation, particularly on what the executive believes to be, to use James I's words, 'matters important', still arises from time to time. These matters are not limited to issues of national security.

Unlike the first two themes—the rule of law and the duty to consult—the scope of executive power theme is still with us. Its extent has reduced but it is not superseded.

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13 See Spigelman, 'Lions in conflict', *op. cit.*

## Theme four: the king's peace

The provision of justice was a primary duty of a feudal monarch. Detailed provision for the justice system constitutes the second largest group of clauses in Magna Carta, and was a primary objective of the Forest Charter.<sup>14</sup> Distinctively, this was one of the few fields in which the political nation of 1215 wanted the king to do more, rather than less. This was also true of most of the successor documents.

The numerous, specific provisions about the law were accompanied by one of the few—and, therefore, enduring—statements of general principle. I refer to the well-known clause 29 of the 1225 text (amalgamating clauses 39 and 40 of the 1215 version). The promise not to impose any sanction without ‘lawful judgment of his peers or by the law of the land’ and the promise not to ‘refuse or delay right or justice’—are words that have never lost their force. They have been invoked continually, both as a basis for complaint and as a principle for reform.

The detailed provisions for the administration of justice in the charters—most of which appear to be reforms rather than restoration of previous custom—were reflected in further such provisions in the successor documents. Most of them, with considerable specificity, abolish abuses and make reforms. That is so in the 1258 Provisions of Oxford; in the 1259 Provisions of Westminster; in the second Statute of Westminster of 1285; in less detail in the Confirmation of the Charters of 1297; in general terms in the Petitions of 1301 and 1341; again in much detail in the Ordinances of 1311; of lasting significance, in the Six Statutes of Edward III; but with most dramatic consequence in the 50 Articles of Impeachment of Richard II in 1399, described as a list of ‘frauds and deceitful tricks of the said king’.<sup>15</sup>

It was opponents of the absolutist pretensions of the Stuarts who gave Edward III’s ‘six statutes’ that appellation. They were invoked because they added detail to Magna Carta’s promise of due process of law. Indeed, it was the statute of 1354 that extended the protection of clause 29 to the whole population. The original charter provision extended only to ‘free men’, more than just the barons but still a minority of the population at that time.

I have referred to the challenge to forced loans demanded by Charles I. When the courts failed to act in the *Five Knights Case*, the House of Commons, relying on clause 29 of Magna Carta and its elaboration in the six statutes of Edward III, drafted the Petition of Right of 1628. When the House of Lords sought to undermine the force of the Petition, by inserting a qualification ‘Saving the King’s Sovereign Power’, Sir Edward Coke responded: ‘Sovereign Power is no Parliamentary word ... Magna Carta is such a Fellow, that he will have no Sovereign’.<sup>16</sup>

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14 See Spigelman, ‘Magna Carta in its medieval context’, op. cit., pp. 394–5.

15 See Edgar Taylor, *The Book of Rights: Or, Constitutional Acts ...*, A. Maxwell, London, 1833, p. 101.

16 John Rushworth, *Historical Collections of Private Passages of State, Weighty Matters in Law, Remarkable Proceedings in Five Parliaments ...*, 1721, pp. 562, 566.

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A document that ‘has no sovereign’ is a good description of a written constitution. The charter was not a ‘constitution’ in our understanding of the concept. It was, however, of constitutional significance. So was the Petition of Right which, like Magna Carta, was a series of demands arising from the practical grievances of the day.

Charles I was forced to accept the petition. It affirmed certain rights and, of particular significance for the administration of justice, it reinforced the principle that the executive cannot deprive citizens of liberty without cause. At a time before the judiciary had security of tenure, it was parliament that did that, not the courts.

The Petition of Right built on, and extended, the scope of Magna Carta in its role as a creation myth. One commentator put it recently: ‘the *Petition of Right* (1628), conceived as a recapitulation of 1215, transformed the baronial charter of privileges into a declaration of the rights of free-born Englishmen’.<sup>17</sup> This traditional, gender-based language is a statement of the Whig interpretation of English history, into which Coke’s ancient constitutionalism was transmogrified.

The numerous specific reforms of the justice system in Magna Carta and the Forest Charter were entirely appropriate for that era. The statements and petitions of successor documents are of the same general character—setting out grievances and enacting reforms in response—dealing with similar issues for different times. Understandably, clause 29 of the 1225 charter—as the only statement of principle in the text—is the best known, precisely because it is not time bound.

That clause has been influential throughout the eight centuries, even if the general words have been infused with content that the original authors could never have conceived. From the time that the judiciary was ensured independence, by the Act of Settlement of 1701, the courts joined parliament as a restraint on the executive branch. Notwithstanding that the words of clause 29 retain their resonance, Magna Carta has been superseded in this respect also.

## Conclusion

Two weeks after D-day in 1944, George VI, returning to Windsor Castle from London, was fuming at the latest frustration of his royal wishes, administered by Winston Churchill. As the car passed Runnymede, he gesticulated out of the window and proclaimed: ‘And that’s where it all started!’<sup>18</sup> Over the course of, then, over seven centuries, many of his predecessors had been similarly exasperated by Magna Carta.

It is by no means clear how much actually ‘started’ at Runnymede, and how much was simply confirmed. However, the written text, proclaimed on many occasions throughout the land, was the start of a long process of constitutional development—carried through by the successor documents—of which we remain the beneficiaries today.

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17 Justin Champion, ‘From *liber homo* to “free-born Englishman”: how Magna Carta became a “liberty document”, 1508–1760s’ in Nicholas Vincent, *Magna Carta: The Foundation of Freedom 1215–2015*, Third Millennium, London, 2015, p. 112.

18 Nicholas Vincent, *Magna Carta: A Very Short Introduction*, Oxford University Press, Oxford, 2012, p. 2.



# Magna Carta in Australia 1803–2015

**David Clark**

... 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

## Introduction

For a document that lasted barely nine weeks Magna Carta<sup>4</sup> 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.<sup>5</sup> 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),<sup>6</sup> once in 1217<sup>7</sup> and

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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](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.

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became a statute in 1225<sup>8</sup> and again in 1297.<sup>9</sup> 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.<sup>10</sup> It was continued in the medieval period by being both enforced by commissions of inquiry into alleged breaches<sup>11</sup> and also by being reaffirmed over 40 times by successive English parliaments.<sup>12</sup> 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.<sup>13</sup> For instance, in 1222 the Golden Bull was issued in Hungary, sometimes called the Hungarian Magna Carta,<sup>14</sup> while in 1188 arrangements were agreed to in Castile and Leon that parallel some of the ideas in Magna Carta.<sup>15</sup>

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

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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](http://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.<sup>17</sup> The greatest proponent of this mythology was of course Sir Edward Coke<sup>18</sup> though he was not alone in this as other common lawyers of the age also reimagined Magna Carta and deployed it in contemporary debates.<sup>19</sup>

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’.<sup>20</sup> Most of the statutory version of Magna Carta 1297 was actually repealed by the British Parliament in 1863<sup>21</sup> and today only three substantive chapters remain on the English statute book.<sup>22</sup> 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](http://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.

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not emerge until 1217<sup>23</sup> and was for many centuries spelled Magna Charta until that was changed in the *British Museum Act 1946* (UK).<sup>24</sup>

The two most famous chapters<sup>25</sup> of 1215 were chapters 39 and 40,<sup>26</sup> which were combined with a slight alteration into chapter 29 of 1297. Chapter 29 reads:

No Freeman shall be taken or imprisoned, or be disseised<sup>27</sup> 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.<sup>28</sup>

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,<sup>29</sup> trial by civilian juries did not come in until 1832,<sup>30</sup> 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,<sup>31</sup> we have both carried on the tradition and have shaped it to our own circumstances.

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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 countries<sup>32</sup> and in a democracy index published in 2012 Australia was ranked sixth out of 167 countries.<sup>33</sup> A 2010 study of the link between the rule of law and good governance rated Australia right at the top of world rankings.<sup>34</sup> 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.<sup>35</sup> As we would expect Australia is manifestly a free country, as Freedom House has consistently pointed out for many years.<sup>36</sup> 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.<sup>37</sup>

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 relic<sup>38</sup> and it has been described as the keystone of English liberty.<sup>39</sup> Harry Evans wrote in 1998:

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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](http://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](http://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.

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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.<sup>40</sup>

### 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 parliamentarian<sup>41</sup> 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:<sup>42</sup>

#### *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.<sup>43</sup> This is wrong for two reasons. First, while John could read there is serious doubt about whether he could write.<sup>44</sup> 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.<sup>45</sup> The practice was for the document to be drafted, before

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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](http://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](http://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.<sup>46</sup> The only book to get this right is the Oxford Big Ideas: History 8<sup>47</sup> though the glossary at the back of the book contradicts this where it says that Magna Carta was signed by King John.<sup>48</sup> 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 1455<sup>49</sup> and in England when William Caxton printed the *Recuyell of the Historyes of Troye* in 1473.<sup>50</sup> In the era before printing, documents were copied by hand by clerks in the chancery.<sup>51</sup>

*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.<sup>52</sup>

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’.<sup>53</sup> 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

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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](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.

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century and were by a statute of 1275 meant to be free,<sup>54</sup> but the right to vote was only available for a tiny minority of male landholders, since the franchise was based on a property qualification.<sup>55</sup> 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.<sup>56</sup> 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’.<sup>57</sup> 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,<sup>58</sup> 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 1947<sup>59</sup> though it was possible to do so in the Australian colonies in the 1850s.<sup>60</sup> 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,<sup>61</sup> a position that lasted at least until the early seventeenth century.<sup>62</sup> 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.<sup>63</sup>

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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.<sup>64</sup> Actually there is a record of the term habeas corpus in 1206<sup>65</sup> and a case in 1214<sup>66</sup> 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.<sup>67</sup>

### *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’.<sup>68</sup> 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.<sup>69</sup> 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.

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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.

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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.<sup>70</sup>

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.<sup>71</sup> 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 1930s<sup>72</sup> 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.<sup>73</sup>

## 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.<sup>74</sup> 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

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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](http://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](http://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.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup>

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’.<sup>78</sup> 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.<sup>79</sup> One would-be

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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.

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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’.<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> Australians seeking admission to the profession also had to study English constitutional history.<sup>84</sup> 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*.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

This was of course nonsense since the principle only emerged later when parliaments met regularly, as they did not in 1215.<sup>88</sup>

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 Parliament<sup>89</sup> and was until recently a mark of ‘most educated persons in the Anglo-Saxon world’.<sup>90</sup> 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.<sup>91</sup>

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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/](http://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.

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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:<sup>92</sup> ‘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,<sup>93</sup> while another thought that the charter provided that no free man could be hanged twice for the same offence.<sup>94</sup> 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’.<sup>95</sup>

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.<sup>96</sup>

Notwithstanding this, in the 1920s an international Magna Carta day to be celebrated on 15 June each year was launched in the United States<sup>97</sup> and the movement quickly spread to other English-speaking countries including Australia.<sup>98</sup> 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’.<sup>99</sup> The celebration of the day was mandated by state education departments, which required all schools to teach students about the charter

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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.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup>

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,<sup>103</sup> as standing for both a constitutional tradition and for certain key values.<sup>104</sup> These values include the rule of law,<sup>105</sup> 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.

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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](http://www.parliament.vic.gov.au/about/news/2693-recognising-magna-cartas-enduring-legacy) (accessed 10 September 2015).

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## 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 1629<sup>106</sup> and in Australia in a newspaper in 1817.<sup>107</sup> King O'Malley mentioned the term during the debate on the Conciliation and Arbitration Bill in 1904.<sup>108</sup> 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.<sup>109</sup>

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.<sup>110</sup> 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.<sup>111</sup> 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'.<sup>112</sup> 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

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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](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’.<sup>113</sup> 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’.<sup>114</sup> The advocates of such powers usually pointed out that a war cannot be conducted according to Magna Carta<sup>115</sup> and that the defence of our liberties may require a curtailment of some of them in order to protect the greater good.<sup>116</sup> 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.<sup>117</sup>

### 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,<sup>118</sup> as the Commonwealth Constitution was once described as the ‘Magna Carta of Australia’.<sup>119</sup> The refugee convention was described as the ‘Refugee Magna Carta’ in 1954,<sup>120</sup> and a major tariff agreement in 1961 was written about as a ‘Magna Carta for World Trade’.<sup>121</sup> There are currently calls in England for a new Magna Carta; that is, a new constitution.<sup>122</sup> 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.<sup>123</sup>

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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/](http://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.

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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.<sup>124</sup> In 1943 a women’s charter was launched in Sydney in which Magna Carta was specifically invoked.<sup>125</sup> 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,<sup>126</sup> a cantata by Henry Coward first created in 1884,<sup>127</sup> and a play by John Arden in 1965.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> There are YouTube skits on the charter and even an episode of *The Simpsons* in which Lisa sings a ditty devoted to Magna Carta.<sup>131</sup>

## 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’.<sup>132</sup> These are Magna Carta themes as that tradition has developed since 1215. If that tradition is to continue then,

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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](http://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](http://www.youtube.com/watch?v=ZaIxNXygpB4) (accessed 1 October 2015); [www.lyricsmania.com/magna\\_carta\\_song\\_lyrics\\_simpsons\\_the.html](http://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.<sup>133</sup> 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—itself a combination of history, statutory interpretation and political philosophy<sup>134</sup>—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.

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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).



# The Other 1215

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**Desmond Manderson**

## Myths and stories

I am not one of those Magna Carta minimisers. So important do I consider it that I would go so far as to say that it is the second most important legal document produced in 1215. But what, one may ask, of the document that beats it into second place? How is it different and more to the point, how do the two texts shed light on each other?

It is often said that Magna Carta has ‘become’ a myth. This is not so. It was a myth right from the start. As Sir Edward Coke used the charter as a symbol of ancient liberties against the Stuarts, so the barons already appealed to the ‘ancient laws’ in their battles against King John. Magna Carta, and the barons’ Charter of Liberties on which it was based, already recalled the Coronation Oath of Henry I for its authority. The Coronation Oath in turn harked back to the laws and liberties of Edward the Confessor. So Magna Carta already appealed to a mythic time of ancient liberties. If some of its textual ambiguities were responsible for the short-term failure of the charter, these same ambiguities and the gloss of myth that covered them were equally responsible for its long-term success. All myths are indeterminate enough to mean different things at different moments, concealing legal and social change under the patina of tradition.

But the greatest of all the myths that surround Magna Carta is the myth of exceptionalism. Scholars as wide-ranging as H.E. Marshall or R.F.V. Heuston—not to mention Margaret Thatcher—belabour the supposed Englishness of the rule of law. In a celebrated cartoon like Thomas Rowlandson’s ‘The Contrast’ (figure 1), published in 1792 at the height of British reaction to the French Revolution, Magna Carta is held up as the feature that distinguishes British liberty (‘loyalty, obedience to the laws ... justice’) from the French kind (‘treason, anarchy, murder, equality [!], madness, cruelty, injustice’). Or there is Rudyard Kipling:

And still when Mob or Monarch lays  
Too rude a hand on *English* ways,  
The whisper wakes, the shudder plays,  
Across the reeds at Runnymede.

But Magna Carta was not so exceptional. English law was part of a pan-European legal culture, bound together by a common religion and a common cultural language, which saw a constant traffic in legal ideas in different places, and between canon and civil law. England was more connected to continental trends and currents than at any time since (at least, one might say, until the European Court of Human Rights). The struggle between the power of kings and the limits on those powers was

everywhere manifest in thirteenth-century Europe. Hungary's Golden Bull (1222) and Simon de Montfort's Statute of Pamiers (1212) are but two examples of similar documents produced around the same time as Magna Carta. All seek to lay down explicit limits on the prince's ability to ignore or make new law as he saw fit. And all connect the appeal to justice to a return to a golden age, often located in the time of our grandfathers: that is, on the very border between remembered stories and verified facts. This has always been the function of grandparents. They are the bearers of myth, from their childhood to ours, the last physical, tangible links in the chain of inheritance.



Figure 1: 'The Contrast 1792. British Liberty. French Liberty. Which is best?' by Thomas Rowlandson. Hand-coloured etching, British Museum, London, J,4.50 © The Trustees of the British Museum

## A delicate balance

References to previous Coronation Oaths, or to the laws of our grandfather's day, formed a narrative connection between past and present. This was important because of the function of narrative in late medieval thought, which in all fields of intellectual activity, was essentially proverbial and textual. It operated horizontally between texts, rather than vertically from authority to subject, or from principle to example.

It operated by way of resemblance and comparison rather than by distinction and hierarchy. In this way, commentators and critics (as we might call them now) shared an equal authority with the authors they commented on. Gratian's synthesis of canonical texts in the twelfth century in the *Decretals*, itself a complex synthesis of prior sources, gave rise to a whole host of glosses and discourses, and so on ad infinitum.

Textual analysis was unending, discursive, disputatious, referential, and rhetorical. While adages such as *princeps legibus solutus est* (the prince is loosed from the laws), or 'what pleases the prince has the force of law' were important themes in medieval jurisprudence, it is a mistake to take them at face value. It was in the much later context of the sixteenth and seventeenth centuries that the doctrine of the divine right of kings took these flights of medieval rhetoric literally. In the late Middle Ages, the claims of the prince were constantly balanced by norms of responsibility and justice. Frederick Barbarossa (1122–1190) famously asked his scholars, 'am I lord of the world?'—but the short answer was no. A close reading of the great glossator Accursius (1182–1263) discloses that, for him, the question of *princeps legibus solutus est* is not whether the prince is entitled to act arbitrarily—he is not—but whether any mechanism can hold him to account.

Where the baroque world was in love with power, the medieval world was in love with balance and with subtlety. Indeed the unique pluralism of medieval society is, as Brian Tierney argued, the true origin of the rule of law. Feudal law was essentially constituted by divided and independent sources of power: the canon law of the pope on the one hand, and the Roman law of the emperor on the other. But these 'two suns', as Dante had it, were themselves internally divided. Bishops and the church on the one hand, and princes and lords on the other, claimed in certain areas an *independent* authority granted directly by god, and not a delegated or subordinate one. To this must be added the normative force of local customs, in some cases extending back to pagan times.

This 'fertile jurisgenesis', as Robert Cover would have it<sup>1</sup>, provided the soil in which the medieval genius for new and semi-autonomous legal communities could take root. Universities, monasteries, guilds, cities and corporations all flourished as entities with distinct legal personalities. It became habitual to think of a distinction between a person's interests and their role, between their own power and the body or corporation on whose behalf they were acting. This gave rise to two critical legal concepts, whose origins and importance Shaun McVeigh has insisted on for many years. The first was the idea of 'office', which replaced the *personal* basis of feudal relations with abstracted responsibilities of which the office-holder is only the custodian. As Ernst Kantorowicz argued, 'the fisc', 'the Crown', and 'the patria' are all abstractions whose

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1 Robert M. Cover, 'The Supreme Court, 1982 term—foreword: nomos and narrative', *Harvard Law Review*, vol. 97, no. 1, 1983, p. 16.

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emergence creates a *distinction* between the prince and the body corporate or politic. The second was the idea of ‘jurisdiction’, the necessary complement of a pluralist system in which lines of authority must be constantly drawn and redrawn. But with jurisdiction, says Tierney, comes the concept of a right; for what is a right but a claim that appropriating or depriving one of some good, is *ultra vires* a particular authority. The limit of a jurisdiction is the birth of a right. The notion of the office allows those rights to be asserted on behalf of an abstract community, against even the prince.

## The legal Reformation

But in the twelfth century a new wind was perturbing this delicately balanced system. Harold Berman famously said that law was the first science of the West. Law developed, over time, into a system based on known principles, applied on the basis of hypotheses empirically tested in court through cases. But if law was the first modern science, the first modern law was, ironically, the Catholic Church. Most notably in the course of the Papal Revolution or *Reformatio* initiated by Gregory VII’s *Dictatus Papae* in 1075, the pope claimed absolute authority over the church and independence from all secular authority. As part of this explicit separation of church and state, canon law began to take on the characteristics of a coherent and internally independent legal system, along with the power to create new laws enforceable throughout the pope’s jurisdiction. This radically changed the style and functioning of law in the church. It replaced notions of reason and justice with sovereign will. It made the legitimacy of law a question not of its content or its source but its form—in Laurentius’ articulation of this logic in 1215, the first glimmerings of legal positivism can be discerned. And in contrast with earlier concepts of law in medieval Europe—law as custom, folk law, natural law, or divine law—*ius novum* was understood as *made by man*, though not of course just any man.

The church was not modelled on the State. On the contrary; the State was modelled on the church. This profound change in the concept of law inaugurated radical changes in law’s functioning and purpose all over Europe. As Pennington put it, the role of the ruler changes from being the ‘guardian’ of the law, to its ‘authors’.

For the kings and princes, particularly of the Norman kingdoms, began to see the potential of this technology to transform how they did business. It turned the key function of kingship from a military to a legislative and administrative one: changing behaviour by changing laws. Law becomes temporal rather than spiritual, a positive and wilful act. It becomes related not to the conquest of land but the conquest of subjects. And it requires a whole phalanx of new professionals to devise and supervise this complex system. In the centuries between Gregory’s legal reformation and Luther’s religious one, a new class of clerics, clerks, lawyers and judges serve



as the vanguard of modernity and, in the words of one later commentator, ‘a guild of sovereignty-mongers’.<sup>2</sup>

The English experience conforms to this pattern. The Angevin reforms of the twelfth century—the justice in eyre that brought a coherent system of law to the whole country, the development of the writ system to determine jurisdiction, the assizes that changed the law, the jury system that applied it, and the plea rolls that recorded it—all speak to a passion for administrative efficiency, regularisation, and law-making as a principal function of government. Henry II (1133–1189) was one of the great Norman pioneers of the instrumentalisation, centralisation, and bureaucratisation of law. King John’s problem, or one of them at least, was that he was no Harry Plantagenet. He applied these modern legal methods with gusto, but then fell back on extorting exactions to pay for his European ventures through the old ways of arbitrary and personal government. He applied the law to others but not to himself. The struggle that led to Magna Carta is often described as a rebellion by the ‘Northern barons’. No wonder. Because he was vigilant and itinerant, imposing his will up hill and down dale, it was the northerners that suffered the most; they were used to being left alone.

Thus Magna Carta responds to the developing *modernity* of kingly rule. It appeals to ancient rights and privileges, and to the pre-existing fabric of often tacit constitutional checks and balances. What is interesting is that it does so using the techniques and methods of the Angevin reforms itself. It seeks the surety of the king by securing his assent to a set of written and explicit rules. It evokes a corporate model of social organisation in which the king is subject to the laws of the land and not ‘loosed’ from them. And overall, although there are of course specific rights and liberties contained in Magna Carta, the document focuses on the consistent and predictable application of procedure. By and large it accepts the Angevin reforms, insisting only that the Crown should be held to the same standards of regularity and consistency that King John demanded of the barons.

## Due process

The development of the interest in ‘due process’, which is given an early formulation in article 39 of the original version of the charter and which was to become a central element of the rule of law, was a reflection of the new priorities of the reformed legal system—its positivist, temporal, instrumental, textual, semantic, evidential orientation, accompanied by its interest in questions of office and jurisdiction. If the king can make law out of his own will, then the question is no longer *what* law, but *how*. And this gives to questions of procedure and consistency a wholly new importance.

A crucial moment in the development of due process, both as an area of legal concern, and as a forum for the protection of rights and interests, was the decline in trial by

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2 Johann Jacob Moser quoted in Gerald Strauss, *Law, Resistance and the State: The Opposition to Roman Law in Reformation Germany*, Princeton University Press, Princeton New Jersey, 1986, p. 142.

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ordeal, or trial by combat. The empirical, rational, and evidential orientation of the reformed legal system had already made dramatic inroads into these earlier modes of proof in the twelfth century. These trials operated on the assumption that in the right place, divine judgment would be *manifested*. Once manifested, as the expression of divine will, it could of course hardly be disputed or appealed. But once law is understood to be a human construction, the question of proof becomes the main problem of the legal system. Absent an expression of divine will, how is evidence to be gathered? How is proof to be assessed? By whom? These questions open up the whole field of due process, which is precisely concerned with the gathering and evaluation of evidence in a world in which the intervention of the divine could no longer be presumed. And of course, since humans err, due process must envisage the possibility of mistake, appeal and correction: a whole structure of courts and review mechanisms that had previously been inconceivable. The rule of law is tightly connected to the concept of due process, and due process itself is a function of the translation of law, and above all of questions of evidence and proof, from the spiritual to the temporal realm. None of this makes any sense in a world governed by divine intercession in the form of trial by ordeal.

And 1215 was the year it ended. This was accomplished not by Magna Carta, but the Fourth Lateran Council. Convened by Pope Innocent III, it prohibited the involvement of any members of the church in trial by ordeal and mandated the implementation of the *ordo iudicarium*—that is, a *legal* and *judicial* process—wherever the church's writ ran. But the implications of this extended far beyond canon law. In any jurisdiction, spiritual or temporal, trial by ordeal required the participation and approbation of a priest. But after 1215, no member of the church could take part. It is true that trial by ordeal had been in marked decline over the previous century. But the blanket withdrawal of the imprimatur of the church was the last nail in its coffin.

The problem of procedure and evidence in the absence of the immanence of divine judgment hereafter became the characteristic problem of modern law. Law was no longer a forum for the determination of truth, but rather for the weighing of proof. And on this point, it must be said that there does appear to be a distinction between the direction taken in much of Europe, and in England. The problem of human judgment led to a rise in torture. Torture is not an atavism, but in fact a consequence of law's early modernisation, of its being the *first* science, born in the middle of the Middle Ages. Proof was the problem and confession was the solution. Torture was conceived as a way of securing the best evidence possible for the commission of a crime. As such it became a normal part of criminal procedure right up until the seventeenth century.

This was never the case in England. Although torture by the State or the Crown was not unknown, it was never a recognised part of the legal system. The reason for this was simple. The Angevin reforms in the twelfth century had instituted and expanded the system of trial by jury. Until 1215, this continued in parallel with the older forms of trial by ordeal, or trial by combat introduced by the Normans. After 1215, trial by

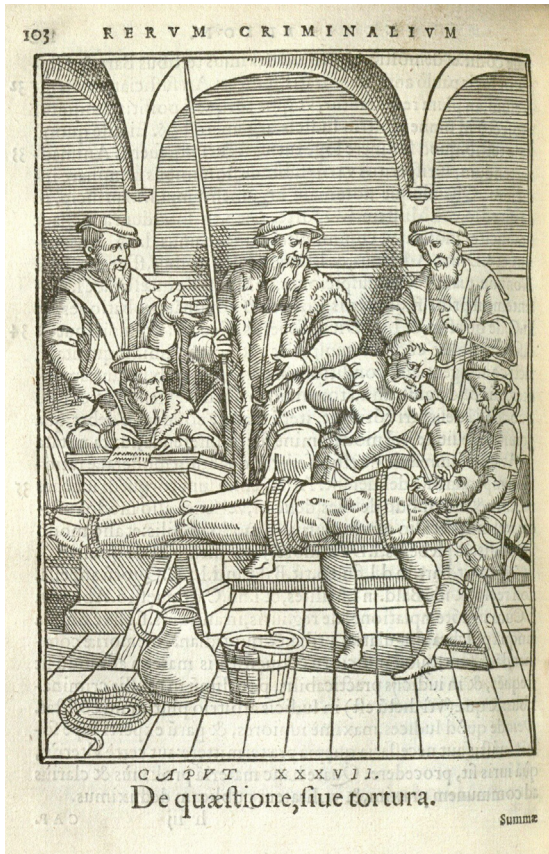


Figure 2: Woodcut from a Flemish legal text, Joost de Damhoudere's, *Enchiridion Rerum Criminalium* (*Praxis Rerum Criminalium*) (Louvain, 1554), p. 103. Rare Book Collection, Lillian Goldman Law Library, Yale Law School

jury became, of necessity, uncontested. It put in place an empirical structure for the ascertainment of law and proof, connected to the participation and experience of a local community. In this way, an alternative to the model of torture and confession was available that was conformable to modern expectations of process, human judgment, and empiricism. Trial by jury was a form that was able to adapt old practices to the expectations of the new legal order. It operated like a myth, indeterminate enough to mean different things at different times, concealing legal and social change under the patina of tradition. Again, Magna Carta makes explicit reference to the jury, but we equally owe its success to the deliberations of the Lateran Council, that other 1215.

## 1215

Nonetheless, Magna Carta *was* an unusual document. Its reference to the separate corporate identity of the 'realm' or 'kingdom' or 'free men', to which the king was responsible—and even (at least in the 1215 version which did not long survive) accountable—'acknowledged', as J.C. Holt wrote, 'non-baronial interests far more than most of the continental concessions and it covered a wider range of such interests more thoroughly'.<sup>3</sup> The logic of reciprocity and of consistency of law-directed

3 J.C. Holt, *Magna Carta*, Cambridge University Press, Cambridge, 1965, p. 183.

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behaviour goes much further. But what makes it particularly significant, as a sign of the times, is its forms and tenor. These reflect in every paragraph the changing modes of government in early modernity, and the changing role of law, rights and procedures. The barons responded to legal technology not just with a nostalgic appeal to the past but with more and better legal technology. Modern concepts of law were the arms-dealers selling the guns to both sides.

It is emblematic that Magna Carta was not an oath but a charter, and equally emblematic that it did not stay a charter but became a law. In this movement from personal promise and loyalty, to a loyalty to the realm and to the law, lies the shift in the meaning and power of law that had taken place between 1075 and 1215. Magna Carta is best understood in the context of the radical transformation in legal culture and consciousness taking place right across the continent. It is both an instrument of and a response to the impact of these modernising forces. 1215 was a significant moment in that history, which began much earlier and whose ramifications continue to be felt to this day. On the one hand, Magna Carta was a local manifestation of this continental shift. On the other hand, the *ordo iudiciarium* was an important step in ensuring the entrenchment and acceleration of these processes, whose effects were felt right across Europe. One 1215 was a symptom—the other was a cause.

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# Magna Carta in Print and in English Translation\*

*Stephanie Trigg*

My central question today brings two historical periods together, the medieval and the early modern, to ask this question: ‘what did printing do to the Magna Carta?’

This essay focuses on the first printed editions of the charter in the sixteenth century, both in the original Latin, in 1508, and also in English translation, partially in 1527 and in its entirety in 1534.<sup>1</sup> These are key moments in the reproduction and broader dissemination of Magna Carta. I am especially interested in the way these early printed editions present this medieval text: both as an ‘ancient’ document from the past and as a crucial document for contemporary legal practice, in particular.

The invention of print technology is often represented as one of the great steps forward from the Middle Ages into modernity. Print culture is associated with increased levels of literacy, greater involvement in democratic process, and a growing sense of national identity. The technology of print allowed news and information to spread far more rapidly and brought people into greater connection with each other.<sup>2</sup> Printed texts were sometimes thought more reliable and authoritative than hand-written ones.<sup>3</sup> Accordingly, print is often regarded as a transformative technology: a technological and social development that in part, at least, brought about the end of the Middle Ages.

When we think of the first Magna Carta as a physical object, we think of it primarily in manuscript form, written by hand in Latin and sealed with King John’s wax seal. Alternatively, with the advantages of modern technology, we may view the manuscript in facsimile, or in digital form on the internet. We may not be able to decipher the

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\* The author acknowledges Helen Hickey and Anne McKendry for their assistance with this paper.

1 *Antiqua Statuta*, printed by Richard Pynson, London, 1508; *The Boke of Magna Carta, with diuers other statutes whose names appere in the nexte lefe followynge, translated into Englyshe by George Ferrers*, imprinted at London in Fletestrete by me Robert Redman, dwellyng at the syngye of the George / nexte to Saynt Dunstones church, 1534.

2 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. edn, Verso, London, 2006.

3 The most influential expression of this view is Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change*, vol. 1, Cambridge University Press, Cambridge, 1980, but see also Adrian Johns, *The Nature of the Book*, University of Chicago Press, Chicago, 1998; David McKitterick, *Print, Manuscript, and the Search for Order, 1450–1830*, Cambridge University Press, Cambridge, 2003, and the excellent discussion of these debates and their specific reference to legal printing in David J. Harvey, *The Law Emprynted and Englysshed: The Printing Press as an Agent of Change in Law and Legal Culture 1475–1642*, Hart Publishing, Oxford, 2015.

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letter forms, or understand the Latin, but the image of the manuscript has become a familiar visual icon, offering several layers of authenticity, whether this be precise and legal, in the personal seal of the king, or more vaguely historical, in the pre-modern aura of the hand-written document.

But what happens to these elements of the text when it is set into type and duplicated to make many copies on the printing press? Print makes the text clearer and more readily accessible, to those who can read its Latin, or those who wish to read in English, but how many of the text's medieval qualities and characteristics survive the transformation to the new technology and the proliferation of variant copies?

There are a number of contradictions at play here. Early printed editions of medieval texts tried to maintain the authority of their manuscript originals, especially of foundational texts such as the Bible or statutes and legal charters. At the same time, they needed to commend their commercial innovations to prospective purchasers. The discourse of printing often treads a fine line between affirming that standard texts have not changed and affirming that new editions offer additional value. In the case of Magna Carta, there are fundamental differences between a manuscript copy of a text affirming a political agreement made in that year, for example, and a printed copy sold three hundred years later as a source for legal history and precedent.

Magna Carta was copied many times in manuscript form in the thirteenth century as a written record, but also as a text to be read aloud. Copies were sent to cathedrals, sheriffs' offices, county courts, and other places as successive versions were made and then copied anew. As David Carpenter tells us, in 1265 the de Montfort government sent copies of the 1225 charter to every cathedral where they were to be read twice a year before the people.<sup>4</sup> In 1300 the sheriffs were still supposed to read the charter four times a year before the people in the county court, in French, and possibly in English as well as Latin. (There are some French manuscript translations that survive, but no English ones.) Interestingly, Carpenter cannot resist his own light-hearted invocation of medieval stereotypes in the midst of this serious discussion. He writes, 'Some in the county court may have listened with rapt attention. Others probably went out to the ale house.' In the same year, 1300, Edward I ordered that Magna Carta be declaimed in Westminster Hall, both literally (i.e. in Latin) and also 'in the language of the country [*lingua patria*]'.<sup>5</sup> It is frustrating that the text does not specify which language this might be. English would have been the language spoken by more people at this time, but French was still used for parliamentary and legal records. Nevertheless, the principle is clear: the text will be read aloud from the manuscript copies.

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4 David Carpenter, *Magna Carta*, Penguin, London, 2015, p. 431.

5 *ibid.*



Carpenter has records of over 30 copies made in the century after Runnymede, though the practice of reading the charter aloud eventually fell into abeyance, and the text gradually became incorporated into other manuscript collections of statutes and charters.<sup>6</sup>

In the fourteenth and fifteenth centuries, as the English Parliament grew more representative and more powerful, the charter became used less as a political document and more as a legal one, invoked more commonly in property law than political practice. Magna Carta was still often affirmed at the beginning of a parliamentary session, and was confirmed by Henry VI in 1423, but by the time the text was first printed in 1508, nearly thirty years after the arrival of print technology, it was being used primarily in legal, not political contexts. The earliest editions, then, were prepared for students and lawyers, who constituted an important market for printed texts.

William Caxton had established the first English printing press in Westminster in 1476, directing his business primarily to the royal court. His successor, Wynkyn de Worde, famously moved his press to the City of London, to Fleet Street, in 1500.<sup>7</sup> De Worde also set up a bookstall in St Paul's Churchyard, and many other booksellers followed suit.<sup>8</sup> One of the most successful early printers was Richard Pynson (born in 1448 in Normandy), who first printed Magna Carta in 1508.<sup>9</sup> Named as the king's printer, he printed law texts and statutes, as well as religious texts, romances, the travel book of Sir John Mandeville, and three volumes of Geoffrey Chaucer's poetry.

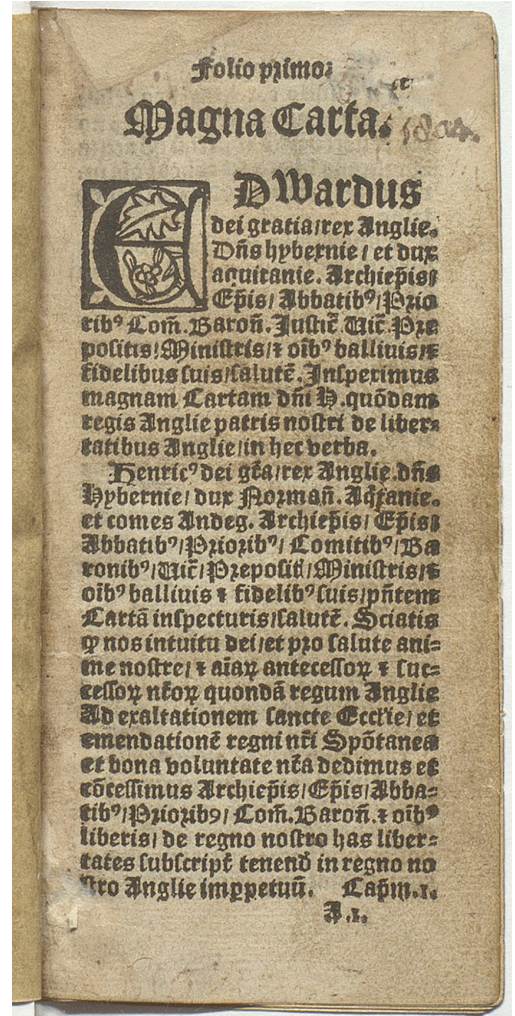


Figure 1: *Antiqua Statuta* (1508), fol. 1. Printed in Latin by the king's printer, Richard Pynson. British Library, C.112.a.2.

6 *ibid.*, p. 21.

7 *A Bibliography of Early English Law Books*, compiled by Joseph Henry Beale, Harvard University Press, Cambridge, Mass., 1926, p. 208.

8 Haruko Momma and Michael Matto (eds), *Companion to the History of the English Language*, Wiley-Blackwell, Hoboken, NJ, 2009, p. 289.

9 *Antiqua Statuta* (1508), *op. cit.*

Pynson's text of *Magna Carta* opens with a large decorated initial E in *Edwardus*. Like the font itself, and the rubrication that appears in many early printed texts, it is reminiscent of medieval manuscript style. This edition uses the font that becomes known as 'blackletter', the heavy gothic or 'textura' font that was modelled on the scripts used by the most formal and deluxe medieval manuscripts (see figure 1).

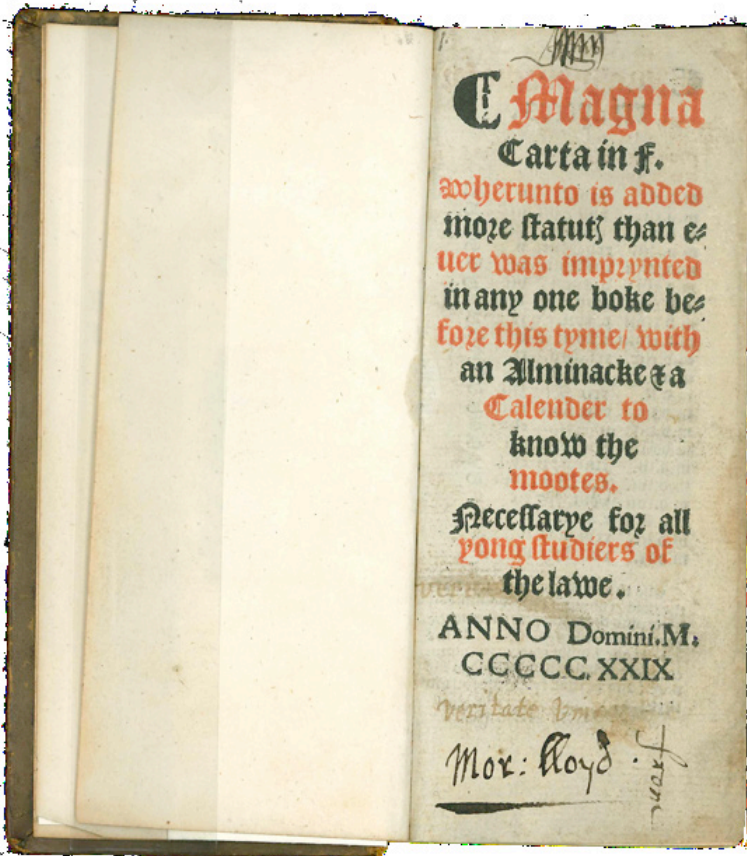


Figure 2: *Magna Carta in folio* ... (1529) [i.e. 1539], title page. Printed in Latin by Robert Redman. Boston College Law Library, Daniel R. Coquillette Rare Book Room

Roman and italic types were developed early in the fifteenth century, and were often used for works of humanist scholarship, but Gothic fonts were for several centuries preferred for older, authoritative texts such as bibles, legal statutes, and indeed, the printing of medieval poetry. The works of Geoffrey Chaucer, for example, were printed in black letter throughout the sixteenth and seventeenth centuries, and were not printed in roman type until John Urry's edition of 1721.

Slowly but surely, print established its own conventions. Desmond Manderson in his essay in this volume writes about the layers of textual apparatus that surround medieval theological and legal texts in the manuscript tradition, where authoritative commentaries were recopied, along with new commentaries and unique glosses in

texts used for monastic or university study.<sup>10</sup> In the more commercial discourses and practices associated with print, by contrast, corrections and additions were incorporated into subsequent editions, which were often greatly expanded with new materials and commentaries.

In 1539 (originally misprinted as 1529), Robert Redman printed *Magna Carta* (the 1225 version) along with other statutes. His title page (figure 2) alternates red and black ink, and typically commends the work to the prospective buyer, ‘young studiers of the law’, as containing ‘more statutes than ever was imprinted in any one book before this time’.<sup>11</sup>

There is a small, but significant feature to observe on the first page of the text (figure 3) where blackletter is used for the text itself, but roman typeface is used for the title and the surrounding introductory or marginal materials: those elements we may describe as the para-text.



Figure 3: *Magna Carta in f(olio) ...* (1529) [i.e. 1539], fol. xvii–A1. Printed in Latin by Robert Redman. Early English Books Online, image 10 of 238.

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10 See Desmond Manderson, ‘The other 1215’, in this volume at pp. 63–71.

11 *Magna Carta in f(olio) wherunto is added more statutz than euer was imprinted in any one boke before this tyme with an Alminacke & a Calender to know the mootes. Necessarye for all yong studiers of the lawe*, printed at London in Flete street by me Robert Redman dwellynge at the syngge of the George nexte to Saynt Dunstones church, 1529 [i.e. 1539].

Even though this seems only a modest change, the differentiation is significant. It confirms that Magna Carta is a medieval text, marked by historical difference from the modern present, signified by the roman font that introduces and frames the older text.

This pattern of using fonts to mark out historical and cultural difference is seen at its most glorious at the end of the sixteenth century, in the great edition of Chaucer's works by Thomas Speght in 1598 (see figure 4).<sup>12</sup>



Figure 4: *The Workes of our Antient and Learned English Poet, Geoffrey Chaucer, newly Printed* (1598), frontispiece.

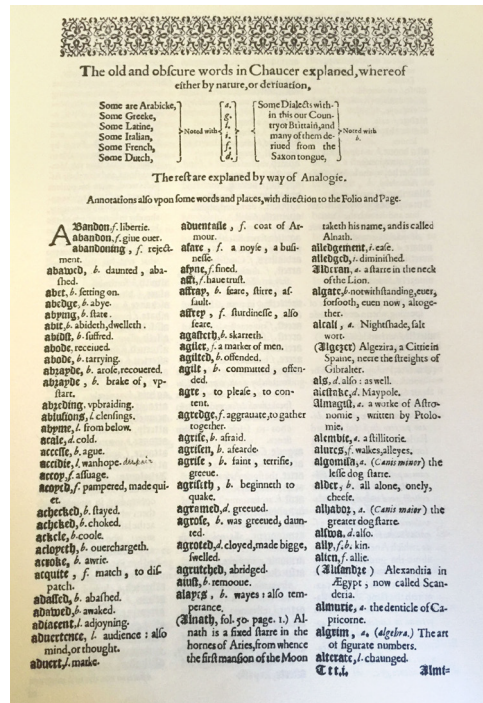


Figure 5: *The workes of our ancient and learned English poet, Geoffrey Chaucer, newly printed* (1602), fol. CII.i. Printed by Adam Islip, London; additionally edited by Francis Thynne.

Speght's elaborate title page uses roman and italic fonts, with epigraphs from both Chaucer and Ovid. The medieval poet is presented here surrounded by the full critical apparatus of humanist scholarship. There is a great deal of prefatory material in this edition: a biography, a family tree with an engraving of Chaucer and an image of his tomb, dedications, poems, and a long introduction. This latter is set in roman type, using italics for titles and foreign languages, but using black letter for quotations from Chaucer.

12 *The Workes of our Antient and Learned English Poet, Geoffrey Chaucer, newly Printed*, edited by Thomas Speght, printed by Adam Islip at the charges of Bonham Norton, London, 1598.

Speght is the first editor to include a ‘Glossary of Old and Obscure Words in Chaucer, explained’ but Francis Thynne in 1602 expanded his edition to set out the glossary in three columns, each using blackletter font for the medieval words, roman type for the modern meaning, and italics for the word’s etymological origin (figure 5).

The glossary provides a graphic illustration that blackletter is associated with medieval texts and languages that are becoming unrecognisable, that cannot be read without editorial assistance; here, typography is used to mark out the linguistic and cultural otherness of the medieval text.

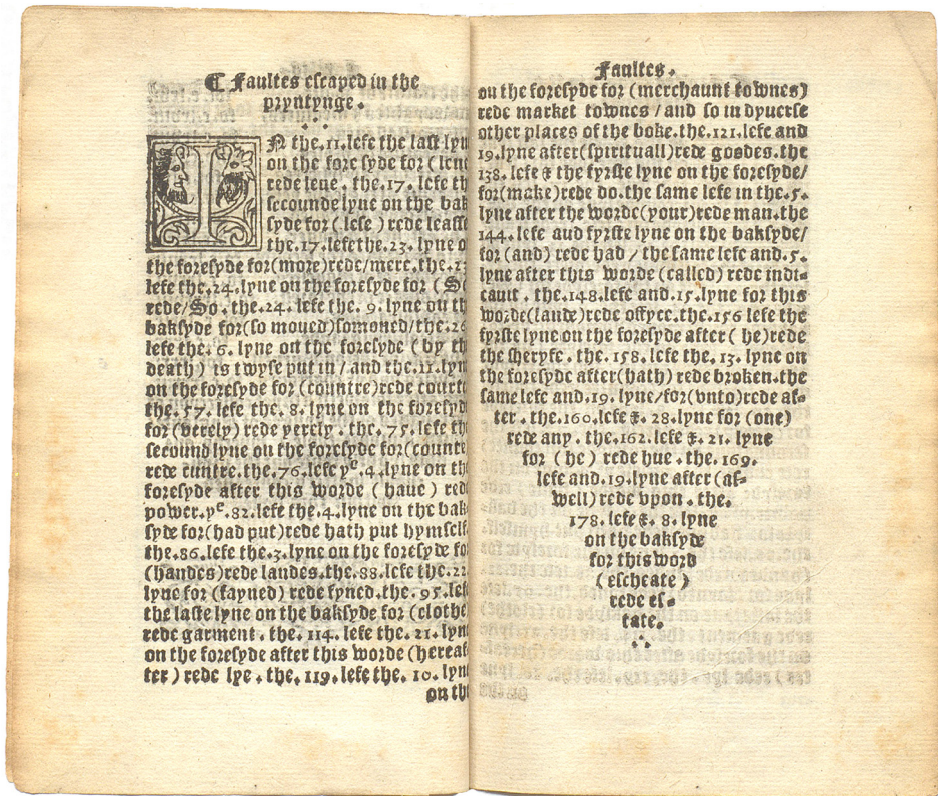


Figure 6: *The Boke of Magna Carta, with diuers other statutes ... translated into Englyshe by George Ferrers* (1534), fol. iv–v. Printed by Robert Redman, London. British Library, C.112.a.6.

A similar awareness informs Robert Redman’s publication of the first complete English translation of Magna Carta, by George Ferrers (c.1510–1579), into English in 1534.<sup>13</sup> Most of the text and commentary are printed in blackletter. This is generally

13 *The Boke of Magna Carta, with diuers other statutes whose names appere in the nexte lefe followynge, translated into Englyshe by George Ferrers*, imprinted at London in Fletestrete by me Robert Redman, dwellyng at the synge of the George / nexte to Saynt Dunstones church, 1534.

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agreed to be not a particularly successful translation, and there were many corrected and revised translations printed during the sixteenth and seventeenth centuries. Nor was the printing itself without error. Rather ironically, the text is preceded by two pages of ‘Faultes escaped in the pryntyng’ (figure 6). This is a list of errors and mistakes but beautifully laid out to taper to an elegant point on the second page: an example of the printer’s skill even as he corrects his own errors. The text was reissued in 1541.

In that recorrected edition, Redman draws attention to the labours of printing, and the difficulty that would be involved in reprinting the text from the beginning. Indeed, he argues that so many of the technical words in Magna Carta are already obsolete, and almost beyond understanding:

For yf thys were to be cutte agayne / men shulde fynde if no easy pece of worke to take in hand, specyally when many of the termes as well French as latyn be so ferre out of use by reason of theyr antyquyte, that scarcely those that be best studyed in the lawes can understande them, much les then shal suche as come rawly to the redyng therof perceyve what they meane. And yet in the same yf they be well sought, is conteyned a great part of the pryncples and olde groundys of the lawes. For by serchyng the great extremities of the comon lawes before the makynge of statutes and the remedies provyded by them, a good student shal soone attayne to a perfyte iudgement. And bycause the moste parte of them retayne theyr force, and bynde the kyng’s subiectes unto this day, me thought it necessary to set them forth in suche sorte as men myghte beste have knowledge of them and knowledge can they have none except they rede them and what dothe it avayle to rede, yf they understande not, and how shulde they understande the meanyng which understande not the texte. For this cause I saye was thys boke translated into the Englyshe, whiche thoughe percase it shal not satisfye the lerned, yet shall it be a good helpe for the unlearned.<sup>14</sup>

Redman’s hierarchy of learning is clear: the translation may not ‘satisfy’ the most learned, but at least ‘the king’s subjectes’ will be able to understand the texts that govern them if they can read them in English translation and trace them back to their origins.

A more highly developed version of this discourse is found in Richard Tottel’s edition of 1556. Here the text of Magna Carta appears in Latin, but Tottel addresses his preface in English to ‘Gentlemen studious of the lawes of Englande’ in a calculated appeal to their love of a well-organised book, grounded in authority, and as encyclopedically complete as possible:

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14 *The great Charter called i[n] latyn Magna Carta with divers olde statutes whose titles appere in the next leafe Newly correctyd*, Elisabeth wydow of Robert Redma[n], London, [1541?].

But now to say also somewhat of this present work, albiet it might seme superfluous and nedelesse to haue emprinted it now againe so sodeinly being so lately done in so faire paper & letter by an other: yet when ye shal wey how in sundry places much here is added out of bokes of good credit, as examined by the roules of parliament, how ech where the truth euen of the best printes is ouer matched by theire faultes not fewe not a litle reformed, the light of pointing adioyned, the chapters of statutes truly deuided, & noted with their due numbers, the alphabeticall table justly ordred and quoted, the leaves not one falsly marked, with mani other help to correct it and further you, when (I say) ye shal haue weyed both al these by me performed, and the want of these in al other heretofore, I hope your wisdoms wil some espie that nether I have newe printed it for you causelesse, nor ye shal bye it of me frutelesse. This thought I fit in min own behalf first to haue sayd unto you; and so now I cesse further to trouble you from your more earnest studies; wherin I pray God to sende you most worshipful successe, to your own glorie and profit, to the comfort of your frendes, and auancement of your countree. R. T.<sup>15</sup>

The discourse of the printers and early publishers, far from affirming the fixity and standardisation of the new medium, is often uneasy and uncertain. The printer here adopts a flattering tone, while also trying to sell his new improvements in technical terms, at the same time as he voices his own doubts as to whether it was worth reprinting the text so soon. Still, more elements have been added, texts have been compared with the rolls of parliament, punctuation (pointing) has been added, chapters have been sorted and numbered, an alphabetical table added, and pages correctly numbered. Thus, ‘nether I have newe printed it for you causelesse, nor ye shal bye it of me frutelesse’. Tottel even invokes the national benefit: to buy the book will advance the student in ‘most worshipful successe’ for his own glory and profit, the satisfaction of his sponsors, and the advancement of his country.

Print culture certainly made medieval texts like Magna Carta more available to greater numbers of people, as well as rendering the text more comprehensible through the addition of punctuation, indenting and capitalisation, to say nothing of English translations. Yet the vagaries of print technology, human error and human interpretation inevitably complicate this history. After all, it was in the commercial interests of the printers *not* to fix the text, but to keep generating a market for new, improved and revised editions. Magna Carta in the sixteenth century blackletter editions was both reassuringly old, but also excitingly new, again and again.

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15 *Magna Charta cum statutis quae antiqua vocantur, iam recens excusa, & summa fide emendata, iuxta vetusta exemplaria ad Parliamenti rotulos examinata: quibus accesserunt nonnulla nunc primum typis edita: apud Richardum Tottelum, London, 1556.*





# Magna Carta: Personal Encounters, Popular Culture and Australian Links

*Kathleen Neal, Andrew Lynch and David Headon*

## Encountering Magna Carta in the Middle Ages

**Kathleen Neal** — In the 1997 Australian film, *The Castle*, the hapless barrister Dennis Denuto concluded his case against the compulsory acquisition of his clients' house with the immortal phrase, 'In summing up, it's the Constitution, it's Mabo, it's justice, it's law, it's the vibe ...'<sup>1</sup> The landmark High Court decision in the native title case *Mabo v Queensland (No. 2)*, and its representation, or rather misrepresentation in popular culture, might seem like a strange place to begin talking about encounters with Magna Carta; but in fact it has a powerful bearing on the medieval and even modern reception of the iconic document we are celebrating this year. In this paper I provide a taste of the range of people who encountered Magna Carta in the Middle Ages, and what they made of it when they did. While, as we shall see, there is a great deal of evidence for Magna Carta's currency in some kinds of legal and political discussion in England in the Middle Ages, I argue that understanding of Magna Carta was neither universal nor complete. As in the case of *The Castle*, beyond certain legal and political circles, 'the vibe' of Magna Carta was cited (and understood) as much, if not more frequently, than the letter.

The Mabo decision forms one of the running jokes in *The Castle*. It serves as a shorthand for both the poor legal understanding of the Kerrigan family's counsel, and the family's naivety in engaging him. It also functions as a metaphor for the disconnection between 'the people' as represented by this 'salt of the earth' working-class family, with their simple wants and even simpler understanding on one hand, and the threatening interests of big business, with their better knowledge, big lawyers, and—by extension—the support of big policy makers on the other.<sup>2</sup> Perhaps most importantly, it becomes a shorthand for the justice of the Kerrigans' cause: the inherent rightness of protecting a family's home from malign outside interests. The Mabo decision never had any relevant bearing on the case that forms the centre of the movie. Nevertheless, the appeal to icons of legal rightness—like Mabo, like the Constitution—signalled the moral 'vibe' of the situation to the audience. Importantly, this was true even if the audience had no better understanding of the legal complexities of those documents than the Kerrigans.

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1 *The Castle*, directed by Rob Sitch, Working Dog, Melbourne, 1997.

2 See, for example, Justine Lloyd, 'The Castle: a cinema of dislocation', *Australian Screen Education Online*, no. 30, 2002, pp. 125–30.

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In a similar way, throughout its history, Magna Carta has often operated as a metaphor, signal, or shorthand, irrespective of the average understanding of what it said or signified. Mechanisms were put in place quite early on in its history to publicise it, and to make sure that people heard about it, understood its significance and took note of its highlights. Yet really understanding its legal and, indeed, political implications remained fairly privileged knowledge. In other words, people heard of and about Magna Carta, but how well they understood it and the uses to which they thought it could be put varied widely and weren't always accurate. Beyond members of the legal fraternity, and elites who came into contact with the charter through their involvement in political and legal gatherings like parliaments or county courts, the wider population often referred to the 'vibe' of Magna Carta rather than its precise articles.<sup>3</sup> This was especially true as the immediate context of the charter's production passed out of living memory and other mechanisms of redress gained currency in the late thirteenth and fourteenth centuries.

A concern for the dissemination of the charter was evident from the moment of its inception. In the six weeks following the initial agreement in June 1215, copies were distributed widely with instructions for sheriffs to arrange for the terms to be read aloud throughout their bailiwicks.<sup>4</sup> Public announcement of the charter in Latin was probably not widely useful, since understanding that language was a relatively restricted skill. However, even though all the surviving original charters were recorded in Latin, scholars have accumulated evidence that encounters with the charter and its ideas were not necessarily conducted in the Latin medium. Thirteenth-century England was a multilingual culture, within which different languages were associated with different social ranks, registers of formality, and textual forms. Latin was the most official and appropriate language in which to produce a legal text, and so the preservation of the charter itself in Latin versions is not surprising. However, the aristocracy more likely spoke and read a local form of French, sometimes known as Anglo-Norman or the French of England, while the lower ranks most likely spoke English, which was not commonly written down at this time. Magna Carta may have had a presence across this linguistic spectrum from its very origins. For example, it is clear that the barons involved

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3 All clause citations in the body of the text are given with reference to the 1215 charter which is being celebrated this year. My preferred text of the 1215 charter is published with facing translation in David Carpenter, *Magna Carta*, Penguin, London, 2015. An online English translation is available at [www.bl.uk/magna-carta/articles/magna-carta-english-translation](http://www.bl.uk/magna-carta/articles/magna-carta-english-translation) (accessed 8 October 2015). For the 1297 text, which entered the statutes, see *Australia's Magna Carta*, 2nd edn, Department of Senate, Canberra, 2015, pp. 21–6. Also available at [www.magnacarta.senate.gov.au/index.php/translation/](http://www.magnacarta.senate.gov.au/index.php/translation/) (accessed 5 November 2015). Where clauses were still in effect after 1225, under different customary numbering, I give the new clause in a footnote.

4 M.T. Clanchy, *From Memory to Written Record: England 1066–1307*, 3rd edn, Wiley-Blackwell, Oxford, 2013, p. 266.

in negotiating the charter worked in Anglo-Norman: by happy chance a copy of a set of ‘working papers’ from 1215 survives to demonstrate this.<sup>5</sup>

Furthermore, an Anglo-Norman copy of the 1215 charter and the accompanying writ instructing the knights of the shire of Hampshire to proclaim it in the county survive in a contemporary Norman cartulary, that is, a volume of collected charters and official documents. These texts suggest the possibility that when Magna Carta was first proclaimed aloud it could have been rendered in translation for the benefit of local understanding, certainly in the language of the aristocracy, if not yet in English.<sup>6</sup>

By the 1260s, when the charter had gained fresh significance as a touchstone for rebels against the rule of Henry III,<sup>7</sup> reissues of the charter were certainly being proclaimed aloud in multiple languages to ensure a maximum possible reception: first in Latin, the language of authority, and then in ‘the mother tongue’, which might have meant Anglo-Norman, or English—and possibly both.<sup>8</sup> When Edward I reissued the charter in 1297 and again in 1300, in response to the demands of political opponents,<sup>9</sup> he ordered that it be read aloud ‘in full, and in public’, four times per year, at the major feast days, which were also key moments in the Crown’s legal and administrative calendar. These were: Michaelmas (29 September), Christmas, Easter, and the Nativity of John the Baptist (24 June).<sup>10</sup> Proclamations of this kind took place in towns and cities, at markets, fairs, in the countryside, and at major crossroads: in every public place.<sup>11</sup>

Thus, while not all English people attended parliament, or obtained a legal education, everyone—in theory—had the opportunity to be exposed to the charter, regularly and in some detail. Importantly, while these measures demonstrate the possibility of widespread awareness of the charter’s existence, they remained largely aural.

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5 London, British Library, Harleian MS 458. See Appendix 7 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.

6 J.C. Holt, ‘A vernacular-French text of Magna Carta, 1215’, *The English Historical Review*, vol. 89, no. 351, 1974; Ian Short, ‘The vernacular-French Magna Carta: some linguistic evidence’, *Semasia*, vol. 4, 1977.

7 Adrian Jobson, *The First English Revolution: Simon de Montfort, Henry III and the Barons’ War*, Bloomsbury, London, 2012.

8 Clanchy, op. cit., p. 266; Anthony Musson, ‘Magna Carta in the later Middle Ages’ in Nicholas Vincent (ed.), *Magna Carta: The Foundation of Freedom, 1215–2015*, Third Millennium, London, 2014, p. 89; Tim William Machan, *English in the Middle Ages*, Oxford University Press, Oxford, 2003, p. 35.

9 Marc Morris, *A Great and Terrible King: Edward I and the Forging of Britain*, Hutchinson, London, 2008.

10 See ‘Articuli super cartas, 1300’, in *Magna Carta, 1215 and Beyond*, The National Archives, [www.nationalarchives.gov.uk/education/resources/magna-carta/articuli-super-cartas/](http://www.nationalarchives.gov.uk/education/resources/magna-carta/articuli-super-cartas/) (accessed 5 November 2015). For a variant text see Melbourne, State Library of Victoria [henceforth SLV], RARES 091 G79, f.3v. ff. I give particular thanks to Jan MacDonald of the State Library of Victoria for her assistance in accessing this manuscript.

11 Musson, ‘Magna Carta in the later Middle Ages’, op. cit., p. 89.

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Although the document itself survives today as a written, material object, this was not how the majority of medieval English people encountered it. Aside from copies displayed in some cathedrals, most people encountered Magna Carta in the Middle Ages by hearing it. In other words, in order to understand the full meaning of the charter, those listening had to be able to follow its intricate legal terms in real time, and commit them to memory. This was a major obstacle to widespread accurate and detailed understanding of the charter. It is perhaps no wonder, therefore, if the idea of Magna Carta that most people retained was of a significant, powerful legal gist, or ‘vibe’, perhaps remembering in depth a few points of specific relevance to their own livelihoods. For example, we might expect that women recalled most clearly the clauses on widows’ financial rights, and fishermen the clauses on rivers and weirs. Like the Kerrigans acquiring a general sense that the Mabo decision pertained to a paramount right to ancestral land, people knew that Magna Carta mattered, but they needed specialists to help them turn that knowledge into a viable legal argument.

There is rich evidence for the importance attributed to Magna Carta as a living document at the turn of the fourteenth century among the notaries and attorneys of the legal profession. The charter was afforded a prime position in legal instruction at this time. For example, it takes pride of place at the beginning of the surviving books of English law from this period in many of the great libraries of the world, including a little-researched volume of English statutes, c.1300, now in the State Library of Victoria in Melbourne.<sup>12</sup> In such ‘bespoke’ handbooks of legal documents, commissioned or personally copied by lawyers-in-training to be the main reference works of their careers, the first document is invariably Magna Carta, followed by the Charter of the Forest, and the Articles instituted by Edward I to provide remedies and processes for transgression of the two charters’ various clauses.<sup>13</sup>

The fact that these documents were not recorded merely for their historical interest is clear from the text and its physical manifestation in legal handbooks. In the first instance, the handbooks invariably record the most recent version of Magna Carta—not its earliest form in 1215, but the abbreviated and refined version of 1225, which was the text subsequently affirmed by Edward I in 1297. This was normally copied together with Edward’s covering notice of confirmation, or *inspeximus*, which affirmed its current relevance.<sup>14</sup> That these were working documents is also evident from the addition of annotations and navigation aids such as chapter numbering that would have helped the student or practising lawyer to locate passages quickly. In this respect, the accompanying Articles were clearly of considerable relevance in how Magna Carta itself was used. In the Melbourne manuscript, for example, it is this text, rather than the charter itself, that has been most annotated. A later hand (or hands)

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12 Melbourne, SLV, RARES 091 G79. But see also, for example, Oxford, Bodleian, Add. C 188; Washington DC, Law Library, Library of Congress, 008.

13 For the Articles, see ‘Articuli super cartas’, op. cit.

14 See for instance *Australia’s Magna Carta*, op. cit.

has added chapter divisions in alternating red and blue, corrected a number of minor copying errors that risked introducing errors of interpretation, and placed chapter numbers in the margins. We also know from the records of moot courts, class debates and lectures, that by the mid-fourteenth century legal students were routinely required to cut their teeth by disputing questions of interpretation centred on specific clauses of the charter.<sup>15</sup> Apart from reinforcing the notion that lawyers were the ones who really understood Magna Carta in the Middle Ages, evidence such as this shows that lawyers considered it important and worthwhile to spend time, effort and resources obtaining physical copies of the charter and its associated texts, and subjecting the document to close examination and its principles to thorough interrogation.

An important factor that drove legal knowledge of Magna Carta was its usefulness in framing petitions submitted to the king and council in parliament for redress of various grievances from the late thirteenth century onwards. Having been introduced as a mechanism for seeking legal redress in the 1270s by Edward I, petitions quickly acquired a formal style and required format, and petitioners therefore needed to seek expert advice to draw them up.<sup>16</sup> Specialist notaries and legally aware secretaries were normally employed to undertake this task. As a result, these documents do not necessarily represent the general populace's normal degree of legal awareness. Yet, because petitions were sent by all sectors of society and not elites only, they provide a wonderful source for testing how widespread awareness of Magna Carta could be. When we look at these petitions, it is clear that when people needed legal remedy in the late thirteenth and fourteenth centuries, whether through their own knowledge or through the advice of their legal team, Magna Carta was among the tools available to them in justifying their cases.

Some petitioners were evidently well-informed or had knowledgeable counsel, because they rested their cases on particular clauses of Magna Carta, which they explicitly discussed. Such was the case, c.1289, of the abbot of Bury St Edmunds in a complaint about the actions of the king's officials when he had been absent from the realm. The abbot's petition explained that he had been summoned before the justices travelling through Suffolk by a writ known as *precipe* in a matter concerning two of his manors in that county, but that he had refused to attend on the grounds that the issue of the writ was against Magna Carta (clause 34).<sup>17</sup> These manors, he argued, were held in chief of the king, that is, as the king's personal tenant, and therefore exempt from action under this writ according to the charter. His reasoning was correct;

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15 Musson, 'Magna Carta in the later Middle Ages', op. cit., p. 88.

16 For medieval parliamentary petitions see W. Mark Ormrod, Gwilym Dodd, and Anthony Musson (eds), *Medieval Petitions: Grace and Grievance*, York Medieval Press, Woodbridge, 2009.

17 The petition survives at Kew, The National Archives [henceforth TNA], SC 8/177/8816. The online catalogue provides a summary and image of the document: <http://discovery.nationalarchives.gov.uk/details/r/C9294684> (accessed 5 November 2015). This clause was still in effect in 1289: see *Australia's Magna Carta*, op. cit., clause 24, p. 24.

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however, according to the abbot's story the justices had not accepted it and implicitly the abbot's possession, or 'seisin' of his manors was threatened. He petitioned the king to uphold his refusal to answer, explaining his grounds with specific reference to the charter.<sup>18</sup>

Similarly, when the citizenry of York petitioned Edward II in 1317 for the rivers Ouse and Ure not to be 'put in defence'—a technical term meaning that the fisheries had been taken into private hands<sup>19</sup>—they rehearsed specific clauses on river management (clauses 47–8) in their case.<sup>20</sup> Their petition claimed that the rivers Ouse and Ure had been put in defence by the late Richard of Cornwall, the brother of Henry III, contrary to the terms of 'the Great Charter', and that the practice had been continued by his son, Edmund. The petition proceeded to articulate the community's accurate understanding of the relevant clause(s), saying 'that no river should be in defence, except for those that were in defence in the time of King Henry [II], great-great-grandfather of the present king'. Demonstrating political as well as legal awareness, the reasoning relied explicitly on the 'recent ordinances' guaranteeing that the clauses of the charter would be upheld in all points.<sup>21</sup> The complaint was successful in bringing the matter before the King's Bench, which apparently found in the community's favour. However, proving the difference between holding rights and being able to enforce them, the same complaint was articulated in another petition five years later, at which time it apparently remained unanswered.<sup>22</sup> The legal accuracy of a reference to the charter seems to have been useful in drawing attention to the complaint, but insufficient to conclude it successfully in the favour of the petitioners.

Informed and technical references to the charter thus had some legal force, but this was increasingly complemented by a moral weight and political power that petitioners were keen to exploit. In some petitions it is clear that the appeal to the

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18 The outcome of the petition itself is not clear. However, it is probable that it was upheld, because the Patent Rolls reveal that the matter was subsequently brought before the justices at Westminster and eventually settled by trial by combat. It seems likely that the counter claimants had fallen back on this strategy having been foiled in their action by writ. See *Calendar of the Patent Rolls Preserved in the Public Record Office, 1281–1292*, HMSO, London, 1971, p. 414.

19 For a clear definition of the term see Tim P. O'Neill, 'Fish, historians and the law: The Foyle Fishery Case', *History Ireland*, vol. 17, no. 6, 2009, [www.historyireland.com/20th-century-contemporary-history/fish-historians-and-the-law-the-foyle-fishery-case/](http://www.historyireland.com/20th-century-contemporary-history/fish-historians-and-the-law-the-foyle-fishery-case/) (accessed 7 October 2015).

20 Kew, TNA, SC 8/7/314. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9060436> (accessed 2 October 2015). Clauses were still in effect which guaranteed no rivers would be put in defence unless they had already been banked in the time of Henry II (d. 1189). See *Australia's Magna Carta*, op. cit., clause 16.

21 These were the Ordinances of 1311, which called for the 'Great Charter of liberties and the Charter of the Forest' to be upheld in all their particulars. See J.R. Maddicott, *The Origins of the English Parliament, 924–1327*, Oxford University Press, Oxford, 2010, pp. 331–7.

22 Kew, TNA, SC 8/2/73. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9060186> (accessed 19 November 2015).

charter was as much an appeal to the exact letter of the law as it was to the growing ‘vibe’ of Magna Carta. This kind of dual reference to the charter as a legal and moral authority is especially noticeable in the case of petitioners seeking redress of persistent grievances, as in the case of the men of York, above. A particularly powerful example comes from 1315. In the January parliament of that year Lady Isabel Bardolf,<sup>23</sup> widow of Sir Hugh Bardolf, petitioned the king and council for redress concerning ‘the suit of Robert Lewer who deprived her of her free tenement by means of a writ obtained by false accusation ... and despite [Isabel] producing her royal charters granting [those same] tenements’.<sup>24</sup> Isabel asserted that she had complained in the chancery immediately after the initial adverse finding, now at least a year previously, and had approached the parliament in 1314 to no avail. Her new petition wove precise and well-informed references to Magna Carta together with many other strategies for persuading the king’s authorities to find in her favour, so that its specific legal relevance ultimately contributed to a wider, moral claim.

Isabel was the only surviving heir of her father, Robert Aguilon, and the wording of her request makes clear that the lands concerned were hers by right of inheritance rather than as her widow’s portion, or dower. Thus, she was not pressing her case based on any of the clauses specific to women in the charter, but on the most famous articles of modern times: the king’s promise not ‘to go against [a free person] or send against [them] save by lawful judgment of [their] peers or by the law of the land’ and not ‘sell or deny or delay right or justice’ (clauses 39–40).<sup>25</sup> Isabel’s petition used key words to make clear how the charter had been transgressed in this article.<sup>26</sup> The initial inquiry into her lands had been held ‘arbitrarily’ and ‘without her knowledge’, indicating that the judgment had not been conducted lawfully. She outlined how this was ‘contrary to the terms of the Great Charter concerning franchises, which states that neither the king nor any of his officials is to expel any man from his free tenement without a reasonable judgement’. Her argument was not limited to this point, however. She also explicitly appealed to the clause of the Ordinances, building on the Articles on the Charters,<sup>27</sup> that prevented any common law matter from being delayed by a writ

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23 See *Calendar of Inquisitions Post Mortem and Other Analogous Documents*, vol. VI (Edward II), HMSO, London, 1910, pp. 272–3. Available at: [www.archive.org/details/cu31924099427845](http://www.archive.org/details/cu31924099427845) (accessed 5 November 2015).

24 For the petition, see Kew, TNA, SC 8/4/190. Available at: <http://discovery.nationalarchives.gov.uk/details/r/C9060310> (accessed 11 December 2015).

25 For more on women and Magna Carta generally, see Louise J. Wilkinson, ‘Magna Carta and women’ in *Australia’s Magna Carta*, op. cit. The quote comes from the 1297 version given in *Australia’s Magna Carta*, clause 29, p. 25.

26 The full petition is given in J.R.S. Phillips (ed.), *Edward II: Parliament of January 1315, Text and Translation*, online edn, The Parliament Rolls of Medieval England, Scholarly Digital Editions, Leicester, 2005, item 48. Available at [www.sd-editions.com/PROME](http://www.sd-editions.com/PROME) (accessed 20 November 2015).

27 ‘The New Ordinances, 1311’ in Harry Rothwell (ed.), *English Historical Documents III: 1189–1327*, Eyre & Spottiswoode, London, 1975, clause 32. Cf. ‘Articuli super cartas’, op. cit., clause 6.

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of the privy seal: a refinement of the principle of ‘reasonable judgement’ articulated in the original charter. Having already experienced set-backs and delays in securing her lands, Isabel thus deployed all the legal and moral tools at her disposal in this attempt to force the issue. The ‘vibe’ or tenor of Magna Carta was one part of a veritable barrage of rhetoric that she launched against her opponent to justify her case: alleging that Lewer’s offence against her stemmed from fraud and un-due process on several levels, as well as contravening the charter and the Ordinances as iconic statements of the king’s pact with his people.<sup>28</sup>

Not all moral appeals to the charter were as well informed. In 1324 the tinsmiths of Cornwall collectively opened a rather ambitious claim to general freedoms by asserting that the liberties of ‘Magna Carta and the law of the land of England’ ought to apply to the entire realm.<sup>29</sup> More specifically, they were angered by royal officials who paid them in foreign coin of lesser worth than sterling. They sought the right to be paid in the ‘standard coinage of London’, which they implied was granted in the charter and should therefore be extended to them. They were not precisely correct: clause 35 did indeed discuss weights and measures, and attempt to establish the London quarter as the standard measure of grain, but it did not directly concern coinage.<sup>30</sup> It may have been a misguided appeal to this clause that was intended. Alternatively, the tinsmiths may have conflated the terms of the charter with the regulations on gold assaying developed in Edward I’s later Articles on the Charters which did deal with metal quality, albeit in a different context. Such confusion could have been encouraged by the reissue of English coinage that had also taken place in 1300 in an attempt to remove debased foreign coins from circulation.<sup>31</sup> The tinner’s petition also asked for free trade conditions that would permit them to sell their tin publicly, rather than being restricted to dealing with the king’s contracted merchants whom they explicitly accused of underpaying. Hence, in the case of the Cornish tinsmiths, it would seem a general grievance concerning the conduct of the king and queen’s officials with respect to inadequate payment had become attached to the charter’s general moral principle that the king owed right to his subjects, rather than any legal principle it contained. Magna Carta’s relevance to the case was almost entirely symbolic.

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28 Her case was still unresolved in 1322, when she petitioned again: see Kew, TNA, SC 8/4/191. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9060311> (accessed 26 November 2015). Thomas, her son and heir, was still pursuing the case c.1324 after Isabel’s death: see Kew, TNA, SC 8/95/4735. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9149286> (accessed 26 November 2015).

29 Musson, ‘Magna Carta in the later Middle Ages’, op. cit., p. 91. For the petition see Kew, TNA, SC 8/103/5129. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9149699> (accessed 5 November 2015).

30 For 1297 see *Australia’s Magna Carta*, op. cit., clause 25, p. 24.

31 ‘Articuli super cartas’, op. cit., clause 20. For the coinage see Martin Allen, *Mints and Money in Medieval England*, Cambridge University Press, Cambridge, 2012, pp. 357–8.



Appeals to Magna Carta as a kind of symbolic legal authority, beyond its specific legal significance, were becoming almost stereotypical by the 1320s: the Cornish tinnars were not alone. We can see this, for example, in a petition from the townsmen of Oxford to the king in 1328, as part of their long-running conflict with the university.<sup>32</sup> The townsmen held:

that grants have been made to the Chancellor and university of Oxford which are contrary to [the town's] liberties, the law of the land, and the Great Charter, and are to the prejudice of the crown, and which have thrown [the townsmen] into such a state of subjection and oppression that they cannot levy the King's farm or keep the peace; so that they will be compelled to abandon the town if they do not have the King's help.<sup>33</sup>

In this petition, we can see how appeals to 'the vibe' of the charter were becoming integral to medieval English ways of expressing slippery concepts like justice and injustice, and to ways of attempting to coax a favourable response from the legal and administrative authorities of royal government. The burgesses of Oxford directed their appeal in a general way to the guarantee of 'ancient liberties and customs' that had applied, in theory, to all towns since the first issue of Magna Carta (clause 13).<sup>34</sup> They had made oblique reference to this provision in securing confirmation of their charters of liberties in 1324.<sup>35</sup> In their new petition, however, the way that their appeal to the charter formed one in a series of ever more rhetorically impressive foundational concepts of rightness—the town's liberties, the law of the land, the Great Charter, and the Crown's interests— suggests that they, like Isabel Bardolf, saw the charter as a moral argument as much as a legal one. They used this language to increase pressure on the Crown to resolve their complaint. They were at least partially successful, since writs were issued instructing both parties to present their records for comparison and final determination of their respective liberties.<sup>36</sup> In the long term, however, the conflict continued.

In a further example, in a case before the King's Bench in 1384, certain townsmen of Padstow in Cornwall argued for their ancestral right to control their own maritime contracts with reference to Magna Carta's grant of ancient liberties to other maritime

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32 The protracted conflict had many parts, but the specific grievances of this petition had been running since at least 1324; see Eleanor Chance et al., 'Medieval Oxford' in Alan Crossley and C.R. Elrington (eds), *A History of the County of Oxford: Volume 4, the City of Oxford*, Victoria County History, London, 1979, [www.british-history.ac.uk/vch/oxon/vol4/pp3-73](http://www.british-history.ac.uk/vch/oxon/vol4/pp3-73), n. 638.

33 See Kew, TNA, SC 8/202/10099. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9333654> (accessed 1 October 2015).

34 *Australia's Magna Carta*, op. cit., clause 9, p. 23.

35 Kew, TNA, SC 8/200/9994. Available at <http://discovery.nationalarchives.gov.uk/details/r/C9295884> (accessed 8 December 2015).

36 *Calendar of the Close Rolls Preserved in the Public Record Office, 1327–1330*, Eyre & Spottiswoode, London, 1896, pp. 391–2.

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towns like the Cinq Ports.<sup>37</sup> The specifics of the clause were not as vital to this case as reference to a principle—long prized in England both before and after Magna Carta—of appeal to ancient and continuous precedent. And yet, they must have felt it was a beneficial strategy to tie their request explicitly to the charter by name.

Perhaps most tellingly, even outside formal arenas of legal dispute, we find evidence that citation of Magna Carta was coming to be part of the popular language of complaint by the early fourteenth century. For instance, references to it appeared in literature claiming to offer advice on good rulership to Edward III, and in the preaching of his ecclesiastical opponents.<sup>38</sup> Perhaps the clearest example, however, comes from the reports of tax assessors and collectors who had been sent out into Staffordshire and Shropshire in 1317. Their letters back to the exchequer noted that their duties had been impeded by people ‘under the pretext of the king failing to observe the Great Charter of liberties of England, the charter of the forests and the ordinances made by the prelates, earls and barons’.<sup>39</sup> This seems to imply that local people in these counties knew very well how to speak the appropriate language of rights and law—at least to delay if not to prevent unwelcome intrusions into their lives by the king’s officers. For all these complainants, as for the Kerrigans, ‘the vibe’ of the charter strongly conveyed the moral rightness of their case, irrespective of the precision of their legal understanding, or even the nature of the forum in which they expressed their grievance.

These examples, and many others that I have not discussed, furnish us with evidence of widespread awareness of Magna Carta as a valuable moral and rhetorical basis of argument, and sometimes of a detailed legal understanding of its contents. Both geographically and socially, the individuals and groups whom we know to have cited it in their legal affairs ranged widely. From the businessmen and local authorities from eastern ports like Yarmouth to western maritime towns like Padstow, from cities close to London like Oxford, to distant northern cities like York. From the relatively lowly tinsmiths of Cornwall to high ranking baronial families like the Bardolfs, whose seniority was reflected by their hereditary right to provide the king and his guests with a particular dish on the occasion of his coronation feast.<sup>40</sup> It would seem, then, that people from all walks of life in medieval England had encountered Magna Carta.

Interestingly, despite this widespread trust in and reliance on the charter in its general and specific significance, the outcomes of appeals to Magna Carta whether as a legal and/or rhetorical strategy of complaint in the Middle Ages were far from guaranteed.

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37 Musson, ‘Magna Carta in the later Middle Ages’, op. cit., p. 91.

38 Wendy Scase, *Literature and Complaint in England, 1272–1553*, Oxford University Press, Oxford, 2008, pp. 24, 58.

39 Samuel K. Cohn, *Popular Protest in Late Medieval English Towns*, Cambridge University Press, Cambridge, 2013, p. 151.

40 *Calendar of Inquisitions Post Mortem and Other Analogous Documents*, vol. IV (Edward I), HMSO, London, 1913, p. 168.

As in the example of the Kerrigan family with which I began, cases that rested on Magna Carta met with mixed success. In fact, evidence shows that the Crown and its officials were just as able as other English people, if not more so, to manipulate the clauses and ‘tenor’ of the charter to their own ends. In many of the petitions mentioned above, the contemporary annotation indicates that the immediate outcome was usually some variant of ‘this needs more investigation’, or sometimes, ‘this cannot be done, or must be delayed, or needs to be heard in another court, because it is against Magna Carta’. On the one hand, this points to the unsurprising conclusion that the Crown had sophisticated lawyers who could find legal ways to avoid giving away too many rights or privileges that subjects might otherwise pay to enjoy, or which might conflict with its own interests or those of its most important tenants. However, a further, subtler reading is also possible. Namely, that appeals to Magna Carta were rhetorically effective in forcing a complaint to be heard, but that the charter’s legal force was insufficient to ensure a positive outcome. In that sense, appealing to the ‘vibe’ of the charter served an important but largely extra-legal purpose, and seems to have served it well. In medieval times, just as now, appeals to ‘the vibe’ of the rightness of things were powerful ways of thinking about and talking publicly about justice. But they were not enough—on their own—to clinch the case in a court of law. Overall, we may be forced to conclude that even in the Middle Ages when people encountered Magna Carta, they found that it was often more powerful as persuasive language than it was effective as a legal tool.

## **Magna Carta: The View from Popular Culture**

**Andrew Lynch** — Yeatman and Sellar made the definitive statement in *1066 and All That* (1930) that ‘History is not what you thought. It is what you can remember’.<sup>1</sup> My discussion here is about some of what has been popularly remembered (and forgotten) about Magna Carta over eight centuries, and how popular culture has shaped its significance. I have divided this material under four headings: 1. Magna Carta was a brave new start; 2. Magna Carta is a people’s document; 3. Magna Carta has never been forgotten; 4. Magna Carta: a Good Thing from a Bad King. How well do these popular views measure up to what is known of the historical record?

### *1. Magna Carta was a brave new start*

A common view is that the charter granted by King John in 1215 was a startlingly new venture, making an end of royal absolutism and a beginning of modern rights and liberties. It would be truer to say that Magna Carta was already consciously ‘old’ when it began. This is partly because it owed a lot to older forms of popular belief and shared cultural memory.

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1 R.J. Yeatman and W.C. Sellar, *1066 and All That: A Memorable History of England*, Methuen, London, 1930, preface.

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That is not surprising. Magna Carta comes from a time when very few outside the trained clergy could read official documents in Latin, including the barons who had such an interest in them. To be widely effective, documents needed the support of public rituals—memorable events like the meeting at Runnymede, which has since been re-enacted and recalled countless times in every medium. They also had to be connected with widespread and accepted beliefs about the way things were and should be. Although Magna Carta’s existence as one of many charters proliferating in its own times shows the growing importance of official writing, the document still drew much of its authority from a persistent popular myth: namely, that England had been better off in the past, in the days of Henry I, and before that in the far-off time of King Edward the Confessor, who died in 1066, and who was by the time of Magna Carta a canonised saint and renowned as a great law-giver.

The so-called ‘Laws of King Edward’ loomed large in cultural memory, both in 1215 and for many centuries after, right down to the time of Thomas Jefferson. In reality these were a mid-twelfth-century compilation,<sup>2</sup> but they were associated with an imagined golden age, the immediate pre-Conquest period of 1052 to 1065, which even the modern *Oxford Dictionary of National Biography* calls ‘an oasis of peace and prosperity’.<sup>3</sup> The Prelude to these ‘Laws’ says that four years after the Conquest, in 1070, William I, on the advice of his barons, had them taken down under oath from twelve Anglo-Saxon men from each shire. There is no evidence for that actually happening, but it indicates a shared belief that good laws came from a legendary king accepting counsel and listening to popular tradition. According to the chronicler Roger of Wendover, when the barons met secretly, late in 1214, to work out what to do about King John, they discussed the ‘Charter of Liberties’ granted by Henry I at his coronation more than a hundred years before in 1100, which promised to restore ‘the Laws of King Edward the Confessor’.

Magna Carta needed a long pedigree of that kind. The idea that it was a brand new start would have been very damaging to its status. To have proper authority, it had to be seen as restoring ancient and customary ways, to which it frequently refers, while removing abuses seen as recent or contemporary innovations, ‘evil customs’ that had crept in. After 1215, the view that Magna Carta had simply restored a former good arrangement became standard: the very popular chronicle history known as the prose *Brut*, of which 181 manuscripts still survive, attributes all King John’s problems with the barons to his breaking an age-old tradition:

A great dispute began between King John and the lords of England,  
because he would not respect and uphold the laws which St Edward had

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2 Bruce R. O’Brien, *God’s Peace and King’s Peace: The Laws of Edward the Confessor*, University of Pennsylvania Press, Philadelphia, 1999, pp. 3–7.

3 Frank Barlow, ‘Edward [St Edward; known as Edward the Confessor] (1003x5–1066)’, *Oxford Dictionary of National Biography*, Oxford University Press, 2004; online edn, May 2006, [www.oxforddnb.com/view/article/8516](http://www.oxforddnb.com/view/article/8516) (accessed 21 Oct 2015).

ordained, which had been in use and upheld up to the time that he had broken them.<sup>4</sup>

The *Brut*, in this fifteenth-century version, adds that when John died,

the king [Henry III] and the archbishop and earls and barons gathered at London the next Michaelmas, and King Henry confirmed by his charter all the liberties that King John had granted at Runnymede, and they are still current throughout England.<sup>5</sup>

Magna Carta was certainly not promoted as a novelty in its own time, but it has very successfully continued to embody the traditional idea of a precious ancient legacy still powerful in the present. The lead curator of the British Library's exhibition this year, Claire Breay, was rung up by a man asking if Magna Carta could get him off his traffic fines.



Figure 1: John Wilkes by John Dixon, published by Carington Bowles, mezzotint, 1770  
© National Portrait Gallery, London, NPG D18845

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4 *The Brut, or The Chronicles of England*, ed. F.W. Brie, Early English Text Society, Original series 161, London, 1906, chapter 104 (excerpt translated by A. Lynch).

5 *ibid.*, chapter 107 (excerpt translated by A. Lynch).

## 2. Magna Carta was a people's charter

Magna Carta was won by baronial and church coercion, at a critical stage in a complex struggle between the king, his barons, the papacy, and the Crown of France. It had no input from the great mass of the population, and not much direct concern for them. Yet, despite the fact that later kings did not always, or even often, abide by the charter, historians tell us it did moderate their financial demands. Knowledge of it at least gave people a yardstick for measuring royal actions. As Kathleen Neal's essay in this volume shows, subsequent translation and publicising of the terms of the charter put into wide circulation the view that the king was not above the law.<sup>6</sup> These factors lie behind the long-term popular belief that Magna Carta in 1215 was a charter 'for the people'.

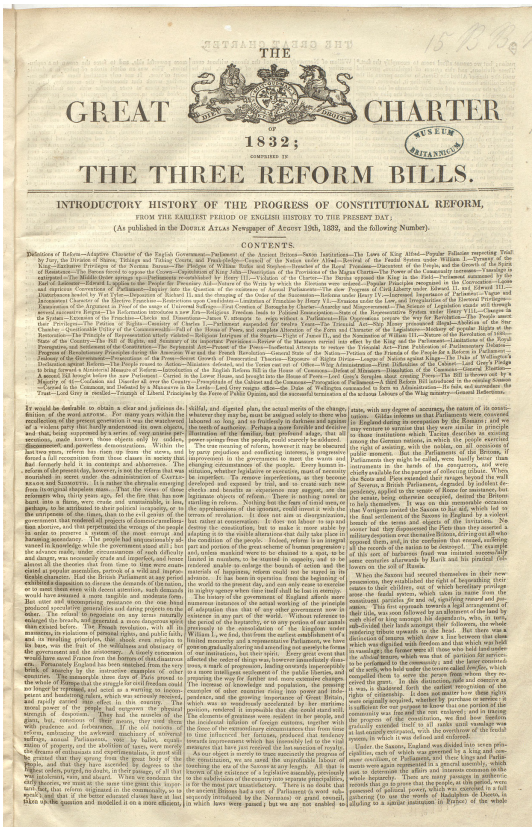


Figure 2: 'The Great Charter of 1832; comprising the three Reform Bills', British Library, 504.1.5

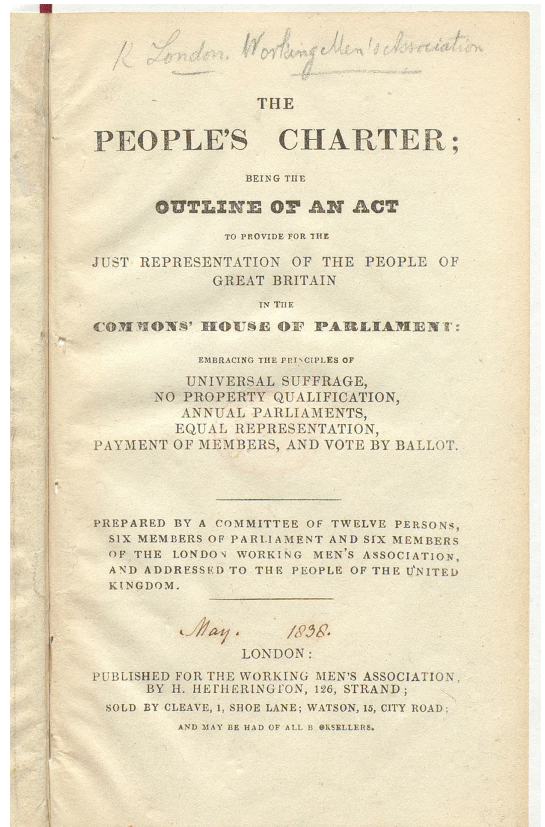


Figure 3: 'The People's Charter; being the outline of an Act to provide for the just representation of the people of Great Britain in the Commons' House ...', 1838, British Library, C.194.a.938

This belief has taken many forms in later historical periods. One version is that Magna Carta is the (originally Anglo-Saxon) basis of English common law, and the forerunner and ally of parliament as the people's guardian against the encroachments of monarchy.<sup>7</sup> A second version is seen in the legitimization of later democratic political views by deliberate association with Magna Carta. For example, the eighteenth-century radical John Wilkes was pictured in 1770 (figure 1), holding Magna Carta and giving a good impression that he had just written it himself. The Reform Act of 1832 was published as 'The Great Charter' (figure 2). The 'People's Charter' of 1838, an early part of the Chartist Movement, also used the name, making the point that parliament did not properly represent the 'people' adequately, so that a new charter was needed for modern times (figure 3).

A third version is to represent the idea of Magna Carta itself as actually emanating from the common people. An interesting example occurs in the 2010 film *Robin Hood*, where the hero, Robert of Loxley, is a common archer, and his father, a stonemason, has written the prototype of the charter:

If Your Majesty were to offer justice, justice in the form of a charter of liberties, allowing every man to forage for his hearth, to be safe from conviction without cause or prison without charge, to work, eat and live on the sweat of his own brow, then that king would be great .... What we would ask, Your Majesty, is liberty. Liberty by law!

John pretends to agree, but then betrays his word to Robin, just as King Richard has done before. At the film's end, the dream of a people's contract with monarchy is dead, and Robin goes off to an outlaw socialist collective in the forest:

Nobody rich, nobody poor. Fair shares for all at nature's table. Many wrongs to be righted in the country of King John.<sup>8</sup>

Is the film's conclusion that the charter dreamed of by Robin and his father will soon be realised in Magna Carta? I think Brian Helgeland's screenplay implies instead that the imminent arrival of Magna Carta will not really help. True justice and liberty will never simply be granted from on high to the ordinary folk, or won for them by baronial intervention; they will always have to fight for it themselves. In the 1770 print of John Wilkes with Magna Carta (figure 1), a bas-relief of Hercules fighting the Hydra is pictured behind him to make the same point.

### *3. Magna Carta has never been forgotten*

Magna Carta is often called the 'foundation of liberty', or the 'fountainhead of freedom'. That implies an integral and steady historical tradition based on it, or flowing from it. But in reality the popular view of Magna Carta depends, to a large extent, on forgetting most things that were actually in it. For example, by far the most

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7 Justin Champion and Alexander Lock, 'English Liberties' in Claire Breay and Julian Harrison (eds), *Magna Carta: Law, Liberty, Legacy*, British Museum, London, 2015, pp. 107–11.

8 *Robin Hood*, dir. Ridley Scott, Universal Pictures, 2010.

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radical thing about the 1215 charter was its appointment of a committee of 25 barons to see that the king kept his word, and whom he empowered, if he did not, to ‘distrain upon and assail us in every way possible, with the support of the whole community of the land’. John bound himself by these terms—he clearly had no intention of keeping them—to give over his sovereignty as king. But John soon died and naturally later reissues of the charter by other kings omitted all that. The king’s grant of a charter of liberties was an assertion of his own right and power to do so. The barons’ committee has gone largely unnoticed in popular memory, although it has been sensationally likened to the ‘Committee of Public Safety’ in the French Revolutionary period.<sup>9</sup> Similarly, Magna Carta’s references to debts owed to Jews (clauses 10 and 11) are rarely mentioned. England scarcely wishes to recall its twelfth- and thirteenth-century anti-Jewish history of exploitation and violence, culminating in Edward I’s Edict of Expulsion in 1290.

Magna Carta now stands unrivalled as what is popularly remembered from the history of King John’s time. That has not always been the case, at least up to the beginning of the twentieth century. In the sixteenth century, in the wake of the Protestant Reformation, John was better known for his troubled relationship with Pope Innocent III. England was placed under a papal interdict from 1208 to 1214, and John was excommunicated in 1209. He made so much money from keeping the revenues of vacant dioceses that this situation apparently suited him for a good while.<sup>10</sup> Eventually, to get the pope back on his side, John surrendered the crown of England and Ireland to the papal legate, Pandulph, in 1213 and formally did homage to the pope for it, with the promise of 1000 marks per annum and restitution to the church: typically, he soon stopped paying it.

This submission was probably a good idea at the time but it became notorious in later centuries. Any enemy of the pope was a friend to early Protestants like John Bale, writing at the time of the dissolution of the monasteries, after Henry VIII had made himself head of the English Church. In Bale’s play *King Johan* (1540), John bravely defies Rome, which he calls ‘the grett captyvyte / Of bloody Babulon’, and only surrenders his crown to avoid the destruction of his people. Bale tells his audience that John has been maligned by the Italian-born Tudor historian Polydore Vergil:

Kynge Johan was a man both valeaunt and godlye.  
What though Polydorus reporteth hym very yll  
At the suggestyons of the malicyouse clergye?  
Thynke yow a Romane with the Romanes can not lye?<sup>11</sup>

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9 Geoffrey Hindley, *The Book of Magna Carta*, Guild Publishing, London, 1990, p. 161.

10 Barlow, op. cit.

11 John Bale, *King Johan*, ed. Gerard NeCastro, Act 2, <http://ummutility.umm.maine.edu/necastro/drama/kingjohan.txt> (accessed 28 October 2015).



Magna Carta is not mentioned by Bale, nor does it feature in popular history plays of the later sixteenth century. Shakespeare's *King John*, for example, written in 1596, omitted it, though we know he was aware of it from Holinshed's *Chronicles*. The hot topics in Shakespeare's text are its anti-papal stance, the untrustworthiness of the French, and the military greatness of a united England. John is a bad character, but the real villain is Pandulph, the manipulative papal legate. John is given some fine lines defying him:

No Italian priest  
Shall tithe or toll in our dominions;  
But as we, under heaven, are supreme head,  
So under Him that great supremacy,  
Where we do reign, we will alone uphold,  
Without the assistance of a mortal hand.<sup>12</sup>



Figure 4: King John by Renold Elstrack, line engraving, 1618 © National Portrait Gallery, London, NPG D23644

John denies the pope's right to question or judge his actions as king: only God can do that. These were apparently crowd-pleasing sentiments in 1596, but their tendency is governed by Tudor fear of division and civil disorder, not at all inclined to favour popular restraint on the monarch's power. Similarly, a contemporary English image of King John by Renold Elstrack (figure 4) represents him as lofty, regal and dignified, confidently holding the sceptre and orb that symbolise his rule. In such a climate, Magna Carta would have seemed out of place.

Anti-Catholic sentiments also made Shakespeare's play popular in later periods. In 1745, when a Stuart invasion was threatening, Colley Cibber took the chance to stage his much-altered version, *Papal Tyranny*. When *King John* was staged at Drury Lane in the 1840s and 50s, Catholic Emancipation (1838) and the re-establishment of Catholic bishops in 1850 were topical: the actor/producer William Charles Macready wrote that 'part of the audience came to the play, not to see it, but to act themselves in a foolish demonstration

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12 William Shakespeare, *King John*, Act 3, Scene 1.

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of hostility of Papistry'.<sup>13</sup> Only when Sir Herbert Beerbohm Tree staged Shakespeare's play in 1899 was a spectacular tableau of Magna Carta inserted. But at that time *King John*'s main relevance was as a patriotic call to arms and national unity: 'One reviewer noted on the first night that the Bastard's final speech made heads turn to the box where sat Joseph Chamberlain, the embattled colonial secretary during the [Second] Boer War'<sup>14</sup>:

This England never did, nor never shall,  
Lie at the proud foot of a conqueror,  
....  
Come the three corners of the world in arms,  
And we shall shock them. Nought shall make us rue,  
If England to itself do rest but true.<sup>15</sup>

Magna Carta is never fully forgotten, but under the pressure of war and civil unrest, its importance has certainly been played down in the popular mind, just as its provisions concerning imprisonment and access to justice are often reinterpreted or suspended by governments when states of national emergency are identified.

#### 4. *Magna Carta: a Good Thing from a Bad King*

In the terms of *1066 and All That*, Magna Carta is a 'Good Thing' and King John a very 'Bad King', in fact an 'Awful King'. The two judgements go together. Magna Carta is an occasion of fun, mainly because it gives us the opportunity to enjoy the nastiness and rage of King John, secure in the knowledge that he will get his comeuppance. John has a long tradition in popular history as an absurd figure, a pantomime villain. Holinshed's *Chronicles* (1577) relate that:

the king hauing condescended to make such grant of liberties, farre contrarie to his mind, was right sorowfull in his heart, curssed his mother that bare him, the houre that he was borne, and the paps that gaue him sucke, wishing that he had receiued death by violence of sword or knife, in steed of naturall norishment: he whetted his teeth, he did bite now on one staffe, and now on an other as he walked, and oft brake the same in peeces when he had doone.<sup>16</sup>

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13 Diary of William Charles Macready (1851), quoted in Anjna Chouhan, 'King John: a play for all time?', *Blogging Shakespeare*, <http://bloggingshakespeare.com/king-john-a-play-for-all-time> (accessed 28 October 2015).

14 William Shakespeare, *King John*, ed. L.A. Beaurline, Cambridge University Press, Cambridge, 1990, 'Stage history'.

15 Shakespeare, *King John*, Act 5, Scene 6.

16 Raphael Holinshed, *Chronicles of England, Scotland and Ireland*, Imprinted for Iohn Hunne, London, 1577, vol. 4, 1.7.1., [www.english.ox.ac.uk/holinshed/texts.php?text1=1577\\_5316#p10491](http://www.english.ox.ac.uk/holinshed/texts.php?text1=1577_5316#p10491) (accessed 28 October 2015).

Centuries later, the very popular children's historian Henrietta Marshall wrote in *Our Island Story* (1905):

When the meeting was over, and John went back to his palace, his anger was terrible. He threw himself on the floor foaming with passion ... He cursed the barons and the people with terrible curses. He tore and bit the rushes with which the floor was covered. He gnashed his teeth, growling and snarling like a wild animal mad with rage.<sup>17</sup>

In the Ladybird 'Adventure from History' book of *King John and Magna Carta* (1969),

... the King sat biting his nails in sullen fury. We are told that this was a bad habit which he had acquired as a boy and never lost. If it had been his only bad habit, he would not have been in the situation in which he now found himself.<sup>18</sup>

John has also had long-term trouble with ill-fitting accessories. Matthew Paris in the mid-thirteenth-century *Abbreviatio chronicorum Angliae* depicted him as degenerate and incompetent, the crown sliding off his head (figure 5).<sup>19</sup> Walt Disney's animators picked up on that symbolism. John's crown slips down below the ears on his unregal head.<sup>20</sup> In an illustration from John Newbery's history for children (1749 and reprints) the king wears his sword behind to indicate cowardice



Figure 5: Depiction of King John by Matthew Paris in 'Drawings of the kings of Britain and England to Henry III (1216–1272)'  
© The British Library Board, Cotton Claudius D. VI, f.9v

- 17 H.E. Marshall, *Our Island Story: A History of England for Boys and Girls*, T.C. and E.C. Jack, London, 1905, chapter 36.
- 18 L. Du Garde Peach, *King John and Magna Carta*, A Ladybird 'Adventure from History' Book, Loughborough Wills and Hepworth, 1969, reprinted 2015, p. 42.
- 19 Suzanne Lewis, *The Art of Matthew Paris in the Chronica Majora*, University of California Press, Berkeley, 1987, pp. 156–7, figure 88.
- 20 *Robin Hood*, dir. Wolfgang Reitherman, Walt Disney Productions, 1973.

and unmanliness, and his mantle—the royal mantle of his great brother Richard the Lionheart—is far too large and trails on the ground behind him (figure 6).<sup>21</sup> In Ridley Scott’s 2010 film of *Robin Hood*, John wears a helmet absurdly too big, and in a mail hood even evokes memories of *Blackadder* (figure 7).



(Left) Figure 6: Woodcut illustration of King John from *A New History of England* (1785) by John Newbery. Image courtesy of liveauctioneers.com and PBA Galleries, San Francisco.

(Below) Figure 7: King John in *Robin Hood* © 2010 Universal Pictures. Courtesy of Universal Studios Licensing LLC



21 John Newbery, *A New History of England*, J. Newbery, London, 1763, sig.A.4r.

Laughing at John's rage and taking pleasure in his discomfort has a political point: the king's power is in inverse proportion to his maniacal claim to dominance. The fun of despising John provides a comedic victory of the people over the monarch, a comforting affirmation that executive power is finally accountable to popular opinion. Laughter at him unites the people *as* a people, whose judgement matters. Of course, the politics of this comedy of contempt are ambivalent. Depending on your views, John can be taken as an example of the vileness of all monarchy, or as a monarch so totally bad that he exonerates the rest by comparison: not a 'proper' king. Whichever way one reads it, the horrible history of King John remains vital in giving Magna Carta its present popular status as a 'Good Thing' from which everyone still benefits.

### **A Few Chapters in Australia's Magna Carta Story**

**David Headon** — When the Clerk of the Senate invited me to present a paper at this symposium, for the 800th anniversary of Magna Carta, I was flattered to be included in such a distinguished line-up of speakers but also a little apprehensive about the subject itself. Thirteenth-century England and the so-called 'Great Charter' are just two of many notable absences in my CV. I was aware, as well, of Lord Jonathan Sumption's abrupt opening sentence in his speech in March 2015 to the Friends of the British Library, when he remarked that it 'is impossible to say anything new about Magna Carta, unless you say something mad'.<sup>1</sup>

Despite this cautionary observation from one so well-qualified to provide an opinion, I must say I welcomed the prospect of commenting on Magna Carta's 'Australian links', one small yet significant part of the much larger narrative. I will begin with my 'personal encounter', and work my way into some discussion of popular culture, political culture, constitutional history and, lastly, some detailing of Magna Carta's Australian story—a story which has continued to have new (and, on occasion, abrasive) chapters added to it right up to the present day.

First, the personal encounter. When the occasional interstate federal politician, during sitting period downtime, takes the opportunity to enjoy the cultural fabric of Canberra, he or she might well head down the grassy hill of Federation Mall on foot, past the Old Parliament House and into the symbolic heart of the parliamentary triangle. There is much to take in, aesthetic, historic and symbolic. One site of cultural significance encountered on the western side of the triangle, the Commonwealth Avenue/Commonwealth Bridge side, is Magna Carta Place, with its distinctive, low bronze dome.

From 2000 to 2007, I had the privilege of working for the National Capital Authority (NCA) as its Cultural Adviser. One of the first major projects with which I was directly involved was the Magna Carta Place design competition, first conceived

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1 Lord Jonathan Sumption, 'Magna Carta then and now', Address to the Friends of the British Library, 9 March 2015, <https://www.supremecourt.uk/news/speeches.html>, p. 1.

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in 1995 and later developed into a proposal submitted to the NCA by the Australia–Britain Society in late 1996 as that organisation’s ‘Centenary of Federation’ project. An international competition was eventually announced in August 1999, with a rather flash 23-page booklet, and some two years after that, the competition run and won, and building complete, the monument site was officially opened at Magna Carta Place, appropriately on (Archbishop Stephen) Langton Crescent in Parkes, by then Prime Minister John Howard on 26 September 2001.<sup>2</sup>

My personal involvement with the project involved preparation of the text for six bronze panels comprising a key element of the monument, and the choice of accompanying visual material. A big project on this scale could only materialise if it had a sponsoring private organisation willing to provide additional financial support to complement the Commonwealth’s contribution—and that group, the Australia–Britain Society, did assert itself confidently in the whole process, led by its President, the imposing Mrs Marjorie Turbayne MBE OAM. Those selected to represent the Society in discussions proved to be formidable advocates.

It is fair to say that those same Society representatives, and Mrs Turbayne, would never want to be regarded as social and cultural progressives. Not surprisingly, our discussions concerning the textual/visual material for the monument proved to be, in a word favoured by former Prime Minister Howard, ‘robust’ indeed. In my roles as NCA Cultural Adviser and in-house historian, I was determined to ensure that the history panels featured in the monument’s inviting open green space not only engaged with the Australian context, but made it the central narrative element. Canberra’s Magna Carta commemoration was not going to be yet another ill-informed Great Charter hagiography exercise, a lazy birthday puff-piece of the kind that has too often featured throughout the Western world over the past few hundred years.

I am pleased to note that the end result for our Magna Carta Place was an intelligent, scholarly and accessible set of text panels, the wording supplied by John Williams, these days Professor John Williams, Dean of Law at the University of Adelaide—with whom I did two Melbourne University Press books some years ago: *Makers of Miracles—The Cast of the Federation Story* (2000) and, in close collaboration with our mutual dear friend, the late Dymphna Clark, a volume called *The Ideal of Alexis de Tocqueville* (2000), a first publication, a jointly edited publication, of Manning Clark’s 1940s thesis on Tocqueville.<sup>3</sup>

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2 National Capital Authority, ‘Design competition guidelines for Magna Carta Place, Canberra, Australia’, August 1999; Prime Minister John Howard, ‘Address at the opening of the Magna Carta monument, Canberra’, 26 September 2001, pmtranscripts.dpnc.gov.au/release/transcript-12382.

3 David Headon and John Williams (eds), *Makers of Miracles—The Cast of the Federation Story*, Melbourne University Press, Carlton South (Vic.), 2000; Dymphna Clark, David Headon and John Williams (eds), *The Ideal of Alexis de Tocqueville—Manning Clark*, Melbourne University Press, Carlton South, Vic., 2000.

John Williams, I knew, was the right choice for the Magna Carta/Canberra job, and he did his work with dedication. The only hitch in the process that I can recall concerned the reproduction of an image of Tasmanian Supreme Court judge, Andrew Inglis Clark, now widely recognised as the primary author of the Australian Constitution. The representative of the Australia–Britain Society with whom I was dealing objected to Inglis Clark’s image being used at all, as he had only just found out that Inglis Clark was—shock, horror!—a republican. Discussion of the objection was polite if firm, and I am pleased to say that it concluded with Clark taking his place amidst the splendid Magna Carta collage of relevant images on the monument’s east-facing wall. If you have not yet seen the site, it is definitely worth a visit. I should also record, perhaps as a postscript to the entire experience, that the final text for the six panels produced no substantive disagreements at all. I was pleasantly surprised.

Before discussing the text that appears on the various panels, and the related speeches and written material that accompanied the September 2001 monument opening, there is a need for a broader context in which to place this distinctively Australian material. A short summary of Magna Carta’s global reception over eight centuries will assist, and in providing it I acknowledge my reliance on the work of two experts of recent decades: Britain’s Lord Sumption, quoted at the outset, and the Australian Senate’s own Harry Evans, the late Harry Evans, a fine historian who was never afraid to go public on matters of principle and concern.

In his recent British Museum speech, Jonathan Sumption summarises Magna Carta’s historic reception with characteristic bluntness. Like many commentators over the last hundred years, he enlarges on two contrasting schools of thought: firstly, the ‘lawyer’s view’, Magna Carta as ‘a major constitutional document, the foundation of the rule of law and the liberty of the subject in England’, a view adhered to by historians up to about the time of Australian Federation, a view which became emboldened over time as it developed into the ‘myth’ of Magna Carta (making an important contribution to the entrenchment of British exceptionalism during the expansion of Empire); and secondly, what Sumption proposes as the ‘historian’s view’, first articulated in numbers in the early years of the twentieth century, a view ‘which has tended to emphasise the self-interested motives of the barons and has generally been sceptical about the charter’s constitutional significance’.<sup>4</sup>

Until the early twentieth century, most commentators were quite content to ratify the myth, first and famously promoted by Sir Edward Coke with his gaze firmly on charters, statutes and year-books. The same myth was embraced by, amongst others, the early American colonists, and afterwards developed with zealous intent by their Revolutionary descendants. Coke’s narrow emphasis on legal sources, with no regard for cultural context, would eventually be challenged when English historians such as the Oxford academic Edward Jenks, in 1904, and soon after the

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4 Sumption, *op. cit.*, p. 1.

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likes of W.S. McKechnie and Maurice Powicke, exposed an array of Magna Carta misconceptions. The Great Charter was shown to be a deeply conservative, dated document. As Sumption deftly summarises, where Magna Carta is concerned there ‘are no high-flown declarations of principle. No truths are held to be self-evident. Indeed, there are hardly any provisions that can be called constitutional at all’. Magna Carta, he concludes, ‘guarantees very little’.<sup>5</sup>

Though he makes no attempt to highlight the point in his iconoclastic British Museum speech, Lord Sumption does engage with a distinct third school of thought: namely, those who acknowledge that Magna Carta matters all right, but not, as he puts it:

... for the reasons commonly put forward. Some documents are less important for what they say than for what people wrongly think they say. Some legislation has a symbolic significance quite distinct from any principle which it actually enacts. Thus it is with Magna Carta.<sup>6</sup>

Canvassing the same broad issues as Sumption though approaching them in an entirely different way, Harry Evans, in a trenchant paper entitled ‘Bad King John and the Australian Constitution’ (presented in the Australian Senate’s Occasional Lecture Series in 1997<sup>7</sup>), expands on the myth-making school which, as he points out, reached a crescendo of intensity in the eighteenth and nineteenth centuries when the charter was routinely referred to as ‘the palladium of English/British liberty’.<sup>8</sup> Harry can’t resist instancing arguably the most publicised sceptic, Oliver Cromwell, a frustrated Oliver Cromwell, who was ‘very rude’ about Magna Carta—a restrained allusion by the Australian to Cromwell’s oft-quoted, Chaucerian reference to Magna Carta as ‘Magna Farta’.

More purposefully, Evans also maintains that Magna Carta’s ultimate significance ‘is not dependent on its content’<sup>9</sup>, and it is this line of enquiry—this third school of thought—that I intend to track for the rest of the paper, within an Australian context. Evans concentrates his attention exclusively on the charter and its covenant traditions, keen to explain the explicit combination of these two traditions in the Australian example. I too want to explore some of the revealing ways in which Magna Carta has been applied within the unique Australian setting, past and present.

Magna Carta surfaced as a political and cultural reference point in Britain’s southern colonies on a number of occasions in the nineteenth century—in 1848, for example, when Henry Parkes’ Constitutional Association took root; in the following year, 1849,

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5 *ibid.*, pp. 2–3, 8, 17.

6 *ibid.*, p. 17.

7 Harry Evans’ lecture, presented in the Department of the Senate’s Occasional Lecture series in 1997, is republished in: *Australia’s Magna Carta*, 2nd edn, Department of the Senate, Canberra, 2015.

8 Evans, *op. cit.*, p. 47.

9 *ibid.*, pp. 48, 50.



when the anti-transportation debates in New South Wales ignited; in 1853–54, as William Charles Wentworth precociously promoted a hereditary New South Wales Upper House (a sort of home-grown House of Lords); and, not surprisingly, in the 1890s Federation debates. But easily the most striking nineteenth-century example of the charter's persistent application to an Australian setting found voice as the result of what took place in Ballarat, on 3 December 1854, when the short-lived Eureka rebellion reached its tragic conclusion.

The most famous invocation of the charter within the Eureka narrative, and there were many, is that by an American, Samuel Clemens, Mark Twain, who visited our shores in 1895 as part of a world tour that he turned into a memorable work of non-fiction entitled *Following the Equator* (1897).<sup>10</sup> The book is replete with acute observations concerning the human condition, as the mature Twain grew steadily more pessimistic about life in general. However, where Australia is concerned, he outdid himself with a remarkable series of comments on subjects as diverse as Aboriginal lore, the promise of early Australian literature, black/white relations, kookaburras, dingoes and the Melbourne Cup. Remember, Twain visited in 1895, whereupon he described Cup Day, only thirty-odd years after the first Cup had been run, as 'the Australasian National Day'. He mused that it 'would be difficult to overstate its importance', because Melbourne's Cup race:

... overshadows all other holidays and specialized days of whatever sort in that congeries of colonies. Overshadows them? I might almost say it blots them out ... Cup Day, and Cup Day only, commands an attention, an interest and an enthusiasm which are universal ... Cup Day is supreme ... I can call to mind no specialized annual day, in any country, whose approach fires the whole land with a conflagration of conversation and preparation and anticipation and jubilation. No day save this one; but this one does it.<sup>11</sup>

With this year's Melbourne Cup to be run on Tuesday, four days away, and with 'popular culture' part of my brief, I felt I simply had to find room for the specialised annual day somewhere.

Despite spending only a few months in Australia, Twain twigged to many of the subtle nuances of Australian history, for which he provided this exquisite summation:

Australian history is almost always picturesque; indeed, it is so curious and strange, that it is itself the chiefest novelty the country has to offer, and so it pushes the other novelties into second and third place. It does not read like history, but like the most beautiful lies. And all of a fresh new sort, no mouldy old stale ones. It is full of surprises, and adventures, and

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10 Mark Twain, *Following the Equator*, 1897; republished by Beaufoy Books (John Beaufoy Publishing Ltd), Oxford, 2010.

11 Twain, *op. cit.*, p. 112.

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incongruities, and contradictions, and incredibilities; but they are all true, they all happened.<sup>12</sup>

Twain certainly understood Eureka's potential national significance into the future, enthused by the prospect of having lighted upon another America in the south. 'Eureka', he writes, was simply:

... the finest thing in Australasian history. It was a revolution—small in size, but great politically; it was a strike for liberty, a struggle for a principle, a stand against injustice and oppression. It was the Barons and John, over again; it was Hampden and Ship-Money; it was Concord and Lexington; small beginnings, all of them, but all of them great in political results, all of them epoch-making.<sup>13</sup>

The Great Charter recruited for service once again, this time with a fresh New World application.

In a book on Eureka about to be published by The Federation Press, *Eureka: Australia's Greatest Story*, historian Paul Pickering discusses the mood in the colony of Victoria before and after the Eureka rebellion, as well as the reaction to Eureka amongst liberals in England. He cites writers in both countries who, trying to understand the details of the tragic event, consciously invoked the Great Charter as a moral reference point. Pickering concludes that 'Magna Carta itself could be pressed into service in defence of lawful rebellion'.<sup>14</sup> Mark Twain's assertion has had plenty of support over the years.

Fast-forward exactly one hundred years after the publication of *Following the Equator*, to Magna Carta Place, Canberra, on 12 October 1997, when the Hon. Sir Gerard Brennan, Chief Justice of the High Court of Australia, delivered an address at the naming ceremony for Magna Carta Place, some four years before the finished product would be opened to the public.

While first providing his audience with an obligatory history lesson on Magna Carta, Chief Justice Brennan made his own thoughts on the charter's contemporary relevance crystal clear. The original text itself was seriously dated. Far more important was what he called 'the beneficial misinterpretations ... with which, from age to age, the text has been invested'.<sup>15</sup> He asserted that Magna Carta today was regarded as 'a traditional mandate for trial by jury, equal and incorrupt justice for all, no arbitrary imprisonment

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12 *ibid.*, p. 116.

13 *ibid.*, p. 166.

14 Paul Pickering, '“Who are the Traitors?”: rethinking the Eureka Stockade', in David Headon and John Uhr (eds), *Eureka—Australia's Greatest Story*, The Federation Press, Annandale, NSW, 2015, p. 78.

15 The Hon. Sir Gerard Brennan, 'An Address on the Occasion of the Naming of Magna Carta Place, Langton Crescent, Canberra', 12 October 1997, [www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj\\_magna.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/brennanj/brennanj_magna.htm).

and no taxes without Parliament's approval'. But it is his conclusion that resonates profoundly, and uncomfortably, in 2015:

Above all, Magna Carta has lived in the hearts and minds of our people. It is an incantation of the spirit of liberty. Whatever its text or meaning, it has become the talisman of a society in which tolerance and democracy reside, ... a society in which power and privilege do not produce tyranny and oppression. It matters not that this is the myth of Magna Carta, for the myth is the reality that continues to infuse the deepest aspirations of the Australian people. Those aspirations are our surest guarantee of a free and confident society.<sup>16</sup>

Professor John Williams' carefully chosen words for the monument panels, while not quite matching the eloquence of Chief Justice Brennan, nonetheless formulate the same argument. He describes Magna Carta as 'the people's touchstone, an enduring legacy of humanity's determination to protect fundamental human rights and human dignity'.<sup>17</sup> Brennan and Williams are on the same moral and ethical page.

Prime Minister Howard spoke at the September 2001 opening, contributing to what I consider to be a milestone moment in the history of the Great Charter's unfolding Australian story. Mr Howard spoke a bare fifteen days after the horror of 9/11. As one might expect, he made reference to 'the assault' by the terrorists on 'those principles and those freedoms' that the Australian and British peoples stood for, including freedom from arbitrary arrest, opposition to detention without trial, and the right of all people charged with crimes to be judged by their peers according to the evidence available.<sup>18</sup>

The day before the monument opening, former *Canberra Times* editor, Ian Mathews, wrote an article for the newspaper under the heading: 'The betrayal of a cornerstone of justice and fairness'.<sup>19</sup> The piece was intentionally placed to anticipate the content of the Prime Minister's Magna Carta address the next day, Mathews taking the Prime Minister to task as someone actively eroding the ethos of Magna Carta. He cited as evidence of his assertion recent migration laws, the Tampa case, and what he described as the Prime Minister's determination to acquire more power for the executive at the expense of judicial review through court action. Mathews quoted the Tampa judgment of Federal Court Justice Anthony North, including the judge's specific reference to Magna Carta and his several references to 'ancient rights'. Mathews, too, enlists Magna Carta for his argument, accusing the Howard

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16     ibid.

17     Text for panels at Magna Carta Place, Langton Crescent, Canberra.

18     Howard, op. cit.

19     Ian Mathews, 'The betrayal of a cornerstone of justice and fairness', *Canberra Times*, 25 September 2001.

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Government, and along with it the Labor opposition, of a ‘betrayal of Magna Carta’s principles’. His understanding of the Great Charter’s contemporary relevance is captured in one uncompromising sentence: ‘What distinguishes [Magna Carta] as a document of worth is its attempt to set down the parameters of fairness’. For Ian Mathews, in 2001, both sides of the Australian Parliament had failed the test of fairness.

In the fourteen years since the Magna Carta monument’s opening, neither the Coalition nor the Labor Party, when in government or opposition, has passed the fairness test where the treatment of refugees and asylum seekers is concerned—nor, it must be added, has a majority of Australians. During this period, fairness has not been one of the ‘deepest aspirations’ of the Australian people. Our governments have failed the test; as a nation, we have failed the fairness test. Sadly, a community that Chief Justice Brennan discussed with such pride in 1997 has lapsed into a society where anxiety and fear have replaced confidence and compassion. As bad as the human rights record in Australia was in the decade following 9/11, a subject exhaustively documented in a number of books, recent years have been even worse.

Yet there may be some small glimmers of hope beginning to appear at last. When Australia’s Race Discrimination Commissioner, Tim Soutphommasane, responded to the quashing of the proposed 18C changes to the Racial Discrimination Act, he opted for the high moral road in his comments, noting that the undignified debate has united Australians in one sense: ‘There has been an emphatic affirmation of our commitment to racial tolerance’.<sup>20</sup>

And perhaps this is where I should conclude discussion of a few select chapters in Australia’s Magna Carta story, as the page starts to turn again: with a new Prime Minister and a population which, according to the most recent polls, has dramatically shifted from being overly pessimistic about the future in the first months of 2015, to an endorsement of the potential impact of a new Prime Minister based in part on the fact that he has ‘a clear vision for Australia’s future’.<sup>21</sup> That vision must incorporate a rediscovery and reassertion of the country’s moral compass, its moral bearings, so that we never again have to endure offensive three-word slogans masquerading as government policy.

I take it as a promising sign that, as reported in the *Canberra Times* on the 27 September 2015, the Australian delegation to the United Nations General Assembly in New York received a warm response to the shift in national leadership: ‘Doors

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20 Tim Soutphommasane, ‘PM bows to public opinion’, *Canberra Times*, 7 August 2014.

21 See Mark Kenny, ‘Voters fault Abbott as new PM shines in the poll’; Peter Hartcher, ‘Turnbull rides high in popularity stakes’; and ‘Tide turns’, all in *Canberra Times*, 19 October 2015, p. 5.

that were recently firmly closed, have mysteriously swung open'.<sup>22</sup> For the 800th anniversary year of Magna Carta, let us hope that this refreshing development is a metaphor applying to the corridors of federal government in Australia, and to the homes and hearts of the Australian community.

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**Rosemary Laing** — Thank you very much to all our speakers today. We have probably got less time left than we had hoped but we had the idea of closing the session with questions and comments, including a number of perhaps personal stories from the audience in relation to their own encounters with Magna Carta. I wonder if we could perhaps start that off with our Parliamentary Librarian, Dianne Heriot, who has a very interesting addition to Professor Nicholas Vincent's paper in our booklet *Australia's Magna Carta*, and to his translation of the 1297 Magna Carta into modern English.

**Dianne Heriot** — As Rosemary mentioned, I am the Parliamentary Librarian, which is a great honour and a great joy to me, but my first encounter with the Magna Carta was as a young student at the wonderfully named Pontifical Institute of Mediaeval Studies at the University of Toronto. As part of my exam prep, I prepared for my current role by transcribing and translating the 1215 and 1297 texts of Magna Carta driven, I must say, not by a passionate interest in the evolution of the rule of law, but by an equally passionate interest in the evolution of feudal taxation systems and customary dues. All of which were occasioned by the fact that my name, Heriot, is in fact the term for a medieval death duty.

As I worked, clause by clause, through those two versions of Magna Carta, I was struck by three things. One was how much had gone missing between 1215 and 1297 in terms of specific clauses addressing contemporary grievances. The second issue was how little what was said in Magna Carta was ever talked about. People who talked about Magna Carta seemed to go much more, as our learned speaker said, with 'the vibe'. The third was that, despite all the focus on the barons, the role of the church and the significance of Magna Carta in the tussle between the papacy and the English Crown was perhaps one of the more interesting stories.

All this was, of course, but an early preparation for my work earlier this year when I set about the task of transcribing and retranslating the Parliament's own copy of Magna Carta to find, to my delight, that we had missed two lines. The two lines, ironically, were about the inability of the king to continue to randomly attribute fines to churchmen. It stipulated that churchmen would suffer fines based on the degree of their delinquency and on their own personal wealth rather than upon the wealth of their benefice or their office.

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22 Nick O'Malley, 'Closed doors open under new PM', *Canberra Times*, 27 September 2015, p. 11.

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**Rosemary Laing** — Thank you. What a legacy that is, to find the missing lines in Australia's Magna Carta.

**Anthony Heiser** — I am the Vice-President of the Canberra Fisherman's Club. Everyone here enjoys a public right to go fishing in all tidal waters in Australia, except the Northern Territory. Not many pastimes enjoy that legal status. I have been interested in this topic since my university days. My understanding is that Magna Carta has contributed to the recognition of this right. I have never quite put my finger on it, but I believe there are two things. Clause 33 called for the removal of fish weirs, which were huge fish traps in the Thames and other waterways. Since the thirteenth century, judges and courts have written that Magna Carta somehow stopped the king from granting private fisheries but I cannot find anywhere in Magna Carta that actually says that. While I was waiting I did some more reading and it might have been that allowing people to fish in tidal waters was to ensure that they could meet their religious needs of eating fish.

**Rosemary Laing** — Very interesting. Anthony, I believe you wrote an article this year for the Canberra Fisherman's Club on Magna Carta and fishing rights, which I am sure you can google. Thank you, Anthony.

**Comment** — Just a couple of observations on how far I feel we have deviated from Magna Carta. I will start off with the inscription on the conference pencil, 'To no one will we sell, to no one deny or delay right or justice'. Justice, unfortunately, as a result of resource restraints, is rationed and we are in the situation where we can have as much justice as we can afford. When we look at point one on the rule of law, 'All persons and organisations are subject to and accountable to the law', well it looks like our government, as mentioned already, has no accountability to anybody as far as law is concerned, either in national law or international law. If we look at the final three points we see that all those points are completely overridden by the anti-terrorism legislation—60 individual pieces of legislation altogether—which deprives people of their liberty and the right to habeas corpus. The only convergence I see with Magna Carta and the present day is that the warlords and the barons continue to exist in the form of the plutocrats on whose behalf and benefit legislation is implemented these days.

**Rosemary Laing** — I think we will take that as a comment. Let me also stress the importance of organisations like the Rule of Law Institute of Australia and indeed the Australian Senate in acting as watchdogs on the exercise of executive and other power.

**James Bayston** — My dad was the scientist, or part of the team anyway, who was responsible for preserving the Magna Carta using argon gas. I remember the burden that he carried to do this job over a period of eight years. I believe he was very much involved, on his own really, in trying to solve this problem of preserving the document.

**Rosemary Laing** — Thank you, and thank you to your father for all those years of work to make sure that our Magna Carta will be preserved long beyond the time of any of us.

At the New South Wales History Council conference in May this year at the State Library in Sydney, I was also delighted that a person in the audience stood up and said, ‘Well my dad made the wooden case that Australia’s Magna Carta is housed in’. So we have been able to identify not only some of the story of how Australia’s Magna Carta came here but also, at a very practical level, we have had translators and we have had people working hard to preserve the physical object. I think also today at this conference we have been able to demonstrate how, through scholarship and the study of so many people that we have, 800 years later, something enduring, whether it is a document, whether it is a vibe, whether it is a set of ideas, whether it is an inspiration to the kind of society we all aspire to.

On that note I would like to thank you all so very much for coming today. I think it has been a fabulous day with many stimulating papers that I hope we will have an opportunity to sit down later and read and savour. To all of our speakers, thank you so much. It has been a really wonderful day. I also thank all of you, the audience, for making it a wonderful day.

