Chapter 1

Introduction: Magna Carta and the Rule of Law

Daniel B. Magraw, Andrea Martinez, and Roy E. Brownell II

I. Introduction

Magna Carta has left a profound and multifaceted legacy for law and culture around the world. Indeed, it is difficult to think of a legal document that exceeds it in historical importance and breadth of legacy. It has been called “England’s greatest export” because of its worldwide influence,1 and it is inscribed in the Memory of the World Register of the United Nations Educational, Scientific and Cultural Organization (UNESCO).2 It has even entered into the English-language lexicon as a term meaning a foundational document or law guaranteeing basic rights or liberties.3

The English barons who brought King John (r. 1199–1216) to heel at Runnymede almost assuredly did not see themselves as the founding fathers of some new and enlightened constitutional order.4 (For an image depicting King John hunting venison, see Illustration No. 1.) But the agreement they forced upon the monarch to satisfy their own immediate grievances would over time germinate into a legal document, the impact of which is still felt to this day across the globe. A sense of Magna Carta’s impact is evident in

Winston Churchill’s historic Fulton, Missouri, speech in which he unveiled the expression “Iron Curtain.” In his address, he characterized Magna Carta as one of the “title deeds of freedom.”

Magna Carta’s impact has occurred in spite of the fact that it was not a statement of principles but rather a “practical solution to a political crisis” arising out of a set of specific grievances. Magna Carta contained specific resolutions to those problems, some of which were quite mundane. Nevertheless, many uncertainties remain regarding the negotiating history of Magna Carta. Some of its provisions had been previously included in the 1100 Coronation Charter of Henry I (r. 1100–1135), which Henry promptly disregarded. But the sources of other ideas and the roles of individuals who might have been the drafters of Magna Carta, such as Stephen Langton, are not clear.

Moreover, very little is known about what actually happened in June 1215. For example, it is not clear exactly where King John and the barons met at Runnymede: Was it on the meadow on which the memorial to Magna Carta erected by the American Bar Association in 1957 stands (as depicted on the front cover), or was it across the River Thames at Ankerwycke? The identity of the true location is lost in the mists of time.

It is not even clear what document, if any, actually was sealed on June 15, 1215. It is possible that there was a master agreement sealed on June 15 that contained the terms actually agreed to and was the basis for the exemplifications that were made thereafter. There is no record of such an agreement, however. The four existing exemplifications of Magna Carta from 1215 are dated June 15. But in keeping with the custom of the times, each exemplification of Magna Carta is in the form of a description of what was


6. BREAY, supra note 4, at 7.


8. Vincent, supra note 7, at 49, 64–65; BREAY, supra note 4, at 25. There is a version of the Great Charter carrying the date June 15, 1215, and the location of Windsor, which is held currently at the Huntington Library in San Marino, California. The manuscript was likely assembled by chancery clerks for the two parties to agree to at the Runnymede gathering. Ralph V. Turner, Magna Carta through the Ages 63 (2003); Holt, supra note 7, at 445–46.


10. See, e.g., Turner, supra note 8, at 63–64; BREAY, supra note 4, at 25–27, 34.

11. Turner, supra note 8, at 63–64; BREAY, supra note 4, at 34.

12. See, e.g., BREAY, supra note 4, at 27. See appendix C, “1215 Magna Carta.”
agreed to, akin to minutes of a meeting, not in the form of an actual agreement; and each has the date the agreement was made, not the date when the document was actually written. These exemplifications of Magna Carta thus must have been written and sealed after the agreement was reached on June 15, and King John therefore could not have had his seal affixed to them on June 15.

Chapter 62 of the 1215 Magna Carta refers to “letters patent” that were issued over the seals of certain named individuals “testifying” to the concessions in the preceding chapters. Sadly, this document is nowhere to be found. It is also possible that on June 15, King John sealed the so-called Articles of the Barons, a list of demands now in the collection of the British Library together with King John’s seal, which became detached in the ensuing centuries. (The Articles of the Barons is reproduced as Illustration No. 2 and an image of the seal of King John that was attached to the Articles of the Barons is reproduced as Illustration No. 3.) But that is not entirely certain; some scholars believe the Articles were sealed on June 10 (or in any event before June 15), to indicate that King John was accepting the basic contents to be negotiated. Moreover, even among those who believe the Articles were sealed by King John on June 15, there is disagreement about whether the Articles were brought to Runnymede already finalized as the result of the previous negotiations between King John and the barons, or whether they were drafted at Runnymede or finalized at Runnymede on the basis of a fairly complete draft.

13. Breay, supra note 4, at 27.
14. See id., at 34; cf. Turner, supra note 8, at 63.
15. E.g., Breay, supra note 4, at 33.
16. Id. at 39.
17. See, e.g., Turner, supra note 8, at 62 (the Articles were “[a] product of weeks of negotiations, its text was copied by a clerk . . . before a meeting with John, and the king likely set his seal to it as a sign that he accepted its provisions on 10 June.”). An English-language translation of the Articles of the Barons is included as appendix B.

Claire Breay writes: “[I]t is possible that the Articles predated the meeting by the Thames, and that they were sealed by the king in advance to demonstrate his agreement to their basic demands, in order to bring the opposing parties together for a final settlement.” Breay, supra note 4, at 27.

18. J.C. Holt notes that traditionally there have been two theories regarding the Articles: “first, that they were presented by the barons on 15 June and conceded by the king forthwith.” Holt, supra note 7, at 429. Bishop William Stubbs, Sidney Painter, and Charles McIlwain are advocates of this position. Id. at n.5. The second is “that they were not drawn up until the 15th itself in the first general discussions between the two parties at Runnymede.” Id. at 429. William Blackstone and William McKechnie are supporters of this theory. Id. at n.6. Holt dismisses both as “[un]satisfactory.” Id. at 429. Ultimately, he concludes, “the Articles must have been prepared in some form before the first plenary meeting of 15 June.” Id. at 431. Holt himself concedes that this “leaves the sealing of such a peculiar document inadequately explained.” Id. He concludes that “[t]he issue depends
Finally, it is possible that nothing was actually sealed on June 15, 1215.¹⁹ The barons did not swear their fealty to King John until June 19, and it can be argued that the king would not have sealed anything until they had done so.²⁰

Nor is it clear how many copies of Magna Carta were made or distributed in 1215 (or thereafter). Several exemplifications of Magna Carta were created by officials from the royal chancery before June 24, 1215: seven exemplifications were “delivered for distribution” on June 24, and at least six more were issued thereafter; but how many others were distributed “in 1215 is obscure.”²¹ Nicholas Vincent estimates there could have been up to 40.²² Four exemplifications are known to exist from that year (two in the British Library and one each in Lincoln Cathedral and Salisbury Cathedral (the Lincoln exemplification, which was stored in Fort Knox for safekeeping during World War II, is reproduced as Illustration No. 4).²³ But it is not unreasonable to assume that a copy was sent to each shire,²⁴ which would mean roughly 40 copies were made of the 1215 Magna Carta.²⁵ Each of the exemplifications was equally authentic, though because they were hand-copied they contain minor inconsistencies.²⁶ The exemplifications have been described as “working documents,” written in Latin and rather plain looking without any ornate lettering as found in medieval illustrated manuscripts, as is evident from the reproduction of the so-called Lincoln Magna Carta in this volume.²⁷ There also was a French-language translation in conjunction with a letter dated June 27, 1215, indicating a desire that persons not fluent in Latin would know Magna Carta’s contents.²⁸

King John issued the so-called King’s Writ on June 20, 1215, to the Sheriff of Gloucester, alerting him to the fact that Magna Carta was coming and

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¹⁹. See Breay, supra note 4, at 34.
²⁰. Turner, supra note 8, at 63.
²¹. Breay, supra note 4, at 34–35.
²². Vincent, supra note 7, at 72, 102.
²³. Id. at 102–04; Breay, supra note 4, at 35. Appendix C contains an English-language translation of the 1215 Magna Carta.
²⁴. Turner, supra note 8, at 64.
²⁵. See Vincent, supra note 7, at 72, 102; see also Breay, supra note 4, at 35.
²⁶. Turner, supra note 8, at 64; Breay, supra note 4, at 37.
²⁷. Turner, supra note 8, at 64.
²⁸. See id.
directing that it be implemented. It is not clear whether this was a unique document or if a similar letter was sent to each sheriff, but there is no reason to conclude that it was sealed on June 15.

It seems very clear that June 15, 1215, is not the date that the documents now known as Magna Carta were sealed. It was rather the date on which an agreement apparently was reached that resolved (at least temporarily) hostilities between King John and the barons and led to the reproduction and actual sealing of Magna Carta exemplifications sometime between June 19 and June 24. June 15 thus has both historical and symbolic significance. As is demonstrated in this book, that is entirely appropriate, because Magna Carta’s influence in recent centuries is largely based on myth.

The profound impact of Magna Carta occurred in spite of the facts that the 1215 Magna Carta was declared invalid by Pope Innocent III (r. 1198–1216) only ten weeks after it was agreed to (an English-language translation of this papal bull is contained in appendix E) and that it demonstrably failed to bring peace between King John and the barons. Nevertheless, over the following centuries, English kings repeatedly issued new versions of Magna Carta or confirmed the version that then existed. New versions were issued in 1216, 1217 (when the Charter of the Forest, which is the subject of chapter 12 of this volume and is depicted in Illustration No. 6, was spun off as a separate charter), and 1225, with the last-mentioned version being essentially reissued in 1297 and given statutory status (Illustration No. 8), and finally in 1300 using the same text. Many confirmations of Magna Carta and of the Charter of the Forest have occurred over the centuries since 1217. However, many of the same kings—including Henry III (r. 1216–1272), who issued the 1225 Magna Carta—acted in ways that ignored or evaded Magna Carta and its close relation, the Charter of the Forest, when it suited their purposes. Nevertheless, from the 13th century on, litigants, barons, and judges have resorted to Magna Carta, as is indicated by the image of a 14th-century mini-Magna Carta, presumably for use by a traveling judge, reproduced as Illustration No. 9.

Perhaps most importantly, judges, politicians, and commentators in England (most prominently Edward Coke in the 17th century; Illustration No. 10 reproduces a portrait of Coke, and Illustration No. 11 reproduces the title page of a book containing “discourses” by Coke and John Selden promoting Magna Carta) and elsewhere (especially in the American colonies) often used Magna Carta for their own ends, arguing forcefully for

29. The only existing copy of the King’s Writ is in the collection of the Hereford Cathedral. An English-language translation of the King’s Writ is provided in appendix D to this volume.
30. See Breay, supra note 4, at 34.
31. See Turner, supra note 8, at 63.
32. See, e.g., id. at 89–91; Vincent, supra note 7, at 84, 86.
principles they asserted were embodied in Magna Carta. In fact, the story of Magna Carta’s impact is the story of advocacy of what turned out to be powerful ideas (such as the requirement of a trial by jury and due process of law), regardless of whether those ideas were precisely embodied in, or originated with, the text of Magna Carta, while at the same time ignoring less noble concepts that are reflected in the text of some versions of Magna Carta (such as the implicit embrace of trial by battle in chapter 54 of the 1215 Magna Carta and the unfavorable treatment of loans owed to Jews in chapter 10 of the 1215 Magna Carta).

The year 2015 will mark the 800th anniversary of the adoption of this venerable text. As part of the commemoration of this historic event, we have assembled a distinguished group of scholars to take a fresh look at Magna Carta and its impact on various aspects of the law. Over the course of many generations, Magna Carta has been analyzed from numerous perspectives, including through important works of history and political science. Nonetheless, it is hoped that this book will be of value to those interested in contemporary legal issues related to this ancient document.

Chapter 2 of this book provides historical context for the 1215 Magna Carta and describes the subsequent transmogrification of Magna Carta from a failed peace treaty to an iconic document. Chapters 3 through 12 each explore a different aspect of Magna Carta and its legacy. Following those chapters are appendices that provide the texts of several documents with an important connection to Magna Carta’s history. The final appendix provides a chronology of Magna Carta and related events. It is followed by a glossary and a subject index.

Section II of this chapter explains various points that will be helpful in reading this book. Following that, Section III briefly describes chapters


34. This provision was included because a woman who asserted this could hire a strong champion to fight for her in a trial by battle, whereas the accused had to fight for himself. See William Sharp McKechnie, Magna Carta: A Commentary on the Great Charter of King John 451 (2d ed. 1914); appendix C, “1215 Magna Carta.” See also id., at ch. 36 (discussing a writ relating to trial by combat).

35. See 1215 Magna Carta, chapter 10 (providing unfavorable treatment regarding loans owed to Jews but not to other persons). In contrast, chapter 11 of the 1215 Magna Carta provides equal treatment to loans owed to all persons. These chapters were not included in subsequent versions of Magna Carta.

36. Appendixes to this book are as follows: A. Coronation Charter of Henry I; B. Articles of the Barons; C. 1215 Magna Carta; D. King’s Writ; E. Pope Innocent III: Papal Bull Declaring that Magna Carta is Null & Void; F. 1216 Magna Carta; G. 1217 Magna Carta; H. 1217 Carta de Foresta (Charter of the Forest); I. 1225 Magna Carta; J. Confirmation Cartarum 1297 (Confirmation of the Charters); K. United States Constitution; L. United States Bill of Rights; and M. Chronology of Magna Carta & Related Events.
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2 through 12. Section IV of this chapter then identifies themes that run throughout this work.

II. Explanation of Terminology and Translations

A. Use of Numbers and “Chapter” for Parts of Magna Carta

The different versions of Magna Carta were written by scribes in abbreviated Latin, without any numbers denoting its constituent parts. A standard numbering system has evolved over the years, however, and it is used in this book. It is common to refer to the parts of Magna Carta as “chapters,” a convention that is also adopted in this book.

B. Identification of Different Versions of Magna Carta

Because the various versions of Magna Carta differ in content, it is important to identify which version is being analyzed or referred to. Specific versions of Magna Carta are identified herein by date if it is not otherwise clear from the context, e.g., “1225 Magna Carta.”

For the same reason, the number for a particular chapter can change over time. For example, chapter 39 of the 1215 Magna Carta corresponds to chapter 29 of the 1225 Magna Carta. Chapter numbers herein normally relate to the 1215 Magna Carta; when a chapter number is from a different version, that version will be specified unless the context already makes it clear.

As noted above, different exemplifications of the same version of Magna Carta also differ slightly, presumably due to the fact that the texts were inscribed by hand. In addition to the four exemplifications of the 1215 Magna Carta identified above, there is one exemplification of the 1216 Magna Carta, and several exemplifications each of the 1217, 1225, 1297, and 1300 versions of Magna Carta. Because any inconsistencies between

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37. Brey, supra note 4, at 38.
39. The four 1215 Magna Cartas are in Lincoln Cathedral (reproduced as Illustration 4), Salisbury Cathedral, and the British Library, which has two exemplifications; the British Library also has a 1225 exemplification and a 1300 exemplification. The only 1216 exemplification is in Durham Cathedral, which also has a 1225 exemplification and 1300 exemplification. Three 1217 exemplifications are in Oxford University’s Bodleian Library, and one is in Hereford Cathedral. One 1297 exemplification is in the National Archives in Washington, D.C. (reproduced as Illustration No. 6), and one is in the National Library of Australia. Two 1217 exemplifications of Carta de Foresta survive, in Durham Cathedral and Lincoln Cathedral (reproduced as Illustration No. 8). English-language translations of the 1215, 1216, and 1225 Magna Cartas are contained
the exemplifications of a particular version of Magna Carta are thought to be insignificant, this book makes no distinction among them.

C. Use of Different Translations

English-language translations of Magna Carta vary, and the authors in this book have used different ones. The translation used in the Foreword and in each chapter thus is identified the first time Magna Carta is quoted.

There is one translation issue that at least theoretically could be significant. The famous chapter 39 of the 1215 Magna Carta (which as noted above has the number 29 in the 1225 Magna Carta) uses the word “vel” between the references to judgment by one’s peers and law of the land. “Vel,” as described by the noted Magna Carta scholar William McKechnie, “introduced an unfortunate element of ambiguity” into the text, because “vel” can mean either “or” or “and.” Some translators have taken the view that it means “or,” some “and,” and some both. Many modern authors have tended to use “or” as the appropriate translation. McKechnie, who appeared to prefer “and,” translated the chapter as:

No freeman shall be taken or [and] imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.

If “vel” means “or” it seems clear that the harms listed in the chapter can be imposed without a jury trial as long as the imposition is according to the law of the land. Indeed, in chapter 11 of this book, “Magna Carta, Civil Law, and Canon Law,” Thomas McSweeney relies partly on a translation of “vel” in chapter 39 as “or” to conclude that the “origins of the criminal jury have nothing to do with Magna Carta.” In contrast, if “vel” means “and,” the argument that Magna Carta forms the basis for the right to a trial by jury is strengthened.

in appendices F, G, and I, respectively. An English-language translation of the Charter of the Forest is contained in appendix H.

40. McKechnie, supra note 34, at 381.
41. See id. at 381 n.3.
43. See McKechnie, supra note 34, at 381–82.
44. Id. at 375.
45. See also chapter 4, “Magna Carta and the United States Constitution: An Exercise in Building Fences.”
D. Name and Spelling of Magna Carta

The name and spelling of the Great Charter have changed over time, just as its content and interpretation have. Originally referred to as the “Charter of Liberties,” it became “Magna Carta” (i.e., Great Charter) in 1217 to differentiate it from the shorter Carta de Foresta (Charter of the Forest), which spun off from Magna Carta that year. During earlier periods, the spelling “Magna Charta,” rather than “Magna Carta,” was in wider use. In part because so many people mispronounced the name by using a “ch” sound instead of a hard “k” sound, Magna Carta is now the more common usage. Some of the quotations contained in this book use the spelling “Magna Charta,” and we have retained that spelling in those quotations. Otherwise, we use the spelling “Magna Carta.” We use “Magna Carta,” “Great Charter,” and “Charter” interchangeably.

The Carta de Foresta is referred to herein by that term, by the English-language translation “Charter of the Forest,” and by “Forest Charter.” Carta de Foresta is a formidable instrument in its own right and is the subject of chapter 12 of this book.

III. The Chapters in This Book

A. Chapter 2: “The Making of Magna Carta: The Historical Background”

Professor Ralph Turner begins his analysis by providing a brief history of the context leading to Magna Carta and the events surrounding it, and its subsequent evolution in English history. Among other things, Turner describes how Coke, the great common law jurist, and others in late-16th-century and early-17th-century England recast the meaning and historical importance of Magna Carta, giving rise to its iconic status. Turner also briefly describes how the mythic Magna Carta spread to English colonies and was further reinterpreted in that context. The 1775 seal of Massachusetts, reproduced as Illustration No. 12, shows a patriot brandishing a sword in one hand and Magna Carta clutched in the other, indicating the importance of Magna Carta in the American colonies. This chapter forms the basis for those that follow, though the perspectives of some authors differ from Turner’s.

46. A.E. Dick Howard, Magna Carta Celebrates Its 750th Year, 51 A.B.A. J. 529, 530 (1965) (Editor’s Note).
B. Chapter 3: “Magna Carta and Sovereign Immunity: Strained Bedfellows”

Chief Judge Diane Wood and Dr. Danielli Evans address the apparent inconsistency between Magna Carta’s promise that everyone is under the rule of law, even the king, and current U.S. law on sovereign immunity, which provides extensive immunity to federal, state, and foreign governments and Native American tribes. Wood and Evans argue that U.S. Supreme Court jurisprudence establishing such extensive immunity is based on a misunderstanding of English law regarding bringing a suit against the king at the time the United States Constitution was ratified. They further argue that the time is ripe to reexamine the historical record and bring U.S. sovereign immunity law into line with Magna Carta’s promise, thus in the words of Wood and Evans giving effect to “the propositions that no person is above the law, that governments must be held to be accountable to their citizens, and that effective remedies are essential,” even vis-à-vis governments.

C. Chapter 4: “Magna Carta and the United States Constitution: An Exercise in Building Fences”

Magna Carta and its reissues constitute a pivotal point in the development of the unwritten English Constitution. Professor Michael Dillon asserts that a side-by-side review of Magna Carta and the original United States Constitution demonstrates that the Magna Carta that had an impact on the 1789 Constitution was neither the Magna Carta of 1215 nor the Magna Carta of 1225. It was instead the *mythic* Magna Carta, in large part the product of the late 16th and early 17th centuries, particularly the work of Coke as interwoven with John Locke’s social contract theory. It was this reconstituted Magna Carta that was conveyed to the American colonies by William Blackstone, that influenced the original Constitution, and that has been greatly influential around the world. While Dillon argues that there are essentially no equivalent segments of the 1215 or the 1225 versions of Magna Carta in the text of the original U.S. Constitution, there are comparable passages between these two versions of the Great Charter and the Bill of Rights, in particular elements of the Fifth, Seventh, and Eighth Amendments. That said, Dillon contends that those parallels may well originate with Coke and Blackstone “rather than directly from Magna Carta.”

D. Chapter 5: “Magna Carta in Supreme Court Jurisprudence”

Magna Carta not only contributed to the creation of the United States Constitution, as amended, but also to its subsequent interpretation in the courts. The Supreme Court has frequently utilized Magna Carta to
highlight key legal principles. Professor Stephen Wermiel examines the
High Court’s jurisprudence in this vein. He finds that the U.S. Reports
make mention of the Great Charter in more than 170 Supreme Court cases.
Professor Wermiel concludes that historically the use of Magna Carta in
Supreme Court jurisprudence has been “largely symbolic.” For Supreme
Court justices, and the advocates who appear before them, Magna Carta is
a venerable document cited to establish the pedigree and legitimacy of their
assertions. Justices have clearly indicated, however, that Magna Carta is
not positive law in the United States, because it antedates the 1789 Consti-
tution. Nevertheless, Professor Wermiel concludes that Magna Carta does
have an impact on the legal reasoning and historical analysis of Supreme
Court justices—an influence that has increased as the Court has adopted
a broader view of individual rights and liberties originating in the second
half of the last century.

E. Chapter 6: “Magna Carta and Executive Power”

This chapter entails a discussion by Dr. Louis Fisher about Magna Carta
and its influence on the development and limitation of executive authority
throughout English and early American history. Fisher points out that mod-
ern American claims of inherent power by presidents and their defenders are
“reminiscent” of the views of King John regarding royal power. Likewise,
parallels can be found between legislative and judicial branch measures to
check the president’s claims of inherent powers and the barons’ efforts to
counter the king’s potentially limitless claims of authority. While the framers
did not draw directly upon Magna Carta in fashioning a presidency bound
by law, notions of the mythic Great Charter’s role in defending individual
rights in England against overweening executive power were transplanted
onto, and took root in, American soil.

F. Chapter 7: “Magna Carta and Habeas Corpus”

Professor Justin Wert compares the respective evolutions of Magna Carta
and habeas corpus over the past 800 years. His analysis reveals that just as
Magna Carta’s significance has waxed, waned, and ultimately been trans-
formed to its current mythic status, so too the writ of habeas corpus has
evolved in reaction to its use for a variety of legal purposes serving the polit-
cal interests of those using it, ultimately becoming the guarantor of freedom
from arbitrary confinement that it now represents. Habeas corpus was used
for a range of purposes, for example, to ensure that a person appeared in
court at the time of the 1215 Magna Carta and to determine who owned
slaves in the antebellum South in the United States. These applications of
habeas corpus are a far cry from today’s usage.
G. Chapter 8: “Magna Carta and Religious Freedom”

Freedom of worship is a bedrock principle in most modern democracies and is firmly embedded in the First Amendment to the United States Constitution. Professor Tore Lindholm examines Magna Carta in light of the current concept of freedom of religion as embodied in the 1948 Universal Declaration of Human Rights and concludes that it has no roots in Magna Carta. That conception of religious freedom (found in historical antecedents as far back as the third century B.C.E. in the edicts of Emperor Ashoka) requires that each person has the right to freedom of thought, freedom of conscience, and freedom of religion. This encompasses the right to change religion or belief, the freedom—alone or with others—to practice that religion or belief, as well as the freedom to practice no religion at all. Lindholm concludes that this concept appears nowhere in Magna Carta, which focused on the freedom of one religion from interference by the government, not contemporary notions of the principle.

H. Chapter 9: “Magna Carta and International Law”

Professor Larry May inaugurates this segment by looking at the experience of Magna Carta for insight into how international law today should be viewed and how the international legal system can be strengthened. May examines the rights laid out in the Great Charter and ties them to international law rights, as well as the concept of the rule of law in Magna Carta serving as a template for the international rule of law in the 21st century. He also analyzes the pivotal role of fair trials in establishing a legitimate political system, and how the Great Charter’s role in merging different sources of law and courts into a unified order can serve as a template for the continued advancement of international tribunals. Finally, he articulates a notion of international due process accompanied by an independent judiciary, citing the evolution of the latter in England from 1215 until the 17th century.

I. Chapter 10: “Magna Carta Unchained: The Great Charter in Modern Commonwealth Law”

As the British Empire expanded to the far reaches of the globe, it carried with it notions of English law as colonists understood that their rights as Englishmen would go with them. Precepts embodied in Magna Carta as envisioned by Coke and other 17th-century political theorists thus spread and currently can be found in the 53 countries of the Commonwealth of Nations, and even beyond. Professor David Clark discusses the global reach of Magna Carta’s legacy and analyzes it with respect to specific legal doctrines in various Commonwealth countries. Again, we see that Magna Carta’s influence is one that “broke free of its medieval roots,” as Clark puts it. Clark examines various
ways Magna Carta entered the law of Commonwealth countries, including express incorporation by statute and judicial opinion.

**J. Chapter 11: “Magna Carta, Civil Law, and Canon Law”**

Professor Thomas McSweeney asserts that elements of the *ius commune*—a legal system composed of canon law and Roman law that is the precursor to today’s civil law—which found their way into Magna Carta, were inserted not to influence the early development of the common law, as many scholars have assumed, but rather to attract the support of Pope Innocent III. According to Professor McSweeney, both King John and the barons knew that the pope could be a powerful ally and they used *ius commune* to bring their local dispute into the broader politics of Western Christendom. Professor McSweeney identifies different ways that *ius commune* could have influenced Magna Carta and also discusses the impact on common law of the Fourth Lateran Council, which he refers to as “the forgotten event of 1215.”


Professor Nicholas Robinson addresses Carta de Foresta, an important charter in its own right, and its relationship to Magna Carta. Carta de Foresta was issued as a stand-alone charter in 1217 when Magna Carta was reissued that same year, and it includes and expands on several chapters of the 1215 Magna Carta. Also referred to as the Charter of the Common Man because of its beneficial impact on the lives not just of freemen (who constituted about half of the population of England at that time) but also all others in England, the Charter of the Forest helped effectuate Magna Carta with respect to important issues relating to the use of forests. Robinson concludes that the Forest Charter consciously developed novel legal approaches to promoting justice and sustaining relations between citizens and the natural resources of the time, and that in this way in Robinson’s words “it became a foundation for an intergenerational struggle toward defining a rule of law for nature.”

**IV. Themes Running Through This Book**

**A. Everyone Is Subject to the Law and Can Be Made So by Virtue of a Written Instrument**

The primary principle of Magna Carta is that everyone, even the king or head of state, is subject to the law and that this can be established via a written instrument. This is the essence of constitutionalism and is inherent
in Magna Carta from 1215 onward. That King John immediately sought to have Magna Carta invalidated by Pope Innocent III on the ground of duress (and that the pope agreed) demonstrates that in this respect King John took Magna Carta seriously and recognized the validity of this principle; the many reissues, demands for reconfirmation by various elements of society, and reconfirmations in the ensuing centuries illustrate the same. This principle, unlike other aspects of Magna Carta, has not changed for 800 years.

**B. Dynamism and Adaptability**

Magna Carta has been dynamic throughout its existence. As mentioned above, Magna Carta’s actual content changed from 1215 to 1216 (elimination of some chapters and postponement of others for further consideration), 1216 to 1217 (e.g., spin-off of the forest chapters into Carta de Foresta), and 1217 to 1225 (i.e., further revisions). Its status also changed, first being included in an English statute book in 1297 and, starting in the 19th century, gradually being repealed. Now only three and a half provisions from the 1297 Magna Carta remain good law in England. Perhaps most significantly from a historical perspective, the contents attributed to Magna Carta have changed dramatically over the centuries, and particularly in the late 16th and early 17th centuries in England and later in the American colonies.

Magna Carta has thus been a dynamic, not a static, document. It has also been an adaptable document in the sense that it has been capable of being used as support for a range of specific political and legal arguments over the past several centuries. Indeed, Magna Carta influenced legal developments in England and the law of the English colonies—including the colonies in America and the laws in Commonwealth and other countries—such as the United States where it has continued to influence the jurisprudence of the United States Supreme Court.


48. See, e.g., Breay, supra note 4, at 43–44; Vincent, supra note 7, at 84. The 1297 Magna Carta contains a minor change from the 1225 version in chapter 2 (introducing a distinction between what an earl and a baron had to pay to inherit). Vincent, supra note 7, at 87. The 1300 Magna Carta, which introduced no changes, was the last formal issuance. Id. at 88. There were more than 40 confirmations of Magna Carta over the ensuing two centuries. Id. at 88.

49. See Turner, supra note 8, at 105; Breay, supra note 4, at 44.

50. 1297 Magna Carta, chapters 1, 9, 29, and part of 37. Vincent, supra note 7, at 102. See also chapter 10, “Magna Carta Unchained: The Great Charter in Modern Commonwealth Law.”
C. Mythic Magna Carta

Apart from the primary principle described above, it is clear that the Magna Carta often invoked in recent centuries bears little or no resemblance to the 1215 Magna Carta or subsequent versions. Earlier commentators have reached the same conclusion. More specifically, it is argued in this book, for example, that sometimes-heard claims that Magna Carta established the rights to trial by jury, religious freedom, and habeas corpus are simply wrong. These concepts developed separately, sometimes with a legitimate though distant connection to Magna Carta (e.g., due process of law) and sometimes with virtually no connection (e.g., habeas corpus as we now know it). For most purposes, in fact, the relevant period for analyzing the impact of Magna Carta is in recent centuries, not in the 13th century.

Another indication that Magna Carta as now conceptualized is mythic is that we now ignore aspects of it that we recognize as repugnant. Prime examples are the references to “free men” in Magna Carta and Carta de Foresta, which implicitly recognize the legitimacy of the feudal system then prevalent in England and that excluded roughly half the English population from the benefits of Magna Carta and from some of the benefits of Carta de Foresta. Another example is the discriminatory treatment of Jews contained in chapter 10 of the 1215 Magna Carta, described above. A further instance is the implicit recognition of trial by combat in chapter 54, which provides that no person shall be arrested or imprisoned as a result of a charge by a woman for the death of any person other than her husband. At that time, the standard in criminal trials (such as those covered by chapter 54) was trial by battle, in which the parties themselves had to fight. However, “[w]omen, men over sixty, and men with physical disabilities were allowed to fight by proxy.”

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51. See, e.g., Holt, supra note 7, at 378–405; Howard, supra note 35, at 369 (“[T]he Magna Carta of the seventeenth century was not the Magna Carta of the days of King John.”); see also Vincent, supra note 7, at 92 (“The charter as totem and as artefact”).

52. E.g., appendix B, “1215 Magna Carta,” ch. 1: “And we have also granted to all the free men of our kingdom, for ourselves and our heirs in perpetuity, all the following liberties, for them and their heirs to have and to hold of us and our heirs”; Carta de Foresta, chapters 9, 12, and 13. However, chapter 17 of Carta de Foresta declares that that Charter applies to “everyone” (chapters 9, 12, and 13 presumably are exceptions to that). See appendix H, “1217 Carta de Foresta (Charter of the Forest).”

53. See Breay, supra note 4, at 32.

A woman therefore could hire a strong champion to fight on her behalf—a practice that put the respondent in a sometimes difficult, even fatal, position.55 The iconic view of Magna Carta as an unblemished symbol of freedom ignores such provisions.

D. Resilience in the Face of Vacillating Treatment

Magna Carta has persisted and even thrived in spite of repeated royal actions that violated or attempted to evade its provisions. This is also the case with respect to certain topics covered in Magna Carta, as well as with Carta de Foresta.56 Although it did not provide for equal rights of women, for example, Magna Carta did provide some protection to women in chapters 6, 7, 8, 11, and 26.57 These provisions, among other things, prohibited the king from forcing widows to marry without their permission and protected some aspects of inheritance.58 Women lost some of these rights under English law in subsequent centuries,59 though women’s rights substantially improved in the 20th century.

E. Rule of Law and Enduring Relevance and Persuasiveness of Magna Carta

A final theme running through the chapters of this book is the enduring nature of the Great Charter’s contribution to the rule of law. Each of the authors concludes in his or her own way that Magna Carta is highly relevant today and each acknowledges Magna Carta’s fundamental teaching that both “the governor and the governed” should be subject to prescribed rules of behavior applied in accordance with law.60

55. See Normanton, supra note 54, at 140. The rule had been that a man accused by a woman could select trial by ordeal instead of trial by battle, but the church came to oppose the former. Id.
56. See, e.g., McKechnie, supra note 34, at 139–59; Breay, supra note 4, at 32; Turner, supra note 8, at 82–88.
57. Normanton, supra note 54, at 136.
58. Id. at 136–40. See generally Janet S. Loengard, What Did Magna Carta Mean to Widows? in MAGNA CARTA AND THE ENGLAND OF KING JOHN 134 (Janet S. Loengard ed., 2010).
59. Normanton, supra note 54, at 134, 142.