Fresco of King John granting Magna Carta painted by Ernest Normand in 1900 at the Royal Exchange in London.

The Timeliness

By Dr. James R. Stoner Jr.

Everyone knows that Magna Carta stands among the headwaters of the great stream of American constitutionalism. Taken out of context, however, it is hard to imagine a political document more incongruent with our world today. Ours is an age of science and technology, eager for fresh discoveries and new gadgets; but Magna Carta invokes established customs and traditions and looks for wisdom in a distant past. Our time is democratic and secular; but Magna Carta was granted by a king at the urging and with the witness of archbishops and bishops, barons and knights. Increasingly our society is "post-literate," obsessed with song and image and chronicled by video-recording; but Magna Carta is a document, repeatedly copied and reissued, whose power was always understood to lie in the written word.

Even in comparison with our own Declaration of Independence, Magna Carta appears out of step. The Declaration appeals to universal principles of natural law, while Magna Carta enumerates feudal privileges. The Declaration proclaims human equality and personal rights to life, liberty, and the pursuit of happiness, while Magna Carta rises above particularism only once or twice, in mentioning the "freedom of the

and Timelessness of Magna Carta

Church" and "the law of the land"—the latter, decidedly restricted to the land of England. The Declaration proclaims a war for political independence and announces the establishment of a new sovereign country, while Magna Carta claims only to restore ancient liberties and remedy abuses. Magna Carta begins by invoking the presence of God, while the Declaration addresses "mankind."

But it is precisely because Magna Carta has grown strange to us that we have much to learn by becoming reacquainted with it. Its central concern—how to counter the abuse of governmental power with the rule of law—remains a matter of interest to citizens of all political stripes today. Why would we want to ignore a successful response to a problem with which we still must grapple? The character it supposed in the human beings who made it and lived under it can also be inferred from its terms, and there is nothing about human nature that makes such character obsolete. Seeking to learn from Magna Carta teaches us doubly about the value of tradition, for the document itself looks to tradition, and we learn about our own tradition by looking to it.

What is Magna Carta and how did it come to be? This is not as easy a question to answer as one might expect, for while the charter was originally issued by King John on the field of Runnymede near Windsor Castle in June 1215—serving as a sort of treaty to end an uprising that the barons and their allies had clearly won—the text that subsequently became authoritative was the reissue a decade later by his successor,

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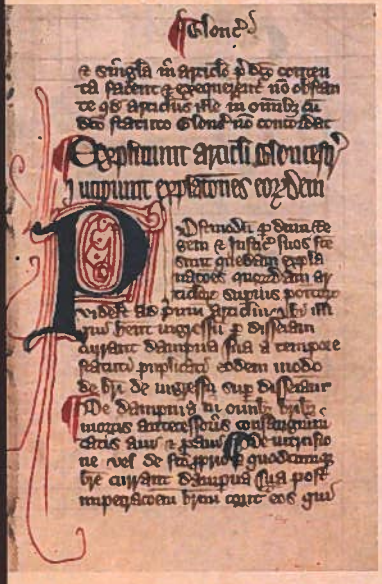
Henry III; and this in turn achieved its full authority by being confirmed in a statute of parliament in 1297. The 1215 version contained sixty-three chapters (what we would call articles or paragraphs). Several of these were split off a few years later to form a separate Charter of the Forest, and a number of the others merely made provision for John's remitting fines "imposed by us unjustly and contrary to the law of the land" (ch. 55) or otherwise settled specific grievances with his subjects (and the Welsh and Scots), so that the 1225 Charter of Liberties included

only thirty-seven chapters as worthy of being held "in perpetuum." The first chapter, in every version, promised that "the English Church shall be free."

There is a complicated history here: John's refusal in 1207 to receive Pope Innocent III's choice for archbishop of Canterbury, Stephen Langton, led to England's being placed under papal interdict and, eventually, to the excommunication of John himself. In 1213 John and the pope were reconciled and Langton was admitted to his post. The charter seems to ratify this arrangement—Langton, in fact, being among the barons and in some accounts considered the likely author of the charter itself, written as it was in Latin. Within the year the pope suspended Langton and allowed John to repudiate the Great Charter he had just granted, but his death soon after occasioned Langton's restoration and the charter's reissue. While such tergiversations between medieval popes and monarchs were not uncommon, the whole sequence cautions against reading the guarantee of freedom to the English Church as a direct forebear of our constitutional security for religious freedom.



Magna Carta cum Statutis Angliae, (Great Charter with English Statutes) page one of manuscript, fourteenth century.

The remainder of the document is a grant "to all the free-men of our kingdom, for us and for our heirs forever, [of] all the underwritten liberties to be had and held by them and by their heirs, of us and of our heirs." The first batch largely removes the king from interference with inheritance or with the remarriage of widows. The "ancient liberties" and "free customs" of the city of London and all other cities, burghs, towns, and ports are secured; they are freed as well from being forced to build bridges or embankments. Later on, a uniform measure throughout the kingdom is promised for wine, ale, corn, and cloth, and in several chapters the liberties of merchants are protected. Feudal duties are for the most part returned to how they stood in the reign of Henry II, and in general are defined and moderated. Constables, bailiffs, and sheriffs are circumscribed in their powers by a number of chapters, particularly in their ability to seize the subjects' land or goods, whether in collection of debts or to satisfy the king's desires. In the original version, though not in the reissues, the king even promises, "We will not make men justices, constables, sheriffs, or bailiffs unless they are such as know the law of the realm, and are minded to observe it rightly" (ch. 45).

The most famous passages, however, are those that concern judicial procedure. The Court of Common Pleas, the king's chief

court of common law regarding land, will no longer travel among the king's courtiers but "shall be held in any certain place" (soon Westminster is so designated). Fines will be laid on both commoner and peer "only according to the degree of the offense." Since trial by ordeal had been banned by the Fourth Lateran Council, also in 1215, "No Bailiff, for the future, shall put any man to his open law . . . without faithful witnesses produced for that purpose" (ch. 28). Finally, in chapter 29 (39 in the original), come the phrases that most resonate with the ages:

> No Free-man shall be taken, or imprisoned, or dispossessed, of his free tenement, or liberties, or free customs, or be outlawed, or exiled, or in anyway destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the law of the land. — To none will we sell, to none will we deny, to none will we delay right or justice.

By the seventeenth century, the most authoritative interpreter of the common law, Sir Edward Coke, will equate the promise of this passage with the guarantee of "due process of law," complete from indictment by grand jury to conviction by a jury of twelve. Scholars now agree that this reads the present back into the past beyond warrant, since trial by jury did not emerge in its modern form until the 1300s. Still, the text makes clear that something like a jury—the "judgment of his peers"—was already employed. Nor was this a privilege reserved to the nobles, the peers of the realm; it is explicitly extended to all free men, not only in this famous chapter, but in the preface to all the chapters after the first, quoted previously.

This point bears underlining, for the extension of protection to all free men—Coke goes so far as to say this includes even villeins (or serfs), except in relation to the lord of their manor—distinguished Magna Carta from most other legal documents in feudal times. That this can be explained by King John's peculiar success in turning all ranks and degrees against him—so that town and country, lord and freeman, layman and clergy all stood together at Runnymede—does not diminish the achievement. Rather than limit its reach to feudal principles grounded in reciprocity—protection in exchange for homage and service—Magna Carta's broad guarantee against condemnation and imprisonment

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except through the action of law suggested a limitation, by law, on monarchy itself. Moreover, in promising justice without bribery or dismissal or delay—by implication through the courts regularized a century before by the reforms of Henry II—Magna Carta established a high standard for English law and judgment. This is not yet the abstract principle of equality in America's Declaration, and it secures equal access to justice under law, not equal rights and privileges in law itself. But Magna Carta provides something the Declaration does not: a detailed program with the force of law arranged to actually restrain those who govern the state. In treating rights as privileges, Magna Carta accords them more value than most rights in our age of complaint: Liberties are tied to the person and his property, they are emphatically one's own. The many copies of the charter, made painstakingly by hand and deposited throughout the realm, were so many deeds of proof.

Sir Edward Coke

Though the language may in this respect be novel, many of the provisions of the document as well as its overall spirit are deeply traditional. Historian J. C. Holt has established that the authors of Magna Carta had before them a copy of the coronation charter of Henry I from 1100, and they were familiar as well with two miscellaneous collections of English laws, *Leges Edwardi Confessoris* and *Leges Henrici Primi*, which had been recently glossed. The text itself introduces some innovations, but the constant reference is to liberties and customs, meaning liberties as these have been established and acknowledged over time. There is no mention yet of "time immemorial"—the phrase that later generations will use to describe the antiquity of common law and which will be fixed by the law to refer to customs and privileges in effect before 1189—but there is reference to "ancient customs," "ancient liberties," "ancient and right customs," "ancient tenure or possession," "due and accustomed place," and so forth. Coke says of Magna Carta that it was for the most part declaratory of preexisting common law, not introductory of new law, and this is apparent in its language and confirmed by those who have investigated the details. "Free customs" is not quite a redundancy, nor is "ancient liberties," but the presumption is that settled legal practices, like landed property in an estate, ensure liberty against governmental abuse. Inheritance appears to this society not as the bane of opportunity, but as the conservation of what is true and good.

How did Magna Carta influence the subsequent development of English law and liberty? In the first place, its constant

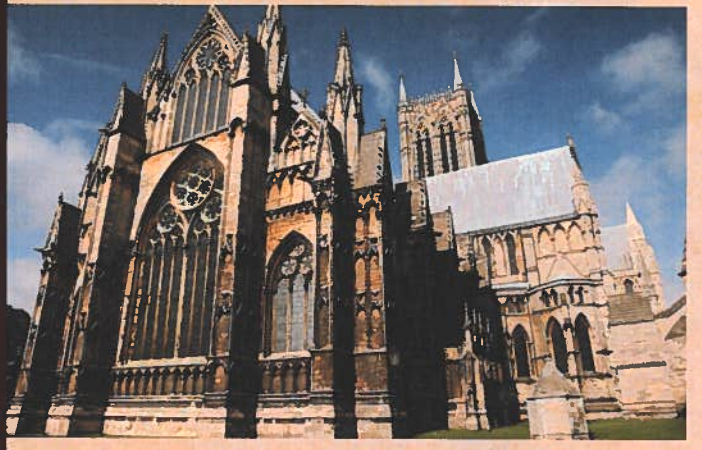
reiteration in reissues and confirmations might suggest repeated threat of royal abuse—but it surely also indicates a steady resolution for stable law and public order. In modern times, the English came to equate their liberty with the sovereignty of parliament, but Magna Carta—though indicative of the claim of the English to be a political people able to restrain their king—antedates the settlement of the modern form of parliament by the better part of a century. Indeed, to say that Magna Carta was given statutory form and placed at the head of English statutes in 1297 means that the parliamentary statute had come of age, the charter itself having been in place for four score years.

Holt documents how the various provisions of the charter found their way into other statutes and into legal practices increasingly fixed in common law precedents. As Ellis Sandoz argues, Sir John Fortescue's celebrated account *In Praise of the Laws of England* in the mid-fifteenth century has absorbed Magna Carta and its meaning into the distinction between political and regal government on the one hand and merely regal government on the other. "For who can be more powerful and freer than he who is able to restrain not only others but also himself? The king ruling his people politically can and always does do this," writes Fortescue, at the end of a lengthy discussion of the virtues of the English jury—by his time the legal embodiment of the principle of judgment by one's peers.

Much is made of the eclipse of Magna Carta in the age of the Tudors, particularly of its lack of mention in Shakespeare's *King John*, but Holt has found lectures upon it in the Inns of Court, where common lawyers trained and associated, as well as in debates in parliament. And Shakespeare's choice to feature dynastic and continental politics is consistent with his other plays and with his general squinting at the law.

What no one doubts is that Magna Carta returns to the forefront of English constitutional debate in the seventeenth century, and that the leading figure in its revival is the same Sir Edward Coke. In the widely read prefaces to his *Reports*, in his actions in parliament formulating the Petition of Right, and in his *Second Institutes*, Coke gave Magna Carta pride of place as the guarantor of English liberty and the authoritative voice of the common law on matters we today would call constitutional. While the commentary on Magna Carta in his *Institutes* runs almost eighty pages—and serves at once to lend the prestige of common law to the charter and the authority of the charter to common law—Coke's text had been seized by the crown shortly before his death and was not published until the 1640s. More immediately important was the reference to Magna Carta in the 1628 Petition of Right. Occasioned as a protest of the king's forced loans, the petition indicts as well the whole practice of imprisonment without cause; it is condemned explicitly as a violation of chapter 29 of Magna Carta, said

to be a violation of due process of law, and shown to be in defiance of judicially issued writs of habeas corpus. In fact, Coke and his contemporaries sometimes wrote as though any act or statute made in defiance of Magna Carta was null and void.



The bishop of Lincoln was one of the signatories to Magna Carta, and for hundreds of years, Lincoln Cathedral has held one of the four remaining original copies.

Coke died in 1634, well before parliament went to arms against the king, and there is plenty in his writings to distance him from the Roundheads. Nor would he, like the Leveller John Lilburne, have used Magna Carta to argue against rank and privilege per se. Nevertheless, Coke's legacy is evident in the Habeas Corpus Act of 1679 and in the English Bill of Rights a decade later, with their emphasis on due process in the courts of justice. The echo of Magna Carta is unmistakable in the enumeration in the bill of specific rights against the abuse of power and in its claim that "all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient, and indubitable rights and liberties of the people of this kingdom." As late as 1765, William Blackstone refers to Magna Carta, the Petition of Right, the Habeas Corpus Act, the Bill of Rights, and the Act of Settlement as the summation of the law of English liberty—which, in his hands, the sovereignty of parliament was meant to confirm and elaborate, not abrogate or change.

Today in Great Britain it is sometimes said that, as a result of parliamentary action, only three provisions of Magna Carta retain legal force: the guarantee of the church's freedom, the protection of the liberties of London, and the famous chapter 29. And indeed, no one doubts that parliamentary sovereignty made Magna Carta the creature of parliament. Still, as recently as 2008, the chancellor of England, Jack Straw, could deliver a speech in the United States called "Modernizing the Magna Carta," concluding with a call for a British Bill of Rights and Responsibilities which might be "a step towards a fully written constitution, which would bring us in line with most progressive democracies around the world."

In America, as these remarks suggest, the course of constitutional development was very different. As A. E. Dick Howard, John Philip Reid, and Donald Lutz, among others, have shown, American colonists from the first moment of settlement jealously claimed their

right to English liberties and to the common law that secured them, and they frequently referred to Magna Carta as a model and a source. While the British moved away from ancient law toward a sovereign parliament in the eighteenth century, the Americans, who experienced parliament as a foreign power within which they had no representation but whose taxes and trade regulations they were expected to endure, seemed to move in the opposite direction. Although their polities were newly made and much of ancient law was inapplicable among them—especially in New England, where primogeniture and entail never were established, but even in Virginia, where no titled local nobility was ever formed—the colonists clung to their assemblies as if they were part of an ancient constitution, and they interpreted efforts by the English ministry to modernize the empire as an infringement on traditional rights. The British, seeking to adapt to the aspirations of a modern, democratizing age, weaned themselves from Magna Carta. The Americans, "born equal, instead of becoming so," in Tocqueville's phrase, found in Magna Carta a symbol of political liberty, silently ignoring its feudal excrescences and adopting the common law insofar as it was, in the later words of Joseph Story, "applicable to the situation of the colony, and. . . not. . . altered, repealed, or modified by any of our subsequent legislation." The Americans eventually established many of the charter's provisions in written constitutions of their own.

The "good old" spirit of resistance to arbitrary authority in the name of the "good old" law was evident in the Stamp Act controversy in 1765 and throughout the period of the Revolution. Even the Declaration of Independence, after its theoretical discussion of the laws of nature and the rights of men, enumerated specific grievances in the language of the English constitution, going so far as to accuse parliament of passing "acts of pretended legislation," "foreign to our Constitution, and unacknowledged by our laws"—a phrase which, in 1776, could only refer to a constitution of British North America, unwritten in the modern sense but anchored in a tradition that extended back to the Great Charter. When in the aftermath of declaring independence Americans turned to writing constitutions for themselves, they included enumerated bills of rights on the traditional model, often adopting specific passages from the English tradition even while adding a liberty of conscience and religious

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exercise then scarcely recognized overseas. Principles from Magna Carta abounded in their new systems: no taxation without consent, executive action subject to legal limitation, no imprisonment without a trial, trial by jury, recognition of local liberties. And one passage is preserved verbatim, the phrase "law of the land," which can be found in some of the state constitutions and may be discerned, in the form of "due process of law," in the federal Bill of Rights.

Magna Carta came about when all the ranks of society came together to restrain arbitrary action by the king. How could such a precedent apply to government by the people themselves? Americans came very quickly to recognize, in Jefferson's terms, that "an elective despotism was not the government we fought for," that sovereign power could be abused in the hands of the people as surely as in the hands of a prince. In retrospect, the clearest abuse of the new democracies was the support that many of them gave to the institution of slavery—itself unknown at common law but reintroduced in the colonies as if from the Roman past. It is no accident that, when the slave power was defeated by force of arms, the constitutional results were registered in an amendment that included a new "due process" clause, now limiting by federal law the actions of the states. Modern analysts typically decry the use of that clause by the courts to enforce liberties associated with economic life, but in fact the argument had traditional resonance: Coke in his *Institutes* interprets the phrase "liberties" in chapter 29 to mean that "all monopolies are against the great Charter, because they are against the liberty and freedom of the Subject, and against the Law of the Land."

To take the story much further would involve us in the politics of the present. But it is worth asking when, if ever, our fundamental law changed from being an enumeration of powers and liberties to a partisan tool of one side or the other—and whether, like the people at Runnymede, we remain empowered to reclaim this inheritance as our own.

JAMES R. STONER JR. (Ph.D., Harvard University, 1987) is a professor of political science at Louisiana State University and author of *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*. He served from 2002 to 2006 on the National Council on the Humanities, to which he was appointed by President George W. Bush. He is an ISI faculty associate.

RESOURCES

J. C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 1965)

A. E. Dick Howard, *The Road from Runnymede* (Charlottesville: The University Press of Virginia, 1968)

Ellis Sandoz, ed., *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of the Rule of Law* (Columbia: University of Missouri Press, 1993)

Steve Sheppard, ed., *The Selected Writings of Sir Edward Coke* (Indianapolis: Liberty Fund, Inc., 2003), 3 vols.