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# Magna Carta and the Forest Charter: Two Stories of Property

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# MAGNA CARTA AND THE FOREST CHARTER: TWO STORIES OF PROPERTY

WHAT WILL YOU BE DOING IN 2017?\*

PAUL BABIE\*\*



**Figure 1. A Medieval Forest<sup>1</sup>**

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1. *Medieval Forest*, WIKIMEDIA COMMONS (Oct. 14, 2011), [https://commons.wikimedia.org/wiki/File:Medieval\\_forest.jpg](https://commons.wikimedia.org/wiki/File:Medieval_forest.jpg) [<https://perma.cc/CGV5-LRLK>], *photographic reproduction from* GASTON PHOEBUS, *LIVRE DE LA CHASSE* (c. 1387).

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## INTRODUCTION

In this octocentenary year of Magna Carta, the title of this Article might seem odd. Why ask about our plans for 2017? Baroness Miller of Chilthorne Domer posed the same question to the government of the United Kingdom in the House of Lords on June 4, 2015:

To ask Her Majesty's Government whether they will mark the 800th anniversary in 2017 of the granting of the Charter of the Forest in a similar way to that in which the Magna Carta is being marked this year.<sup>2</sup>

The government took two weeks to formulate an answer, delivered by Lord Faulks on June 18, 2015:

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2. See 763 Parl Deb HL (5th ser.) (2015) WA4 (Baroness Miller of Chilthorne Domer) (UK), <http://qnadailyreport.blob.core.windows.net/qnadailyreportxml/Written-Questions-Answers-Statements-Daily-Report-Lords-2015-06-18.pdf> [<https://perma.cc/VP8Z-PKWU>]; *Charter of the Forest: Written Question—HL272*, U.K. PARLIAMENT (June 4, 2015) <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2015-06-04/HL272/> [<http://perma.cc/W9RK-PT39>].

The Charter of the Forest was an important document in its own right when it was issued by Henry III in 1217 at the same time as a re-issue of Magna Carta. The Charter re-established rights of access to the forest for free men that had been eroded over the time. However, although the provisions of the Charter of the Forest remained in force for a number of centuries, it has not enjoyed the same lasting and worldwide recognition as Magna Carta, which has had an enduring significance on the development of the concept of the rule of law. Consequently, while the Government is actively supporting the celebration of the 800[th] anniversary of Magna Carta this year, it has no plans to mark and celebrate the 800th anniversary of the Charter of the Forest.<sup>3</sup>

At one time, the “Charter of the Forest,” or the “Forest Charter,”<sup>4</sup> enjoyed a status equal to its indispensable partner, Magna Carta. Indeed one could not be understood without the other, and the failure to remember this fact, either now or in 2017, leaves impoverished our understanding of Magna Carta’s legacy. Why?

In failing to consider the Forest Charter and Magna Carta together, we lose the former’s commitment to community and obligations that balances the latter’s legacy of individual rights. The source of this impoverishment originates in the association of Magna Carta with freedom, or more accurately *constitutional* freedom, or even more accurately *American* constitutional freedom.<sup>5</sup> And the adjectives “personal” and “individual” often qualify this understanding of freedom. In other words, those aware of Magna Carta likely view it through American lenses,<sup>6</sup> and those lenses focus an image of freedom that carries a decidedly individualistic parallax.

3. 763 Parl Deb HL, *supra* note 2.

4. While the literature and sources provided herein use the terms “Charter of the Forest” and “Forest Charter” interchangeably, unless quoting another source directly, this Article uses the latter.

5. Magna Carta, while frequently adverted to by lawyers, is far less relied upon judicially in jurisdictions other than the United States. For example, while Magna Carta is frequently used to support arguments based upon freedom, the Australian judiciary has often limited its application. *See* David Clark, *The Legacy of Magna Carta*, 37 LAW SOC’Y BULL. 10, 12 (2015) (describing one Australian jurist’s suggested treatment of Magna Carta “as an expression of the common law . . . capable of being adapted to modern arrangements”). However, more recently Australian courts have increasingly relied on Magna Carta for support. *See* David Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law*, 24 MELBOURNE U. L. REV. 866, 868 (2000), [hereinafter Clark, *The Icon of Liberty*].

6. *See generally* NICHOLAS VINCENT, MAGNA CARTA: THE FOUNDATION OF FREEDOM 1215–2015 (2015) (explaining how Magna Carta is often viewed through American lenses). This is true even in the United Kingdom. *See, e.g.*, DAVID STARKEY,

The individualistic impression of freedom found in Magna Carta emerges from its famous chapter 39 (29 in the definitive 1225 Magna Carta<sup>7</sup>), which, as understood today, contains four important concepts that form the core of modern American constitutional freedom: habeas corpus, the prohibition of torture, trial by jury, and the rule of law. Yet a fifth significant individual freedom—frequently mentioned in modern American case law, yet so ubiquitous in our social vernacular as to go virtually unnoticed in our modern world—also emerges from chapter 29: property.

In a string of decisions stretching back almost to the antebellum period, the Supreme Court of the United States found, and continues to find in chapter 29, the origins of the protection for property.<sup>8</sup> This appropriation of Magna Carta's legacy served the early republic in its pursuit of capitalism as its foundational economic creed; indeed, American law enlisted Magna Carta to protect individual property rights in almost anything, including, sadly, even the ownership of human beings in the form of slavery.<sup>9</sup> And it is in this seemingly unbounded potential of Magna Carta to support the protection of property even in the most extreme and abhorrent circumstances that

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MAGNA CARTA: THE TRUE STORY BEHIND THE CHARTER 149–55 (2015) (comparing and contrasting the celebration and living nature of Magna Carta in England and the United States). In the United Kingdom, Magna Carta continues to be seen as “representing key values in the legal system” and as a “presumption in favour of liberty.” See Clark, *The Icon of Liberty*, *supra* note 5, at 890–91; see also William D. Guthrie, *Magna Carta*, 10 BENCH & B. 300, 306–07 (1916) (characterizing Magna Carta as “guaranteeing the fundamental rights and liberties of the individual”).

7. The chapter numbers used throughout are from the Magna Carta of 1225, which became definitive. See DAVID CARPENTER, *MAGNA CARTA* 429 (2015) (“The texts of 1225 Magna Carta and Charter of the Forest became definitive. Henry III, Edward I and their successors never issued new versions of the Charters. They simply confirmed those of 1225. It is thus the 1225 Charters, or what is left of them after various repeals, which are on the statute book today. The mere existence of the Charters did not, however, ensure either their enforcement or their continued relevance.”).

8. See, e.g., *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (“Since the time of our early explanations of due process, we have understood the core of the concept to be the protection against arbitrary action . . .”) (referencing Magna Carta); *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (“As to the words from *Magna Charta* . . . the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.”); see also BERNARD H. SIEGAN, *PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT* 3 (2001) (describing Supreme Court decisions beginning in 1987 involving land use cases that are “remarkably consistent with earlier interpretations” of property rights influenced by Magna Carta).

9. PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL* 187 (2007).

the failure to recognize the Forest Charter leaves impoverished Magna Carta's legacy.

For Magna Carta's legacy contains so much more than merely the protection of property in the hands of the individual or individual freedom at the expense of the freedom of others. Indeed, one of the great themes emerging from Magna Carta, when one clears away its uses in American law, is the recognition of the community and obligation towards others as a balance to the protection of the individual and individual rights. But the process of clearing away Magna Carta's use in American law requires a reunion of Magna Carta with its historical partner, the Forest Charter. In four Parts, this Article seeks to reunite these two great partners through the telling of two stories—one, the well-known story of Magna Carta's place in how we understand property and the other, the entirely forgotten story of the Forest Charter's balancing of Magna Carta's first story of property. While we commemorate the first story in 2015, the other lies hidden in the mists of time.

Part I, "Magna Carta as Individual and Rights," tells the first, well-known story. This story, emerging from chapter 29 and told successively by commentators and judges, supports an understanding of property that focuses on the individual. The story can be succinctly stated: the individual has self-regarding or self-seeking choice in relation to the use of goods and resources, and that power of choice ought not, save in exceptional circumstances, be interfered with by others, including, and sometimes especially, by the state. In short, this story tells us that property is "individualist-absolutist": individualist in the exercise of rights and absolutist as concerns state interference with the exercise of those rights.

Why does the story matter? Because so much theorizing about property comes from U.S. Fifth Amendment Takings Clause jurisprudence, property today is often thought of as an echo of this first story. Put another way, this story supports the modern liberal conception of property, and the liberal conception permits a great many choices to be made by individuals, both natural and legal, about goods and resources, none of which take account of the way that those choices might affect others or the wider community. This story, largely created, and certainly encouraged and perpetuated by American law, allows Magna Carta's enlistment in defense of such choices. This is problematic because those choices constitute an overlooked aspect of many of the problems we face in modern global life. Part I recounts the role of such choices in just one of many global problems: anthropogenic climate change.

But this first story, like the conception of property it is said to support, represents only half the story—for property is in fact relational, an understanding of property that Magna Carta’s legacy can also support in its second story. And so Part II tells that second, forgotten story: the story of the Forest Charter. Yet it is not easy—the fading from memory of the Forest Charter’s role in the legacy of Magna Carta is almost complete. To take but two examples of this fading, over the summer of 2015, while in the United Kingdom, I visited the British Library and Salisbury Cathedral, which together hold three of the four original copies of Magna Carta 1215; both had major exhibitions for the eight hundredth anniversary. The British Library exhibition mentioned the Forest Charter in just one display, while Salisbury Cathedral’s exhibition made no mention at all. Indeed, if one was not aware of it, one could easily have left both exhibitions without ever knowing that the Forest Charter was at one time the co-equal “sister” of Magna Carta, and at the very least a central component of its legacy. At some point in the last eight hundred years, the Forest Charter’s story was lost; why it was lost may itself be lost to us today. In reuniting the Forest Charter with the first story, we rediscover a long-forgotten legacy of Magna Carta for property.

What then has been lost in our forgetting of the Forest Charter? Simply this: community and obligation—the balance of the individual and rights—which in essence forms the core of a relational understanding of property. In other words, historically, Magna Carta had its own balance—the Forest Charter. In losing that important counterbalance to the first story, much of what American law tells us about the support Magna Carta gives to the modern, liberal, individualist-absolutist conception of property is misleading. It is misleading because it leaves out the balance of community and obligation to the community and others. It misleads because it denies much of what we know about property today. It is not solely about the individual exercising rights in a self-regarding way; it is also about relationship, which means that it is about considering the other, the community, and the obligations that we owe towards the other and to community in exercising the rights conferred by property. We forget both documents, read *together*, at the peril of losing a fundamental component of Magna Carta’s legacy for property. The *whole* story of Magna Carta’s legacy for property includes *both* stories.

Part III offers three concluding reflections on what the Forest Charter’s twin notions of community and obligation could mean for our contemporary understanding of property. With the proliferation

of contemporary theorizing about property, the reunion of these two great historical partners is both necessary and overdue for two reasons. First, it dispels misconceptions about Magna Carta's true legacy. Second, in rediscovering the community and obligation that balances Magna Carta's focus on the individual and rights, we allow its legacy to tell an entirely different story, one much more in keeping with its original public meaning about the nature of property. This alternative image of private property may serve as the foundation for a new perception of the environment and our place within it, responding to the causes and ameliorating the effects of climate change. Part IV concludes, suggesting that a new metaphor calls us to reassess Magna Carta's story of property. We have no better opportunity to reassess this story than with the eight-hundredth anniversary of the Forest Charter in 2017.

#### I. THE FIRST STORY OF PROPERTY: MAGNA CARTA AS INDIVIDUAL AND RIGHTS

##### A. *The Popular Perception*

American law tells the first story, which enlists Magna Carta's legacy in support of the modern liberal conception of property—a conception that focuses on individual liberty and freedom as the core of property. The story's origins lie in those chapters of Magna Carta that appear to guarantee property rights.<sup>10</sup> Chapters 19 and 21 read:

19. No constable or his bailiff shall take the corn or other chattels of anyone who is not of the vill where the castle is situated unless he pays on the spot in cash for them or can delay payment by arrangement with the seller; if the seller is of that vill [then] he shall pay within forty days.

....

21. No sheriff, or bailiff of ours, or other person shall take anyone's horses or carts for transport work unless he pays for them at the old-established rates, namely at ten pence a day for

10. The two classic and definitive authorities on Magna Carta are by J. C. Holt and William Sharp McKechnie. J. C. HOLT, *MAGNA CARTA* 9–12 (2d ed. 1992) (discussing the history of Magna Carta); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 3–36 (2d ed. 1914) (providing a chapter-by-chapter commentary). The first complete, chapter-by-chapter commentary on Magna Carta since Holt is David Carpenter's *Magna Carta*. See generally CARPENTER, *supra* note 7.



a cart with two horses and fourteen pence a day for a cart with three horses. No demesne cart of any ecclesiastical person or knight or of any lady shall be taken by the aforesaid bailiffs. Neither we nor our bailiffs nor others will take, for castles or other works of ours, timber which is not ours, except with the agreement of him whose timber it is.<sup>11</sup>

A plain reading of these provisions attests to their narrow scope and application largely to agricultural products and related equipment.<sup>12</sup> Chapter 29, though, the most famous provision of Magna Carta, bolsters these provisions to form the core of the first story:

29. No free man shall *in future* be arrested or imprisoned or disseised of his freehold, liberties or free customs, or outlawed or exiled or victimised in any other way, neither will we attack him or send anyone to attack him except by the lawful judgment of his peers or by the law of the land. To no one will we sell, to no one will we refuse or delay right or justice.<sup>13</sup>

Still, notwithstanding its broader scope, chapter 29 hardly seems to provide the sort of lofty language we might expect Magna Carta to contain if it stood as a strong defense of private property.<sup>14</sup>

Where, we might ask, is the clear protection of individual freedom, autonomy, and liberty as against the predations of others, including the state in almost any form and any circumstance? Where is the language commensurate with the popular perception of Magna Carta's place in the American understanding of constitutional freedom, indeed, as part of the foundation of Western civilization?<sup>15</sup> If Magna Carta supports that sort of protection and prohibition, we might expect it to read more like the Fifth Amendment to the U.S. Constitution, for which it is often said to form one of the background principles:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.<sup>16</sup>

11. MAGNA CARTA chs. 19, 21 (1225), *translated in* MAGNA CARTA AND THE RULE OF LAW app. I at 428–29 (Daniel B. Magraw et al. eds., 2014).

12. See R.H. Helmholz, *Magna Carta*, 66 U. CHI. L. REV. 297, 333–34 (1999).

13. MAGNA CARTA ch. 29 (1225), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. I at 429.

14. For an overview of the strong defence that has emerged from the popular use of chapter 29, see LINEBAUGH, *supra* note 9, at 170–91.

15. *Id.* at 22, 192.

16. U.S. CONST. amend. V.

While we might expect to find language more like that of the Fifth Amendment, in fact it simply is not there. Rather, there is only a public perception of its presence. Notwithstanding the lack of lofty language, Magna Carta's popular perception as a general protection of rights (including property) survives as both myth and icon, at once characterized by ambiguity, mystery, nonsense, and even reification.<sup>17</sup>

Over time, though, the popular perception has become the story told by American law about Magna Carta's support for individualist-absolutist property. It is hard to say which came first, the perception or the story; either way, the two have fused into one narrative about Magna Carta and liberty. Thus, while one searches in vain for the strong protection of private property in clear and unambiguous terms that might meet the expectations created by the popular perception, the story of that support is told in the American jurisprudence, repeatedly, if selectively,<sup>18</sup> throughout the history of the republic. How did this American story develop?

#### *B. The Individualist-Absolutist Story*

In England, the story that Magna Carta prohibits the taking of property without just compensation can be traced at least to the time of the Stuarts,<sup>19</sup> at which time "[w]henver an excess of class

17. *Id.*

18. Consider *Kelo v. City of New London*, 545 U.S. 469 (2005), a Takings Clause case that has produced more opprobrium and legislative reaction than perhaps all other takings cases combined, but which mentions Magna Carta not once; although, as we will see, mention of the Forest Charter would certainly have been appropriate, and helpful, in countering the story of strong property protection provided by Magna Carta in support of the outcome in *Kelo*. For a discussion of the opprobrium surrounding *Kelo*, see generally RICHARD A. EPSTEIN, SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY (2008). For further commentary on *Kelo*, see ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (2015) (criticizing the deferential standard the *Kelo* Court seemed to adopt for analyzing "public use"); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (describing the response of state legislatures in limiting eminent domain power for economic development by legislation and arguing that such reforms are unlikely to be an effective substitute for a clear constitutional rule against such takings).

19. The Stuarts were the members of a royal house of Scotland, the House of Stuart, which inherited the realms of Elizabeth I of England in 1603 when James VI of Scotland became James I of England by virtue of the Union of the Crowns. See Jenny Wormald, *James VI and I (1566–1625), King of Scotland, England, and Ireland*, OXFORD DICTIONARY NAT'L BIOGRAPHY, <http://www.oxforddnb.com/view/article/14592?docPos=3> [https://perma.cc/ETQ7-CKYA (staff-uploaded archive)]. Four Stuart kings ruled the British Isles—James I, Charles I and II, and James II—with an interregnum of parliamentary rule lasting from 1649 to 1660 as a result of the English Civil War. *Kings and Queens of England & Britain*, HISTORIC UK, <http://www.historic-uk.com/HistoryUK/KingsQueensofBritain/> [https://perma.cc/R47Q-MA4L]. Following the Glorious Revolution in 1688, Mary II and Anne

legislation and attacks on private property shall lead Englishmen to place checks and restraints upon the power of temporary majorities, so as more effectively to protect personal and property rights . . . then the stirring battle-cry will again be Magna Carta[.]”<sup>20</sup> And at least in its popular perception, Magna Carta served as a source of the liberty supporting property, which continues to appear in English law and those jurisdictions that trace their lineage to the common law system.<sup>21</sup> One of the most recent invocations of this argument comes from Australia, where claimants successfully argued that the public right to fish in tidal waters, subject to abrogation by clear words of Parliament, derives from Magna Carta.<sup>22</sup> In short then, Magna Carta is also seen as a guarantee of Anglo-Australian private property in the popular imagination.<sup>23</sup>

The story as it is found in English law, however, is nothing like the individualist-absolutist version championed by American law.<sup>24</sup> True, the link between Magna Carta and the American story can be traced to chapter 39 and the property-alluding provisions of chapters 21, 28, 30, and 31; but from that tenuous link has grown the cult of Magna Carta as a champion of individual and absolutist property.<sup>25</sup> And while this cult emerged very early in the history of the republic as a key symbol of individual rights and freedoms against government, it was not through any sense of lofty, universal goals concerning the liberty of all people, but from the notorious understanding of liberty that not only countenanced, but facilitated that abhorrent form of property found in slavery.<sup>26</sup> In recounting the

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ruled as Stuart queens. See W. A. Speck, *Mary II (1662–1694), Queen of England, Scotland, and Ireland*, OXFORD DICTIONARY NAT’L BIOGRAPHY, <http://www.oxforddnb.com/view/article/18246?docPos=1> [https://perma.cc/W3HG-Y5W4]. Due to Catholic ties, under the terms of the 1701 Act of Settlement, 12 and 13 Will. 3 c. 2, the Crown passed from the House of Stuart to the House of Hanover in 1714. See *House of Hanover*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/topic/House-of-Hanover> [http://perma.cc/WB3F-Z53K]. When used here, “Stuarts” refers to the period of the first four Stuart kings of England.

20. Guthrie, *supra* note 6, at 306–07.

21. Clark, *The Icon of Liberty*, *supra* note 5, at 890–91.

22. See *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1, 21 (Austl.).

23. Clark, *The Icon of Liberty*, *supra* note 5, at 868, 887.

24. LINEBAUGH, *supra* note 9, at 184 (noting that “[t]he key to understanding Magna Carta in the United States is private property”).

25. *Id.* at 179.

26. *Id.* For a full account of the role of property in the context of American slavery, see generally MARK V. TUSHNET, *SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE* (2003) and ALAN WATSON, *SLAVE LAW IN THE AMERICAS* (1989).

American story, it must be remembered that Magna Carta has been held up as a paragon of liberty even in the face of such egregious affronts to that very concept found in slavery.

Although the references are sparse, the American story has its origins in the antebellum period. One of the earliest mentions of Magna Carta in support of property in the United States came in the 1829 decision, *Wilkinson v. Leland*,<sup>27</sup> in which the Supreme Court of the United States wrote that the “rights of personal liberty and of property . . . [are] the great principles of Magna Charta[.]”<sup>28</sup> During the pre-Civil War era, the Court also cited Magna Carta in *Runyan v. Lessee of Coster*<sup>29</sup> and *Perin v. Carey*<sup>30</sup> to support mortmain and possession in perpetuity.<sup>31</sup>

The Reconstruction Amendments to the Constitution, however, gave renewed vitality to the story, solidifying its support of the individualist-absolutist conception of property. The foundation of this support is found in Section one of the Fourteenth Amendment, which reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>32</sup>

The Amendment has been interpreted as “incorporating” the Bill of Rights, which originally applied only to the federal government, so as to apply to the states as well.<sup>33</sup> For example, in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*,<sup>34</sup> the Supreme Court used the Fourteenth Amendment to incorporate the Fifth Amendment protection of property so as to apply to the states.<sup>35</sup> In 1947, Justice Hugo Black summarized the effect of the Fourteenth Amendment—

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27. 27 U.S. 627 (1829).

28. *Id.* at 657.

29. 39 U.S. 122 (1840).

30. 65 U.S. 465 (1861).

31. See *Perin*, 65 U.S. at 498; *Runyan*, 39 U.S. at 124.

32. U.S. CONST. amend. XIV, § 1.

33. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding that the Sixth Amendment’s confrontation guarantee was, like other constitutional guarantees in the Bill of Rights, incorporated as to the states through the Fourteenth Amendment).

34. 166 U.S. 226 (1897).

35. *Id.* at 236. Professor Peter Linebaugh argues that the Fourteenth Amendment’s incorporation of the Fifth Amendment against the states comprises “the most decisive legal translation from Magna Carta into American law.” See LINEBAUGH, *supra* note 9, at 170–91.

intended to overcome the effects of slavery—in relation to property as

aimed at restraining and checking the powers of wealth and privilege. It was to be a charter of liberty for human rights against property rights. The transformation has been rapid and complete. It operates to-day to protect the rights of property to the detriment of the rights of man. It has become the Magna Charta of accumulated and organized capital.<sup>36</sup>

In at least fifteen cases since the Civil War Amendments, the Supreme Court has explained how the phrase “due process of law” stems from the phrase “law of the land,” itself used by Edward III to conclude chapter 39 in the 1354 confirmation of Magna Carta.<sup>37</sup> For instance, in *Ex parte Milligan*,<sup>38</sup> “the Supreme Court named the sources of [American] law as the Constitution, acts of Congress, Magna Carta, common law, and natural justice.”<sup>39</sup> In *Bates v. Brown*,<sup>40</sup> the Court cited Blackstone’s opinion that private property receives more protection in Magna Carta than in the Petition of Right.<sup>41</sup> In *Reagan v. Farmer’s Loan & Trust Co.*,<sup>42</sup> the Court held that “[a]ll the original States undertook to secure the inviolability of private property. This they did, either by extracting and adopting, in terms, the famous 39th article of Magna Charta[.]”<sup>43</sup> *Carstairs v. Cochran*<sup>44</sup> held that:

Every system of law provides that every man shall be protected in the enjoyment of his property, and that it shall not be taken from him without just compensation. The earliest constitutions, in Magna Charta, guarantee that no freeman shall be disseized of his freehold but by the judgment of his peers or by the law of the land.<sup>45</sup>

And, in *Ochoa v. Hernandez y Morales*,<sup>46</sup> the Court wrote that “[w]ithout the guaranty of ‘due process’ the right of private property cannot be said to exist[.]”<sup>47</sup> Together, the reliance placed by

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36. *Adamson v. California*, 332 U.S. 46, 84 (1947) (Black, J., dissenting).

37. LINEBAUGH, *supra* note 9, at 186 (citation omitted).

38. *Ex parte Milligan*, 71 U.S. 2 (1866).

39. LINEBAUGH, *supra* note 9, at 179; *Ex parte Milligan*, 71 U.S. at 80.

40. 72 U.S. 710 (1867).

41. *See id.* at 715; LINEBAUGH, *supra* note 9, at 184.

42. 154 U.S. 362 (1894).

43. LINEBAUGH, *supra* note 9, at 184; *Reagan*, 154 U.S. at 379.

44. 193 U.S. 10 (1904).

45. *Id.* at 11–12 (internal quotation marks omitted).

46. 230 U.S. 139 (1913).

47. *Id.* at 161.

American courts on Magna Carta in developing the meaning of due process within the Fourteenth Amendment added weight to its authority as a source of the American concept of personal freedom, which in turn has become central to the concept of private property.

Perhaps the clearest statement using Magna Carta to support Fifth and Fourteenth Amendment protections of property comes from this 1880 statement of the Michigan Supreme Court in *City of Detroit v. Detroit & Howell Plank Road Co.*<sup>48</sup>:

[T]he right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the “law of the land.”<sup>49</sup>

Though only a pronouncement of a state supreme court, this summarization of the American story draws together not only the individualist-absolutist understanding of property originating in chapter 39 of Magna Carta but also the protection of the Fifth and Fourteenth Amendments against uncompensated takings of property. Yet, one might wonder about Magna Carta’s role in 1880 and whether it retains any relevance today. A story last heard in 1880 would hardly be one worth remembering.

Not only is the story remembered, but it continues to be told; the most recent retelling came in the midst of the octocentenary year, demonstrating Magna Carta’s status in the American pantheon of property. *Horne v. Department of Agriculture*,<sup>50</sup> handed down by the U.S. Supreme Court in June 2015, involved the Agricultural Marketing Agreement Act of 1937, which “authorizes the Secretary of Agriculture to promulgate ‘marketing orders’ to help maintain stable markets for particular agricultural products.”<sup>51</sup> The marketing

48. 43 Mich. 140 (1880).

49. *Id.* at 148; *see also* Marx v. Hanthorn, 148 U.S. 172, 183 (1893); Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1, 36 (1890); Chicago v. Taylor, 125 U.S. 161, 164 (1888); Spring Valley Water Works v. Schottler, 110 U.S. 347, 372–73 (1884) (Field, J., dissenting); Sinking-Fund Cases, 99 U.S. 700, 737–38 (1878); Transp. Co. v. Chicago, 99 U.S. 635, 642 (1878); LINEBAUGH, *supra* note 9, at 189 n.14.

50. 135 S. Ct. 2419 (2015).

51. *Id.* at 2424.

order for raisins established a Raisin Administrative Committee that imposed a reserve requirement.<sup>52</sup> This requirement forced growers to set aside a certain percentage of their crop for the government, free of charge, and which the government used by any means consistent with the purposes of the program.<sup>53</sup> This reserve was used to stabilize the raisin market.<sup>54</sup> After subtracting the government's administration expenses, the net proceeds were distributed to the raisin growers.<sup>55</sup> In 2002 to 2003, the government "ordered raising growers to turn over forty-seven percent of their crop[;]" in 2003 to 2004, the requirement decreased to thirty percent.<sup>56</sup>

The Horne family were raisin growers who refused to set aside any raisins for the government on the ground that the reserve requirement was an unconstitutional taking of their property for public use without just compensation.<sup>57</sup> The government fined the Hornes the fair market value of the raisins as well as additional civil penalties for their failure to obey the raisin marketing order.<sup>58</sup> The Hornes sought relief in federal court, arguing that the reserve requirement was an unconstitutional taking of their property under the Fifth Amendment.<sup>59</sup> On appeal, the Ninth Circuit Court of Appeals held that the reserve requirement was not a taking.<sup>60</sup>

After granting certiorari, the Supreme Court held in an eight-to-one decision that the raisin reserve requirement was a taking, thus requiring the government to pay the farmers just compensation.<sup>61</sup> Thus, any net proceeds the raisin growers received from the sale of the raisin reserve goes to the amount of compensation they have received for that taking—it did not mean, however, that the raisins have not been appropriated for public use. Nor could the government make raisin growers relinquish their property without just compensation as a condition of selling their raisins in interstate commerce.

*Horne's* holding regarding the taking of personal property in raisins need not concern us here. What is of interest and importance in the current context is the Court's reliance upon Magna Carta as

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 2425–26.

linked to the constitutional prohibition of takings of property without just compensation. A link, the Court says, that stretches over the course of American history.<sup>62</sup> In the decision, Chief Justice Roberts wrote that the application of the Fifth Amendment Takings Clause to both real and personal property was a

principle [that] goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings. Clause 28 [19] of that charter forbade any “constable or other bailiff” from taking “corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.”<sup>63</sup>

And he continued that:

The colonists brought the principles of Magna Carta with them to the New World, including that charter’s protection against uncompensated takings of personal property. In 1641, for example, Massachusetts adopted its Body of Liberties, prohibiting “mans Cattel or goods of what kinde soever” from being “pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford.” Virginia allowed the seizure of surplus “live stock, or beef, pork, or bacon” for the military, but only upon “paying or tendering to the owner the price so estimated by the appraisers.” And South Carolina authorized the seizure of “necessaries” for public use, but provided that “said articles so seized shall be paid for agreeable to the prices such and the like articles sold for on the ninth day of October last.”<sup>64</sup>

Using this background to the Takings Clause as support, Chief Justice Roberts argued that the attitude of early Americans up to the time of the Revolutionary War, and since, has continued to “bridle[] at appropriations of their personal property”<sup>65</sup> in the same way as did the Europeans who brought Magna Carta’s principles with them to North America in the seventeenth century.<sup>66</sup>

62. In *Horne*, Chief Justice Roberts cited cases spanning 120 years. *See id.* at 2425–27.

63. *Id.* at 2426 (citations omitted).

64. *Id.* (citations omitted).

65. *Id.* (citations omitted).

66. *See id.* (“The principle reflected in the [Takings] Clause goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings.”).



*Horne* provides a clear contemporary statement of Magna Carta's story of individualist-absolutist property in American law. But why does it matter that Magna Carta has been taken to stand for an individualist-absolutist conception of property? Why does it matter that we tell a different, alternative story about Magna Carta, one that includes the community and obligation and looks to—indeed, requires—the Forest Charter? The answer to that question comes in two parts: the link to liberalism and the harm that follows. This Part considers each in turn.

### C. *The Link to the Liberal Conception of Property*

Without expressly saying so, the Supreme Court uses Magna Carta's legacy to support what has come to be known as the Hohfeldian (after Wesley Newcomb Hohfeld<sup>67</sup>) “bundle of rights” picture of property<sup>68</sup> or the liberal conception of property.<sup>69</sup> The liberal conception has become the dominant conception of property internationally in law, jurisprudence, and legal theory.<sup>70</sup> To what exactly, then, does the Supreme Court link Magna Carta when it tells its individualist-absolutist story of property? In order to answer that question, we need first to understand something about modern liberalism and the place of property within it.

Modern liberalism concerns itself with the establishment and maintenance of a political and legal order that, among other things, secures to the “liberal individual” the freedom to choose a “life project,” the values and ends of a preferred way of life.<sup>71</sup> Having made this choice, in order for life to have meaning, the individual requires some ability to have control over and to make use of goods

67. For the Hohfeldian background to liberal property, see generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* 65 (Walter Wheeler Cook ed., 1923).

68. On the bundle of rights concept of property, see J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 *UCLA L. REV.* 711, 712 (1996).

69. See Paul Babie, *Choices That Matter: Three Propositions on the Individual, Private Property and Anthropogenic Climate Change*, 22 *COLO. J. INT'L ENVTL. L. & POL'Y* 323, 332 (2010) [hereinafter Babie, *Choices That Matter*]; Paul Babie, *Idea, Sovereignty, Eco-colonialism, and the Future: Four Reflections on Private Property and Climate Change*, 19 *GRIFFITH L. REV.* 527, 527 (2010) [hereinafter Babie, *Idea, Sovereignty, Eco-colonialism, and the Future*]; Paul Babie, *The Spatial: A Forgotten Dimension of Property*, 50 *SAN DIEGO L. REV.* 323, 342 (2013) [hereinafter Babie, *The Spatial*].

70. See Babie, *Choices That Matter*, *supra* note 69, at 353; Babie, *Idea, Sovereignty, Eco-colonialism, and the Future*, *supra* note 69, at 530–31; Babie, *The Spatial*, *supra* note 69, at 338.

71. See *LIBERALISM AND ITS CRITICS* 1 (Michael J. Sandel ed., 1984); see also J. W. HARRIS, *LEGAL PHILOSOPHIES* 277–300 (2d ed. 2004).

and resources. Private property is liberalism's means of ensuring that individuals enjoy choice over goods and resources so as to allow them to fulfill their life project.<sup>72</sup>

The liberal conception of private property is, then, in simple terms, a "bundle" of legal relations (or rights) created, conferred, and enforced by the state through law, between people as to the control of goods and resources.<sup>73</sup> At a minimum, these rights typically include use, exclusivity, and disposition.<sup>74</sup> For example, one can use a car (or any other tangible or intangible good, resource, or item of social wealth) to the exclusion of all others and may dispose of it as she sees fit. The holder may exercise these rights in any way she sees fit to suit her personal preferences and desires. This ability to suit one's own preferences is referred to by a number of phrases, including self-seekingness, preference satisfaction, or agenda-setting.<sup>75</sup> Or, to follow more closely the language of liberal theory, rights are the shorthand for saying that individuals enjoy *choice* about the control and use of goods and resources in accordance with and to give meaning to a chosen life project.<sup>76</sup>

Whatever rights that may be included in the liberal bundle, however, they exist only as a product of relationship between individuals. This is significant, for it focuses our attention on the fact that where there is a right (choice) to do something, there is a corresponding duty (a lack of choice) to refrain from interfering with the interest protected by the right.<sup>77</sup> Rights would clearly be meaningless if this were not so. As concerns any particular good or resource, then, the liberal individual holds choice while all others (the community, society) are burdened with a lack of it. C. Edwin Baker summarized the idea of rights and relationship this way: "[Private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A

72. See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 22–23 (1990); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 1 (1993); JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 2 (2d ed. 2005); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 296 (1990).

73. See JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 2–3 (2000).

74. *Id.* at 2.

75. See, e.g., Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 278 (2008).

76. For a discussion of the liberal choice of life projects and property, see Babie, *Choices That Matter*, *supra* note 69, at 333–36.

77. See HOHFELD *supra* note 67, at 65–67.

specific property right amounts to the decisionmaking authority of the holder of that right.”<sup>78</sup>

Property, then, through this understanding of its relational foundations, is not merely about the control and use of goods and resources, but also, significantly, about controlling the lives of others.<sup>79</sup> Using evocative and graphic language, Roberto Mangabera Unger puts it this way:

[T]he right [choice] is a loaded gun that the rightholder [the holder of choice] may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right[.]<sup>80</sup>

Identifying the importance of relationship in this way reveals the fact that property and nonproperty rights overlap. Choices made by those with property rights have the potential to create negative outcomes—consequences, or what economists call “externalities”—for those without property rights. At the highest level of generality, Unger’s “gunman” is vested with absolute discretion to “[an] absolute claim to a divisible portion of social capital” and “[i]n this zone the rightholder [can] avoid any tangle of claims to mutual responsibility.”<sup>81</sup> The individual revels in “a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade.”<sup>82</sup>

Every legal system acknowledges this problem and, in doing so, seems to accept that with rights come obligations towards others.<sup>83</sup> The state, through law, creates property just as through that same law (what is more commonly known as regulation) it is said to mediate the socially contingent boundary between property and nonproperty holders.<sup>84</sup> This is the essence of property—state conferral of self-seeking, preference-satisfying, or agenda-setting rights.<sup>85</sup> More

78. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742–43 (1986).

79. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1927).

80. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 36 (1986).

81. *Id.* at 37–38.

82. *Id.* at 38.

83. See Joseph William Singer, *How Property Norms Construct the Externalities of Ownership*, in *PROPERTY AND COMMUNITY* 57–60 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010) (discussing the widespread recognition that an individual’s use of property is “socially situated” and “affects the legitimate interests” of others).

84. *Id.* at 75–76.

85. See SINGER, *supra* note 73, at 204.

succinctly, property is choice—choice about one’s self and one’s chosen life project.

Yet more lurks below the surface of what appears to be state control aimed at preventing harm to others. Private property in fact confers what Duncan Kennedy calls “the legal ground rules” that give permissions to injure others, to cause legalised injury.<sup>86</sup> This is insidious, for

we don’t think of [them] as ground rules at all, by contrast with ground rules of prohibition. This is Wesley Hohfeld’s insight: the legal order permits as well as prohibits, in the simple-minded sense that it *could* prohibit, but judges and legislators reject demands from those injured that the injurers be restrained.<sup>87</sup>

And those ground rules are invisible, in the sense

that when lawmakers do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that inaction is a policy, and that the law is responsible for the outcome, at least in the abstract sense that the law “could have made it otherwise.”<sup>88</sup>

This brings us full circle to the broader liberal theory, with which we began, for the importance of relationship in understanding private property reveals an important yet paradoxical dimension of choice. It is simply this: the freedom that liberalism secures to the individual to choose a life project means that in the course of doing so, the individual also chooses the laws, relationships, communities, and so forth that constitute the political and legal order. In other words, this analysis reveals three stages of choice: (i) in the province of politics, where people choose their contexts (through electing representatives, who enact laws and appoint judges who interpret those laws), which in turn (ii) defines the scope of one’s rights (or choice), and this leads (iii) to the institutions that confer, protect, and enforce the choices that the individual might make (bearing in mind the ground rules of permission, as well as, the ground rules of prohibition). The three stages are recursive, for the third leads inexorably to the first, and so on. Individuals thus choose the regulation of property as much as they

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86. DUNCAN KENNEDY, *The Stakes of Law, or Hale and Foucault, in SEXY DRESSING ETC.* 90–91 (1993).

87. *Id.* at 90–91.

88. *Id.* at 91.

do the control and use of goods and resources.<sup>89</sup> That, in turn, has consequences for others—if the scope of choice is expanded—then the impact that those choices might have on others broadens too.

*D. The Harm to Others*<sup>90</sup>

When we focus on choice and relationship as being central to the liberal understanding of property and to the political-regulatory contexts we choose, we begin to see something that was always there yet hidden from view. Namely, that the externalities that stem from the choices permitted by property create many other types of relationships in which the decisions taken by those said to have property hold the potential to affect the lives of many others. The lives of many are, in short, controlled by the choices of a few. This Section focuses on just one specific, and stark, example of this process: anthropogenic climate change.

In earlier work, I have referred to climate change as being a private property problem.<sup>91</sup> Let me explain how. While the science is complex, it is clear that humans, through their choices, drive the greenhouse effect that heats the earth's surface.<sup>92</sup> Among other effects, anthropogenic climate change causes drought and desertification, increased extreme weather events, and the melting of polar ice (especially in the north) and thus rising seas levels.<sup>93</sup> We might call this the climate change relationship, which is itself contingent upon the relational understanding of property that emerges from the liberal conception. Property facilitates the choices (both human and corporate) about the use of the goods and resources that produce greenhouse gasses, which in turn drive anthropogenic climate change.<sup>94</sup> That, of course affects others; as Jedediah Purdy says:

89. I am most grateful to Joseph William Singer for bringing this crucial point to my attention. See Singer, *supra* note 83, at 73.

90. This Section is a revised version of two earlier articles: Paul Babie, *Climate Change: Government, Private Property and Individual Action*, 11 SUSTAINABLE DEV. L. & POL'Y 19 (2011) [hereinafter Babie, *Climate Change*]; Paul Babie, *Private Property: The Solution or the Source of the Problem?*, 2 AMSTERDAM L.F. 17 (2010) [hereinafter Babie, *Private Property*], <http://ojs.ubvu.vu.nl/alf/article/view/124/231> [<https://perma.cc/3/AF7-NK4H>].

91. Babie, *Climate Change*, *supra* note 90, at 19; Babie, *Private Property*, *supra* note 90, at 17–20.

92. Babie, *Private Property*, *supra* note 90, at 20.

93. *Id.*

94. *Id.*

[Anthropogenic] climate change threatens to become, fairly literally, the externality that ate the world. The last two hundred years of economic growth have been not just a preference-satisfaction machine but an externality machine, churning out greenhouse gases that cost polluters nothing and disperse through the atmosphere to affect the whole globe.<sup>95</sup>

Our choices about goods and resources cover the gamut of our chosen life projects, including, but not limited to: where we live, what we do there, and how we travel from place to place. Corporate choices are equally important, for they structure the range of choice available to individuals in setting their own agendas, ultimately giving corporations the power to broaden or restrict the meaning of private property in the hands of individuals. Green energy (solar or wind power), for instance, remains unavailable to the individual consumer if no corporate energy provider is willing to produce it.<sup>96</sup>

Even more troubling is the fact that the externalities of climate change do not end at the borders, physical or legal, of the state that has conferred property over a good or resource. Rather, choices occur within a web of relationships, not only legal and social, but also physical and spatial. Who is affected? Everyone, the world over, with the poor and disadvantaged of the developing world disproportionately bearing the brunt of the negative externalities of climate change,<sup>97</sup> which include decreasing security, shortages of food, increased health problems, and greater stress on available water supplies.<sup>98</sup>

The modern liberal conception of property, supported historically by Magna Carta, through securing choice about the use of goods and resources to those in the developed world, makes possible climate change and many more global, national, and local problems like it. Yet the Supreme Court's story of Magna Carta's legacy for property—which seems so straightforward and natural, “extolling [as it does] individualism, private property, laissez-faire and English

95. JEDEDIAH PURDY, *A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM* 187 (2009) [hereinafter PURDY, *A TOLERABLE ANARCHY*]; see also Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 DUKE ENVTL. L. & POL'Y F. 289, 292 (2008).

96. Babie, *Private Property*, *supra* note 90, at 21.

97. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY* 12 (Martin Parry et al. eds., 2007), [http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4\\_wg2\\_full\\_report.pdf](http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4_wg2_full_report.pdf) [<https://perma.cc/BJM3-TRZL>].

98. See Babie, *Choices that Matter*, *supra* note 69, at 336–37; Babie, *Idea, Sovereignty, Eco-colonialism, and the Future*, *supra* note 69, at 535.

civilization”—is “nothing more than a “whitewash.”<sup>99</sup> The individualist-absolutist story whitewashes the Forest Charter’s story of property, which includes community and obligation as a balance to the individual and rights. It whitewashes, in short, the full story of Magna Carta’s legacy for property. It matters, then, that we hear again the story of obligation and community crystallized in the Forest Charter’s story.

## II. THE SECOND STORY OF PROPERTY: FOREST CHARTER AS COMMUNITY AND OBLIGATION

The Forest Charter represented an attempt to redress the inequities of forest law, a body of law that had grown up around those areas of England known as royal forest.<sup>100</sup> Those origins of the royal forest are found in the Norman Conquest of 1066. Understanding the Forest Charter’s story of property emerges from its modification of the royal forest and its law.

### A. *The Royal Forest and Forest Law*

The Norman Conquest of 1066 brought with it the application of the Norman system of forests to the new English kingdom.<sup>101</sup> This system involved setting aside large tracts of land as royal forest, in turn subjecting that territory to forest law, a body of law distinct from, and at one time rivaling in size and complexity, the common law.<sup>102</sup> But the term forest law belied its true extent and meaning. As to the former, the royal forest comprised not only heavily wooded areas otherwise uninhabited, but also a range of land types that included cultivated<sup>103</sup> and “inhabited countryside with villages and farmland.”<sup>104</sup> In relation to both types of land “the King enjoyed a monopoly over all management and distribution of resources.”<sup>105</sup> Moreover, while the king did not “own” the royal forest *per se*—subjects could still own land within the royal forest—any countervailing rights remained subject to the onerous restrictions of forest law.<sup>106</sup> As the population of medieval England grew, those

99. LINEBAUGH, *supra* note 9, at 216.

100. CARPENTER, *supra* note 7, at 176–79.

101. RAYMOND GRANT, *THE ROYAL FORESTS OF ENGLAND* 3 (1991).

102. *Id.* at 5–7.

103. Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, in *MAGNA CARTA AND THE RULE OF LAW*, *supra* note 11, at 311, 325–26.

104. CAROLYN HARRIS, *MAGNA CARTA AND ITS GIFTS TO CANADA: DEMOCRACY, LAW, AND HUMAN RIGHTS* 24 (2015).

105. *Id.*

106. CARPENTER, *supra* note 7, at 176–79.

restrictions “became increasingly onerous to both the nobility and their peasant tenants who were unable to develop or expand their land without the King’s permission.”<sup>107</sup>

The purpose of the forest law was much narrower than the extent of the royal forest: the protection of the king’s hunting ground<sup>108</sup> and the preservation of food and shelter for the game of the forest for the king’s hunt.<sup>109</sup> Before forest law, “the hunting rights of the King did not differ materially from those of any other landowner . . . .”<sup>110</sup> With the establishment of the new royal forest, though, forest law superseded the common law of property, forbidding all but the king to hunt many animals of the forest, including deer, boar, hares and rabbits, wildfowl and birds, and fish.<sup>111</sup> Moreover, the forest law forbade subjects from accessing the vegetation of the forest and restricted cultivation of the land for crops, the collection of wood for fuel and building, and the pasturing of animals.<sup>112</sup>

Thus, pursuant to forest law, the death of a beast of the royal forest at the hands of any person other than the king, members of his hunting parties, or his foresters was treated with all the seriousness that we might find today in indictable criminal offences.<sup>113</sup> Indeed, the forest law meted out heavy penalties for violators.<sup>114</sup> As the *Anglo-Saxon Chronicle* recorded:

[King William I] made many deer-parks; and he established laws therewith; so that whosoever slew a hart, or a hind, should be deprived of his eyesight. As he forbade men to kill the harts, so also the boars . . . His rich men bemoaned it, and the poor men shuddered at it.<sup>115</sup>

And Carolyn Harris writes:

The chronicler William of Newburgh complained of William I’s youngest son, King Henry I, “He was, also, immoderately attached to beasts of chase, and, from his ardent love of hunting, used little discrimination in his public punishments

107. Carolyn Harris, *The Charter of the Forest*, MAGNA CARTA CAN. (Dec. 17, 2013), <http://www.magnacartacanada.ca/the-charter-of-the-forest/> [https://perma.cc/R7YP-NRA8].

108. GRANT, *supra* note 101, at 6.

109. *Id.*

110. *Id.* at 8.

111. See HARRIS, *supra* note 104, at 24.

112. GRANT, *supra* note 101, at 6.

113. *Id.* at 13, 49–50.

114. See HARRIS, *supra* note 104, at 24 (noting that the punishment for killing a deer included “blinding and mutilation”).

115. THE ANGLO-SAXON CHRONICLE 166–67 (Ernest Rhys ed., Rev. James Ingram trans., J.M. Dent & Sons, Ltd. 1938).



between deer killers and murderers.” By the reign of King Richard the Lionhearted, the punishment for killing a deer was blinding and mutilation even though the King only spent a few months in England over the course of his reign and had little time for hunting between his military campaigns.<sup>116</sup>

The king’s royal foresters enforced the forest law, wielding powers both extensive and arbitrary. Thus,

[p]ermission from the king’s chief forester was required before forest land could be cleared and cultivated, and the king received rent in perpetuity for these newly developed tracts. The right to pasture animals in the forest was strictly controlled and could be revoked at the king’s discretion. Farmers could only chop down trees for their own use if the removal of a tree did not create waste, which was defined in the reign of Henry II as “If a man standing on the stump of an oak or other tree can see five other trees cut down around him.”<sup>117</sup>

And most significantly, if the chief forester could not identify an individual offender, the power existed simply to impose a fine on the entire community.<sup>118</sup>

From the king’s perspective, of course, all of this was perfectly logical: the taking of fines for forest offences produced significant royal revenue.<sup>119</sup> Indeed, David Carpenter concludes: “[Forest law’s] main purpose was not to provide kings with areas for hunting, although they certainly were great huntsmen. It was to provide them with money.”<sup>120</sup>

It is not surprising, then, that the upper classes considered the forest law to be more than a mere inconvenience. Not only did it restrict the hunting rights of the nobility, allowing for the imposition of fines upon them for the slightest violation, but it also crippled poor commoners by removing their access to the wild resources that they relied on for survival.<sup>121</sup> At best, the king’s subjects came to see forest law as an invasion of natural rights; at worst, it was “an unmitigated disaster[.]”<sup>122</sup> In 1159 John of Salisbury wrote that the kings “[i]n their audacity . . . have dared to claim for themselves animals which are

116. Harris, *supra* note 107.

117. HARRIS, *supra* note 104, at 24.

118. *Id.*

119. See CARPENTER, *supra* note 7, at 176–77; see also GRANT, *supra* note 101, at 17.

120. See CARPENTER, *supra* note 7, at 176–77; see also HARRIS, *supra* note 104, at 24.

121. GRANT, *supra* note 101, at 13.

122. CARPENTER, *supra* note 7, at 177.

wild by nature and are made by right for those who can take them.”<sup>123</sup>  
In short, the forest law “had no benefits for [the king’s subjects].”<sup>124</sup>

Still, notwithstanding its lack of support, subsequent Norman kings expanded the royal forest to the extent that by 1215 fully one-third of England was royal forest.<sup>125</sup> Such was the perceived injustice of forest law, then, that it was featured in the original 1215 Magna Carta. Buried beneath the much-lauded clauses sanctifying property,<sup>126</sup> the 1215 Magna Carta also promised to overhaul the restrictions imposed in the royal forests by restoring rights in commons.<sup>127</sup> King John promised the disafforesting of any land he himself had reserved<sup>128</sup> to restore the land to public usage and to investigate and abolish the “evil customs” of the forests.<sup>129</sup>

But the 1215 Magna Carta was short-lived—in August 1215 Pope Innocent III annulled the Charter sealed at Runnymede only two months earlier.<sup>130</sup> While it was reissued under subsequent kings, including Henry III in 1216, 1217, and 1225, the forest chapters were omitted from Magna Carta. Instead, these chapters took the form of an expanded and detailed document regulating the uses of the king’s forests: the Forest Charter.<sup>131</sup> And so it is here that the community-obligation story of property begins.

#### *B. The Community-Obligation Story*<sup>132</sup>

With the reasons for its sealing understood, we can ask: if the liberal conception of property is supported by the individualist-

123. GRANT, *supra* note 101, at 16.

124. CARPENTER, *supra* note 7, at 177.

125. Harris, *supra* note 107.

126. MAGNA CARTA chs. 21, 28, 39 (1225), *reprinted and translated in* CARPENTER, *supra* note 7, at 47–50, 52–53.

127. MAGNA CARTA ch. 48 (1215), *reprinted and translated in* CARPENTER, *supra* note 7, at 54–57.

128. MAGNA CARTA ch. 47 (1215), *reprinted and translated in* CARPENTER, *supra* note 7, at 54–55.

129. MAGNA CARTA ch. 48 (1215), *reprinted and translated in* CARPENTER, *supra* note 7, at 54–57 (“All evil customs of forests and warrens, and of foresters and warreners, sheriffs and their ministers, riverbanks and their keepers, are to be immediately inquired into in each county by twelve sworn knights of the county, who are to be elected by upright men of the same county, and within forty days after the inquiry has been made, they are to be wholly abolished by them, so that they are never revived, provided that we, or our justiciar, if we are not in England, know about it beforehand.”).

130. Robinson, *supra* note 103, at 335.

131. CHARLES YOUNG, *THE ROYAL FORESTS OF MEDIEVAL ENGLAND* 64–67 (1979).

132. For a detailed history of the Forest Charter, see generally Robinson, *supra* note 103, at 331–51. For a concise history of the Forest Charter, see generally Harris, *supra* note 107; *see also* HARRIS, *supra* note 104.

absolutist story of Magna Carta, what can the Forest Charter add? In short: community and obligation. Or, put another way, if Magna Carta offers the notion of the individual and rights as the foundation of property, the Forest Charter balances that with community and obligation. The key to unlocking this story of community and obligation lies in the medieval “notion of having all things common,” which was “made plausible by the network of customary rights and practice on common lands, which already by the thirteenth century was both old and endangered.”<sup>133</sup> One simply cannot understand the Forest Charter’s story of property without first understanding thirteenth-century commons. These commons not only operated long before the Forest Charter, but were also jeopardized by the introduction of forest law.

In those areas treated as commons, the practice of “commoning” allowed commoners freely to acquire resources from land that they did not own.<sup>134</sup> Thus, for instance, in medieval society some natural resources were treated as available to all persons, regardless of whose land the resources grew or fell on.<sup>135</sup> Among the resources commoners could freely acquire were wood, fish, birds, small animals, and plants.<sup>136</sup> In some wooded commons, the “soil belonged to the lord while grazing belonged to the commoners, and the trees to either—timber to the lord, and wood to commoners.”<sup>137</sup>

When much of England was afforested, or converted to royal forest following the Norman Conquest, commoners not only lost many of their land rights to commons but were also subject to fines for exercising their customary rights.<sup>138</sup> The arbitrary and capricious powers wielded by the foresters were, though, eroded prior to the Forest Charter through agreements entered into by Kings Richard and John “to ‘disafforest’ land upon the payment of a large sum from a community whose members agreed they would be better off without the restrictions imposed on forest dwellers.”<sup>139</sup> The process continued with chapters 47 and 48 of Magna Carta, which, as we have seen, referred to the “evil customs of forest [law]” and both disafforested land (or removed lands from royal jurisdiction, which would

133. LINEBAUGH, *supra* note 9, at 25–26.

134. See M. JOHN MANWOOD, A TREATISE OF THE LAWES OF THE FOREST 98–105 (photo. reprint 2003) (1616); NAT. ENG., TRENDS IN PASTORAL COMMONING 7 (2009), <http://publications.naturalengland.org.uk/file/65073> [<http://perma.cc/H6CA-69BD>].

135. See MANWOOD, *supra* note 134, at 98–105.

136. See LINEBAUGH, *supra* note 9, at 42–44.

137. *Id.* at 33.

138. YOUNG, *supra* note 131, at 12–15.

139. Harris, *supra* note 107.

otherwise prevent access and use by anyone other than the Crown) and returned to the people the common rights of the forest.<sup>140</sup>

The Forest Charter, sealed by the young Henry III in 1217, sought to complete the reversal of the deprivation of resources begun in 1066.<sup>141</sup> To achieve this, first, the Forest Charter extended the modifications of earlier agreements and Magna Carta by defining the “evil customs” mentioned in chapter 47. Second, it restricted the royal prerogatives vested in the chief forester to “extract payments for land development or levy fines for violations of forest law.”<sup>142</sup> It further restricted these powers by enunciating significant commoning rights.<sup>143</sup> Most importantly, chapter 17 (chapter 16 of the Forest Charter of 1225) provided that the “liberties of the forest . . . are granted to . . . everyone”—unlike Magna Carta, which largely applied to only barons and knights.<sup>144</sup>

The Forest Charter’s great innovation, then, was to extend the pre-1217 agreements between individual communities and the Crown to the entire kingdom. In turn, this restricted the use of royal forest as purely revenue producing, thereby opening a new means of managing common resources. This new system placed the community, and not the personal prerogative of the Crown, at the center of land ownership. In short, the Forest Charter elevated the place of community relative to the Crown.

The Forest Charter’s specific provisions, therefore, set out the framework of community and obligation that became its legacy for property. Chapters 1 and 3 assured the rights of common to those who had been accustomed to them, even in the king’s forests.<sup>145</sup> These chapters also disafforested vast tracts of land, thus removing them from the regulation of forest law.<sup>146</sup> These chapters had the effect of

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140. *Id.*

141. *Id.*

142. *Id.*

143. CHARTER OF THE FOREST chs. 14, 15 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 423 (Daniel B. Magraw et al. eds., 2014) (explaining that every freeman will be able to have his own woods and resources).

144. CHARTER OF THE FOREST ch. 17 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 423; *see also* HARRIS, *supra* note 104, at 50; Robinson, *supra* note 103, at 343; *cf.* GEORGE C. HOMANS, ENGLISH VILLAGERS OF THE THIRTEENTH CENTURY 64 (1941) (describing a “scene characteristically medieval: the neatherds of a village sitting at their meal under a hedge in the fields and encountering a party of huntsmen who have been making free with the king’s deer.”).

145. CHARTER OF THE FOREST chs. 1, 3 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 421.

146. CHARTER OF THE FOREST chs. 1, 3 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 421.

limiting the arbitrary prerogative power of the Crown to convert land into royal forest, which had so angered the barons.<sup>147</sup>

Other chapters protected animals and goods. For example, chapter 7 forbade royal officials (foresters) from taking produce in lieu of feudal tax.<sup>148</sup> Chapter 9 assured common rights to graze animals.<sup>149</sup> Chapter 10, while acknowledging that deer remained the property of the king, provided that “no one shall henceforth lose life or limb because of our venison.”<sup>150</sup> Further, chapter 12 allowed persons living in the forest to “make in his own wood, or on his land, or on his water, which he has within our forest, mills, springs, pools, marlpits, dykes, or arable ground, without enclosing that arable ground, so that it be not to the annoyance of any of his neighbours.”<sup>151</sup> No longer answerable to the authorities and king for development of the land, this chapter especially represented a significant freedom to use land for the good of the commoners and community, taking account of others in the choices made about one’s land. In this one chapter, the Forest Charter both revoked unpopular decrees made by King John and transferred authority over forest development from king to subject. Put another way, in requiring the consent of one’s neighbor in the development of land, the emphasis of land ownership moved from the arbitrary, and often capricious, whim of an individual (the king)<sup>152</sup> to one’s community. Thus, “[i]nstead of answering to the King alone, forest dwellers had to consult with their communities, [thus] ensuring that any development did not disadvantage their neighbours.”<sup>153</sup>

147. See Harris, *supra* note 107.

148. CHARTER OF THE FOREST ch. 7 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 421.

149. CHARTER OF THE FOREST ch. 9 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 422.

150. CHARTER OF THE FOREST ch. 9 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 422.

151. CHARTER OF THE FOREST ch. 9 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 422.

152. And there is no lack of evidence of just how arbitrary and capricious this whim might be. See HARRIS, *supra* note 104, at 24 (“In 1209, the knight Roger de Crammaville of Kent was fined twenty marks for owning dogs that did not meet forest regulations, which dictated that three claws of their forepaws be removed to ensure that they were unable to hunt game. That same year, John ordered the destruction of unauthorized ditches and hedges on forest land. This decree resulted in wild animals—including deer, which had little fear of humans because of the harsh poaching laws—destroying crops in fields unprotected by hedges or ditches. In addition to collective fines and other payments, John also used his forest prerogatives to settle personal scores. In 1200, he expressed his displeasure with the Cistercian Order by forbidding the monks from pasturing their livestock in the forest until twelve abbots begged his forgiveness on their knees.”).

153. *Id.* at 50–51.

Further, chapter 13 ensured that “[e]very freeman shall have, within his own woods, ayries of hawkes, sparrow-hawkes, falcons, eagles and herons: and shall have also the honey that is found within his woods,” while chapter 14 protected the subjects’ right to gather up to a certain amount of wood, bark or charcoal without having to pay the fee of chiminage (a road tax).<sup>154</sup>

In the totality of the Forest Charter’s provisions, some of which remained in force for over 700 years,<sup>155</sup> we find the core of the community-obligation story of property which emerges from the Forest Charter. Concern for the community arrives in the return of commoning rights that had been lost through the process of afforestation following the Norman Conquest.<sup>156</sup> The return of these rights and the corresponding return of control to individuals illustrate the Forest Charter’s concept of obligation to community members.

As we know, Magna Carta had already begun the process of transforming the royal forest into commoning land in 1215. This transformation was achieved through chapter 47’s abolition of the “evil customs” of the royal forests.<sup>157</sup> And, while chapter 47 was removed from subsequent reissues of Magna Carta, that was possible only because the Forest Charter expanded and developed the provisions relating to the use of royal forest. That expansion involved placing at least some of the power over determining how land would be used in the hands of the community, thus transforming forest law into a common law that required a consideration of the other in the choices made about land use, ultimately serving the needs of the community rather than the Crown alone.

There is little doubt that the Forest Charter’s story of community-obligation became, rather quickly, an integral part of understanding Magna Carta’s legacy for property.<sup>158</sup> It was soon impossible to understand the story told by one of these documents without listening also to the story told by the other. Yet, at some point in the last eight hundred years, the Forest Charter’s story was silenced, leaving the legacy of Magna Carta for property

154. CHARTER OF THE FOREST ch. 14 (1217), *translated in* MAGNA CARTA AND THE RULE OF LAW, *supra* note 11, app. H at 423; LINEBAUGH, *supra* note 9, at 42.

155. See Harris, *supra* note 107.

156. See HARRIS, *supra* note 104, at 50.

157. MAGNA CARTA ch. 47 (1215), *reprinted and translated in* CARPENTER, *supra* note 7, at 54–57.

158. HOLT, *supra* note 10, at 385–86 (“Indeed the repeated demand for afforestation was one of the main reasons for the periodical confirmation of the Charters from 1225 on to the end of the reign of Edward I. The Forest Charter and the particular issue disafforestation helped to keep Magna Carta alive.”).

impoverished, said to support only the liberal individualist-absolutist conception of property, rather than its original, relational view.

C. *Magna Carta's Lost Sister*<sup>159</sup>

From the perspective of its contemporaries, the Forest Charter did not so much restore individual property rights to landowners as it restored common property rights to all inhabitants of the forests.<sup>160</sup> It “expanded on [Magna Carta]’s provisions and provided the foundation for the modern concept of common stewardship of resources.”<sup>161</sup> Indeed, while Magna Carta may be the first self-conscious association of rights and freedoms, in fact, the Forest Charter may have provided commoners with their earliest sense of holding such rights and freedoms<sup>162</sup>:

Crucially, both charters began to explicitly connect commons with an expansive and political sense of rights and freedom. The Forest Charter concluded with the statement, “And these Liberties of the Forests, we have granted to all Men.” This expressed, at an early date, the association of commons with freedom. It is significant in this regard that together the documents were called the Charters of Liberties.<sup>163</sup>

Yet, there was real doubt whether the Forest Charter would even endure. In 1227, when Henry III came of age, it was unclear whether any of the charters approved during his minority would be valid upon his attaining the age of majority.<sup>164</sup> Yet,

[t]he King ultimately agreed to uphold Magna Carta in exchange for a tax on the movable property of the clergy, and the Charter of the Forest for a tax on land. Henry III’s fifty-six year reign coincided with a period of prosperity for England as land development in rural areas matched the needs of communities instead of forest regulations imposed on them by the King.<sup>165</sup>

159. This phrase is derived from Geraldine van Bueren, *Letter to the Editor: Charter’s Lost Sister*, TIMES (June 18, 2014), <http://thetimes.co.uk/tto/opinion/letters/article4122090.ece> [<https://perma.cc/F6G6-JL8Z>].

160. See Robinson, *supra* note 103, at 317–18.

161. Harris, *supra* note 107.

162. Ben Maddison, *Radical Commons Discourse and the Challenges of Colonialism*, 108 RADICAL HIST. REV. 29, 32 (2010).

163. *Id.*

164. Harris, *supra* note 107.

165. *Id.*

Notwithstanding Henry's agreement to be bound by Magna Carta and the Forest Charter, it would be several centuries before commoners generally begun to understand commoning as necessary to be asserted and defended.<sup>166</sup> This took the form of acts of resistance against enclosure and the "gradual popular transcendence of the ideas about common rights articulated in the charters."<sup>167</sup> And once this process of transcendence began, the Forest Charter came to foster beliefs that commons, and not private property, are the vehicle of freedom.<sup>168</sup>

Thus, in their early history, Magna Carta and the Forest Charter came to be seen as equally important. Each time a king reissued Magna Carta, the Charter of the Forest was reissued as well.<sup>169</sup> In 1225 both charters were issued together in what became their definitive form.<sup>170</sup> They were again confirmed when Henry III reached his majority in 1227.<sup>171</sup> By 1297, Edward I directed that the charters would be the common law of England<sup>172</sup> and ordered that both be read aloud in each cathedral twice annually.<sup>173</sup> And so, in 1642, Sir Edward Coke wrote:

It is called Magna Charta, not that it is great in quantity, for there be many voluminous charters commonly passed, specially in these later times, longer than this is; nor comparatively in respect that it is greater than Charta de Foresta, but in respect of the great importance, and weightiness of the matter, as hereafter shall appeare: and likewise for the same cause *Charta de Foresta* is called *Magna Charta de Foresta*, and both of them are called *Magnae Chartae Libertatum Angliae* [great charters of English liberties].<sup>174</sup>

Therefore, when told together, as they were always intended to be told, Magna Carta and the Forest Charter tell a very different story about property than the one told by the U.S. Supreme Court, a story

166. See Maddison, *supra* note 162, at 33.

167. *Id.*; see also Robinson, *supra* note 103, at 338 (noting that the Forest Charter engendered this knowledge as a consequence of orders that both Charters were to be read aloud in each Cathedral twice a year).

168. Maddison, *supra* note 162, at 33.

169. Robinson, *supra* note 103, at 337. The many reissues of the Charters, and consequent reaffirming of the rights contained therein, were usually in exchange for financial support to the King. *Id.*

170. *Id.* at 313–14.

171. *Id.* at 317 n.25.

172. LINEBAUGH, *supra* note 9, at 39.

173. Robinson, *supra* note 103, at 338. *But see* LINEBAUGH, *supra* note 9, at 38 (stating that the frequency is four times per year).

174. SIR EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND*, at Proeme \*A4 (1642), *quoted in* LINEBAUGH, *supra* note 9, at 38.



that carefully balances a system of individualist-absolutist property with obligation towards the community. But, at some point after 1642 the Forest Charter drops out of the popular social imagination and falls into desuetude. When precisely and why exactly we cannot say. What we do know is that the Forest Charter is found in Sir William Blackstone's definitive version of the two Great Charters produced in 1759,<sup>175</sup> so as late as the eighteenth century the second story of property remained extant. What happened? Was the fate of the Forest Charter's lasting image sealed by its seemingly archaic terminology and concepts? Some think so:

Historians have always known the Charter of the Forest existed but many of its terms—for example, *estovers*, or subsistence wood products—seem strange and archaic, and have prevented the general public from recognizing its existence and understanding its importance.<sup>176</sup>

Or is there a connection to the dispossession of the indigenous peoples of North America, the only commoners by practice in the New World? That is speculative, but we do know that at the same time indigenous peoples were being dispossessed, liberty and freedom were being extolled as the virtues of the liberal individual and were central to the American conception of the relationship of people to one another and to government.<sup>177</sup> So it may be that liberalism itself stripped away this memory of the Forest Charter as being community-obligation focused, burnishing in its place Magna Carta's image of liberty achieved by unrestricted private property rights. In contrast, the Forest Charter saw liberty as being associated with freedom and rights intrinsic to the concept of commons.<sup>178</sup>

Or the silencing may have been more recent. Examples of meaningful representations of rights of commons and the Forest Charter can be found in the activities of the “Diggers,”<sup>179</sup> a political

175. See Wilfrid Prest, *Blackstone's Magna Carta*, 94 N.C. L. REV. 1495, 1498 (2016).

176. LINEBAUGH, *supra* note 9, at 6 (citation omitted).

177. *Id.* at 171–72.

178. Chris Besant, *From Forest to Field: A Brief History of Environmental Law*, 16 LEGAL SERV. BULL. 160, 162 (1991).

179. A group of Protestant radicals known as the “Diggers” are sometimes seen as forerunners to modern anarchism and also associated with agrarian socialism. See Nicolas Walter, *Anarchism and Religion* 1, 2–3 (1991), <http://theanarchistlibrary.org/library/nicolas-walter-anarchism-and-religion.pdf> [<https://perma.cc/9RAB-PW8G>]. They are also associated with agrarian communism. See THE BRITANNICA GUIDE TO POLITICAL SCIENCE AND SOCIAL MOVEMENTS THAT CHANGED THE MODERN WORLD 129 (Heather M. Campbell ed., 2009). Originally known as the True Levellers in 1649, and led by Gerrard Winstanley, their attempts to farm on common land resulted in them being

group in civil-war era England, in colonial America and Australia, and even up to the 1890s in Australia.<sup>180</sup> Such representations make clear that, notwithstanding Magna Carta's story of property as told by the Supreme Court, the notion of commoning and its corresponding concept of obligation, may not, on closer scrutiny, be all that archaic to the modern mind.

Still, archaic or not, freedom enhancing or not, the community-obligation story of property told by the Forest Charter has seldom, if ever, been heard in our time.<sup>181</sup> Chris Besant argues that "these two documents standing side by side express a central theme in English history that is not adequately recognized by a tradition of inquiry that treats one document [Magna Carta] as fundamental, and [the Forest Charter] as of antiquarian interest."<sup>182</sup> Whatever the truth, and we may never know why or how the Forest Charter's story was silenced, sometime between 1759 and today, the Forest Charter became Magna Carta's "lost sister."<sup>183</sup>

We need to retell the story using concepts relevant to our own time. The next Section offers some concluding reflections on how we might do that, again using the contemporary challenge of anthropogenic climate change as a means of exploring what the Forest Charter story of community-obligation might say to us.

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referred to as the Diggers. *See id.* The Diggers were so radical, that for Winstanley, "while they might have originated in the Charters of Liberties, the laws derived from the Magna Carta [and the Forest Charter] . . . were 'yokes and manacles, tying one sort of people to be slaves to another[.]'" Maddison, *supra* note 162, at 37. This was a radical view for the time, contrasting the moderate popular view of commons rights as freedoms connected to customary rights on specific land. *Id.* at 38.

180. Maddison, *supra* note 162, at 34–41. *But see* LINEBAUGH, *supra* note 9, at 72 (arguing that our collective forgetfulness may have started in the seventeenth century). In any case, the Forest Charter disappeared as part of Magna Carta's legacy sometime between the seventeenth and nineteenth centuries.

181. Robinson, *supra* note 103, at 314 ("[K]nowledge of Magna Carta has eclipsed memory of [the Forest Charter].").

182. Besant, *supra* note 178, at 160.

183. Van Bueren, *supra* note 159.

### III. REFLECTIONS: THE FOREST CHARTER'S COMMUNITY- OBLIGATION STORY FOR OUR OWN TIME



**Figure 2. *Green Man***<sup>184</sup>

#### A. *A New Metaphor*

You may have passed over it without a second thought. Quite intentionally, without comment, I wanted at the outset of this Article for the reader to see an image of a medieval forest—perhaps it was a forest where the right of commoning existed, or perhaps it was the royal forest, where such rights had been lost. What was lost or when it was lost does not really matter; all that matters is the visual representation of lands as they might have been at the time of Magna Carta, either before being afforested or after being disafforested. In

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184. *Green Man* (Thirteenth Century), Bamberg Cathedral, Germany. © 1992 Clive Hicks (reproduced with permission).

short, the image of the medieval forest captures, at least partially, Magna Carta's legacy for property centered, one way or another, in the individualist-absolutist story.

We have heard this individualist-absolutist story told repeatedly over a very long time: property as choice structured to suit the interests and preferences of the individual, with that power of choice and control protected against all others, including the sovereign. It has become, more than anything else, a metaphor for the liberal conception of property; the same conception that the Supreme Court adverts to and relies upon again and again, just as Chief Justice Roberts did most recently in *Horne*.<sup>185</sup> The image of the medieval forest represents, visually, that metaphor. But while romantic, that image is misleading and false.

The metaphor of Magna Carta as individualist-absolutist property is misleading and false because it represents only half the story—the other half is told by the Great Charter's lost sister, the Forest Charter. Without the Forest Charter's story, a necessary dimension of the freedom and liberty of property—the obligation towards others and towards the community—is neglected. The Forest Charter forces us to find a new metaphor, one that represents the dual stories of property as both individualist-absolutist and as community-obligation. This Section suggests replacing the metaphor in the form of an image that would have been very familiar to Kings John and Henry III, to the barons who forced their hands,<sup>186</sup> and to most other people alive at the time that those kings set their seals upon Magna Carta and the Forest Charter: it is the image of the Green Man.

We scarcely hear of the Green Man today, but in medieval times the Green Man was found in churches and public buildings.<sup>187</sup> The careful observer can still see some of the surviving Green Men in European churches and public buildings today.<sup>188</sup> So what is the Green Man? To begin, the Green Man is plural, for there is no one image of the Green Man, but many variants, which can be classed into

185. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015).

186. Robinson, *supra* note 103, at 318.

187. See generally Lady Raglan, *The "Green Man" in Church Architecture*, 50 FOLKLORE 45 (1939) (explaining generally the presence of the "Green Man" in church architecture).

188. GARY R. VARNER, *THE MYTHIC FOREST, THE GREEN MAN, AND THE SPIRIT OF NATURE: THE RE-EMERGENCE OF THE SPIRIT OF NATURE FROM ANCIENT TIMES INTO MODERN SOCIETY* 160–65 (2006); Luke Mastin, *History of the Green Man*, THE ENIGMA OF THE GREEN MAN (2011), <http://www.greenmanenigma.com/history.html> [https://perma.cc/UE93-ZFS7].

three broad types.<sup>189</sup> First, the Green Man of late Roman architecture, comprising “foliate heads, which were faces actually formed of leaves, foliate masks—faces composed of leaves.”<sup>190</sup> The second appears in the earliest known Christian example, from the French town of Poitiers, in which “the face generates the foliage, in this case from the nose, but later more usually from the mouth, and occasionally from the ears, and even, grimly, in a few, from the eyes.”<sup>191</sup> Finally, in others “the face is set amongst the foliage, like fruit, and this type shades away into marginal examples which might just be faces ringed with decorative leaves.”<sup>192</sup> One also finds Green Women and some green animals.<sup>193</sup> An excellent example of the Green Man is that found in the Bamberg Cathedral in Germany, an image of which greets us at the start of this Section.

But what is important for present purposes is the fact that the Green Man is both “an image and an idea. It is an image of a human face associated with foliage, and it is the idea that makes real the connection between humanity and nature. The image personifies the idea.”<sup>194</sup> The Green Man captures the idea of both the individual and the community: “within each human psyche there is that which each of us feels to be ‘I’, the ego, which is the incarnation of the psyche. The Green Man is an expression of this.”<sup>195</sup> But more than this, “the consciousness of the individual, set in this mortal vehicle, is the union of the timeless with time, in a circle of birth, death and renewal. The Green Man is an expression of this.”<sup>196</sup> And so, “the idea of the Green Man is an Archetype: it is the practical incarnation of the reality that All is One.”<sup>197</sup> The Green Man is a synthesis of individual and community and of humanity and creation-nature-environment. The individual cannot be understood as being separate from the community; humanity cannot be understood as separable from the environment. They are inseparable; they are one; they are constitutive of one another; they are a synthesis.

Increasingly, the Green Man as the idea, the archetype, of the synthesis of individual-community and humanity-environment has been identified with “seeing the world as a whole in a way that no

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189. CLIVE HICKS, *THE GREEN MAN: A FIELD GUIDE* 1–8 (2000).

190. *Id.* at 8.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 1.

195. *Id.* at 2.

196. *Id.*

197. *Id.*

previous generation has done, and [which will] demand reforms as a whole.”<sup>198</sup> Thus, the Green Man serves as a “symbol [having] great value and great potential as a catalyst in the self-revelation of the community and the self-realisation of the individual, and, arising from those, the regeneration of nature that we have so damaged.”<sup>199</sup> The synthesis embodied in the Green Man, then, represents a visual metaphor or archetype of the integration of the individual-community as humanity within the environment, demonstrating the oneness of the three.

This visual metaphor of community and obligation serves to counter, but not to obviate, the metaphor of the individual and rights found in the image of the medieval forest. The two metaphors are not and cannot be separate. The “green” of the Green Man comes from the foliage of the forest, thus linking the two images through our relationship to the world in which we live. Both individual choice and obligation towards the community are linked through the subject of our choices, the tangible and intangible things—the environment in which we live—that are subject to the concept of property.

In the same way that the individual and the community ought not be separated but are linked in the visual metaphor of the Green Man, the two stories of Magna Carta’s legacy for property ought not be read separately. Rather, the two are linked in their common treatment of property—thus, they must be read together, as they were intended to be. What might such a reading mean for our own time?

#### *B. Using the Green Man as a Tool for Reading the Stories Together*

How, then, might we read together the two stories of property emerging from a full reading of Magna Carta’s legacy for property in our own time? This Section uses the metaphor of the Green Man as a means of revealing the inseparability of the individual, the community, and the environment. We have seen that two property stories emerge from Magna Carta and the Forest Charter; the one associated with the former supports the individual, while the one found in the latter reminds us of the community. The Green Man asks us to read these stories as if they were one; in the same way that the individual and the community are inseparable, so, too, are the two stories of property. Thus, reading the two stories together teaches a very simple lesson: property, while comprising the power of choice to suit one’s own personal preferences and interests, must do more than

198. *Id.* at 11.

199. *Id.* at ix.

simply serve the needs of one person—the king at the time of Magna Carta, the individual in modern liberal vernacular. Property must also, in addition to its individualist-absolutist leanings, serve the needs of the community, the members of which, *by right*, share in the control and use of the resources required to survive. Community is, in short, central to what property is.

And, as we have seen, with the recognition of community comes obligation. The right to commons is the core of the Forest Charter's emphasis on obligation, which is something that might seem radical if all we can hear is Magna Carta telling us that property is individualist-absolutist. But if we allow ourselves to think that way, we must remember that any feeling of radicalism we might have in recognizing obligation as central to property comes only as a consequence of failing to understand the dual importance of Magna Carta *and* the Forest Charter. But that is to be expected when the second story, that of community and obligation, has been so fully silenced for so long.

Having then recognized that the two stories are indispensable, that community and obligation form part of the core of freedom and liberty, we can see that property today, as in King John and King Henry III's day, must serve the general welfare:

Although the state may come into being to protect private property, a strong case exists that property serves the general welfare or common good and that individual ownership in our nation is not an end in itself but the way society gives incentive to the resource creation that establishes maximum conditions for benefiting society. The American republic does not exist to protect the individual owner as resource solipsist but to protect all owners in their common interest, in short, to protect the general welfare.<sup>200</sup>

The Forest Charter provides us with both an old and a new story of property, one which supplements, but does not replace, the individualist-absolutist one we have heard for so long in Magna Carta. Leaving them apart impoverishes both documents. Read together, “[t]he lasting legacy of the Charter of the Forest is the precedent for community stewardship of shared resources that endures into the twenty-first century.”<sup>201</sup> When read as one, Magna Carta and the Forest Charter tell a story of property (what we now call the liberal

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200. O. Lee Reed & E. Clayton Hipp, *A “Commonest” Manifesto: Property and the General Welfare*, 46 AM. BUS. L.J. 103, 105 (2009).

201. Harris, *supra* note 107.

conception (read: individualist-absolutist)) as *including* obligation *towards* the community.

What might this mean in the context of the environment and climate change? The next and final Section offers three reflections in answer to this question by considering the potential of the Forest Charter's story of property as community-obligation in order to balance the individualist-absolutist story that allows the choices driving anthropogenic climate change.

### C. *Community-Obligation and Anthropogenic Climate Change*

Once we begin to see community as central to the choices that are made by the individual pursuant to private property, then we can see that obligation may be either self-imposed or imposed by the state through regulation. In either case, this is a modification of the liberal conception of property, which otherwise views the state's role as protecting the individual's choices against the predation of others, including the government; and this story is the one told for Magna Carta by contemporary American law. Yet the story told of Magna Carta was clearly not the core of the Forest Charter's story—the other half of the joint story of private property told by Magna Carta and the Forest Charter. To return to the example used earlier, anthropogenic climate change, it is possible to map out how private property might change to account for community-obligation, but what one might hope for can be summarized in three reflections.

First, recognizing community and obligation as part of Magna Carta's legacy for property would mean that we recognize how property, seen as merely individual and rights, allows us to countenance unequal distributions of power—choice—in the control and use of resources.<sup>202</sup> Those concentrations of power or choice in the control and use of resources not only result in inequalities within the state, but also among states, allowing for a small number of people in a small number of states to negatively affect vast numbers

202. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 1–5, 17–34 (2004). See generally KENNEDY, *supra* note 86 (attempting to “analyz[e] the role of law in the reproduction of social injustice in late capitalist societies”); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) (arguing that a “free” economy through freedom of contract contains “more coercion, and government and law played a more significant part, than is generally realized”); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923) (contending that “systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom, and with restrictions, moreover, out of conformity with any formula of ‘equal opportunity’ or of ‘preserving the equal rights of others’”).



of others beyond those boundaries.<sup>203</sup> Climate change, seen through the lens of an individualist-absolutist conception of property, sets this failure squarely before us.<sup>204</sup> If we are committed to adopting the Forest Charter as part of Magna Carta's legacy, we might hope that the way property is understood would redress this imbalance of power and therefore take greater account of the externalities of climate change flowing from those choices that carry with them extrajurisdictional reach—those that extend beyond boundaries founded upon ideas of national sovereignty.

Second, and following from the first reflection, the Forest Charter's story of community and obligation might lead us to recognize the only community that truly matters today: the global community. Climate change is the best indicator of what this global community might be. Again, there is no doubt that climate change is a truly global phenomena—it involves global interaction and interdependence that concerns all humankind.<sup>205</sup> The liberal conception of private property, however—the conception said to be supported by Magna Carta—rarely explores how such extrajurisdictional decisions or choices taken by one who holds private property visit their consequences not only on those within the jurisdiction that creates and sustains private property (i.e., the state), but also on those without, forming what we might refer to as an interjurisdictional community. Viewed in the global context of climate change, private property begins to look rather asymmetrical.<sup>206</sup>

What do we mean by “asymmetry?” Simply this: the nature of choices as matched against the externalities involved in climate change are not limited by national boundaries, as assumed by the

203. For an amusing example of this blindness, see WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 59 n.9 (2001), where Twining discusses his attendance at the 1982 Harvard Critical Legal Studies Conference, where he notes that one of the failings of Critical Legal Studies was its inward-lookingness. *Id.* Some modern theorists are beginning to reveal the flaws in such thinking in the case of domestic municipal law and public international law. See, e.g., David Kennedy, *The Mystery of Global Governance*, in *RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 37–39 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009); William Twining, *Law, Justice and Rights: Some Implications of a Global Perspective* 4 (Jan. 2007) (unpublished manuscript), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.486.6007&rep=rep1&type=pdf> [<https://perma.cc/P6Z7-8WCG>].

204. For a full assessment of how this is so, see generally Babie, *Choices That Matter*, *supra* note 69.

205. See TWINING, *supra* note 203, at 3 (defining globalization as “those processes that increase interaction and interdependence in respect of . . . ecology [and] climate”).

206. This phrase is adapted from the seminal work of David Lametti. See generally David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO L.J. 325 (2003) (establishing this concept of asymmetry).

liberal concept of private property. The effects of choice exercised in one jurisdiction, the decision to use one form of energy, for instance, or to drive a car rather than ride a bike, produce greenhouse gases that drive anthropogenic climate change. Those consequences go beyond the borders of the jurisdiction that made the choice possible. In short, private property makes choices possible that have consequences far beyond the jurisdictional limits of the systems that created the possibility of such choices.<sup>207</sup> Combined with the fact that the largest holdings of private property are concentrated in industrialized or industrializing nations—such as the United States and most Western European nations—and those most vulnerable and affected by the consequences are those living in the underdeveloped and third world—such as the South Pacific Island nations<sup>208</sup>—the far-reaching consequences of private property render misguided any focus on physical borders and national boundaries as capable of limiting the reach of the effects of private property choices.

Thus, asymmetry refers to the situation that occurs when the consequences of private property choices are visited on those beyond the jurisdictional reach of the legal structures that creates, confers, and protects those choices. This is the case when faced with any global phenomena; here we merely happen to be concerned with anthropogenic climate change. Thus, again, if we are committed to adopting the Forest Charter's story, we may be willing to see our community as somewhat larger than we might have once considered it. In short, it encompasses all people on the planet today.

But yet, there is a third reflection through which we may extend the notion of community one step further: a model of private property that takes account of the global consequences of climate change might also extend the notion of community not only to all other humans on the planet, but also to the environment as a whole. In other words, our notion of community might account for what

207. See PURDY, A TOLERABLE ANARCHY, *supra* note 95, at 187.

208. See generally U.N. DEV. PROGRAMME, TABLE 1: HUMAN DEVELOPMENT INDEX AND ITS COMPONENTS, <http://hdr.undp.org/en/composite/HDI> [<https://perma.cc/4CFD-J38V>] (aggregating data regarding the Human Development Index, a “measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and hav[ing] a decent standard of living[.]” in 188 countries); James B. Davies et al., *The World Distribution of Household Wealth* (World Inst. for Dev. Econ. Research, Discussion Paper No. 2008/03) (2008), <https://www.wider.unu.edu/sites/default/files/dp2008-03.pdf> [<https://perma.cc/9MJH-ZT6F>] (discussing the correlation between countries that lack adequate “social safety nets” and borrowing and lending opportunities and those countries with the lowest measures of household wealth).

William Twining calls an ecocentric focus.<sup>209</sup> Anthropocentric actions are those the reasons for which are the provision of a benefit to human beings, while ecocentric ones are those for which the reason is the provision of a benefit to the environment.

Twining argues that while most canonical jurists are not indifferent to environmental concerns and do not treat ecocentric reasons as invalid, typically they seem to be anthropocentric in their focus.<sup>210</sup> There is a growing body of scholarship surrounding what has come to be known as “earth jurisprudence” that supports such claims about community.<sup>211</sup> Of course, there is little doubt that changing the way we relate to the environment through law would be difficult, but perhaps it is not impossible.<sup>212</sup> Charles Taylor identifies some epochal moments in human history where political shifts have occurred—the most notable being “the great founding revolutions of our contemporary world, the American and the French.”<sup>213</sup> In one, the transition was smooth and less catastrophic because the idealization of popular sovereignty was easy to connect with an existing practice of popular election. In the other, however, the inability to translate the same idealization into a stable and agreed upon set of practices led to great conflict for over a century.<sup>214</sup> Taylor sees such changes as possible when

people take up, improvise, or are inducted into new practices. These are made sense of by the new outlook, the one first articulated in [a] theory; this outlook is the context that gives sense to the practices. And hence the new understanding comes to be accessible to the participants in a way it wasn’t before. It begins to define the contours of their world, and can eventually come to count as the taken-for-granted shape of things, too obvious to mention.<sup>215</sup>

Could the environment in our time be akin to the political relationships of the American and French revolutions? Perhaps. It is not impossible to imagine that climate change could become for the

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209. TWINING, *supra* note 203 at 19 (“An ecocentric action is taken to be one in which the reason to act is the provision of a benefit to the environment[.]” (quoting Bebhinn Donnelly & Patrick Bishop, *Natural Law and Ecocentrism*, 19 J. ENVTL. L. 89 (2007))).

210. *Id.* at 19–20.

211. See EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE 3–12 (Peter Burdon ed., 2011); WILD LAW: IN PRACTICE 19–28 (Peter Burdon & Michelle Maloney eds., 2014).

212. See Babie, *Choices That Matter*, *supra* note 69, at 349–56.

213. CHARLES TAYLOR, *A SECULAR AGE* 175 (2007).

214. *Id.*

215. *Id.* at 175–76.

postmodern world a “revolution” not unlike that witnessed in the United States and France in the eighteenth century, taking us beyond the liberalism that emerged from those revolutions. Charles Reich, writing forty-five years ago in a book seemingly forgotten today, said:

There is a revolution coming. It will not be like revolutions of the past. It will originate with the individual and with culture, and it will change the political structure only as its final act. It will not require violence to succeed, and it cannot be successfully resisted by violence. It is now spreading with amazing rapidity, and already our laws, our institutions and social structure are changing in consequence. It promises a higher reason, a more human community and a new liberal individual. Its ultimate creation will be a new and enduring wholeness and beauty—a renewed relationship of man to himself, to other men, to society, to nature and to the land.<sup>216</sup>

While it would be a radical step to advance our notion of community so far as to include not only humanity, but also the environment, it would certainly be a step supported by the Forest Charter, which, it has been said, may very well be one of the first pieces of environmental legislation, developed to remedy unfair governance of natural resources.<sup>217</sup> Such a conception of the community would certainly be in keeping then with the spirit of the Forest Charter’s story of community and obligation. As J. C. Holt wrote about the legacy of Magna Carta:

Later generations may have differed on what the community was and on who was entitled to represent it, but they were rarely in any doubt that authority should be subject to law *which the community itself defined*.<sup>218</sup>

Magna Carta’s legacy is one that includes *both* the individual *and* the community; the Forest Charter comprises an important, but forgotten, part of that legacy, reminding us that the community plays a central role in Magna Carta’s conception of individual freedom. The environment, too, formed a part of the Forest Charter’s conception of the community good. Just as the Forest Charter’s story of property cannot be separated from Magna Carta’s, so also its conception of the community cannot exclude protection of the environment.

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216. CHARLES A. REICH, *THE GREENING OF AMERICA* 4 (1970).

217. Robinson, *supra* note 103, at 311, 323.

218. HOLT, *supra* note 10, at 404–05 (emphasis added).

## CONCLUSION

So, what should we do in two years? The vista of medieval forest at the outset of this Article reminds us of Magna Carta's well-known story of the individual and rights. The gaze of a medieval Green Man here at the conclusion invites us to listen again to the Forest Charter's story of community and obligation. What, then, should we do in 2017? The answer, I hope, is obvious: we ought to reject what Lord Faulks said in the House of Lords on June 18, 2015, and we ought to gather to commemorate the eight hundredth anniversary of a document every bit as important as Magna Carta—without which Magna Carta's story of property is not only incomplete but also misleading.

Just as the Green Man tells us that the individual and the community are one, so too are Magna Carta and the Forest Charter. Together, they tell us that we can fully understand property only when we see the individual within the context of the community. The eight hundredth anniversary in 2017 of Henry III setting his seal on Magna Carta's lost sister seems a good time to hear that story again.