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“THE WHOLE OF THE CONSTITUTIONAL
HISTORY OF ENGLAND IS A COMMENTARY
ON THIS CHARTER”*

CHARLES DONAHUE, JR.**

“King John was not a good man,” Christopher Robin tells us, “[h]e had his little ways.”¹ Christopher Robin was, in fact, reflecting the best scholarship of his day, 1927, when the poem was first published. Almost all historians in Victorian and Edwardian England believed that King John was irredeemably bad. He was so bad that the barons revolted against him. Stephen Langton, the wise archbishop of Canterbury, so the story went, harnessed the rebellion and drafted the cornerstone of English constitutional liberty, Magna Carta, to which the reluctant king was forced to consent on 15 June 1215.²

Out of evil comes good through the mediation of the Church. Not surprisingly, the most powerful exponent of this version of the story was the Right Reverend William Stubbs, D.D., the bishop of

* © 2016 Charles Donahue, Jr. For the quotation in the title, see text at note 22 *infra*.

** Paul A. Freund Professor of Law, Harvard Law School. The author adds: This paper began life as a lecture given in Calgary, Alberta, in February of 1990 on the occasion of the visit of Lincoln Cathedral’s copy of the 1215 Charter to the Nickle Art Museum. I have refined the lecture over the years in my English Legal History course. The eight-hundredth anniversary of the 1215 Charter has brought forth an outpouring of literature on the topic of Magna Carta. It would seem that everyone who knows anything about the English Middle Ages has been asked to say something about the Charter. (I guess I belong to the broad category; I am certainly not a specialist in either Magna Carta or thirteenth-century England more generally.) Thirteen articles in *History Today* published since 2012 have “Magna Carta” in the title, the tip of an underlying iceberg that will be explored by future historiographers. This paper remains a lecture, decorated now with footnotes, as requested by the *Law Review*, some of which have been kindly supplied by their assiduous cite-checkers. So far as the literature is concerned, I have taken borings in the iceberg. I had to be selective. I have certainly missed important contributions, and to the authors of those contributions I apologize.

Note from the Editors: This Article is historical in nature, and, accordingly, the *North Carolina Law Review* has departed from its ordinary citation practices.

1. A. A. MILNE, *NOW WE ARE SIX* 2 (1st ed. 1927).

2. A review of the historiography may be found by John Gillingham, *John, King of England*, in 30 *OXFORD DICTIONARY OF NATIONAL BIOGRAPHY* 158 (H.C.G. Matthew & Brian Harrison eds., 2004). A more comprehensive review, written at the height of the revisionist period, may be found in J. C. HOLT, *KING JOHN* (Historical Ass’n 1963) [hereinafter HOLT, KING JOHN].

Oxford, and the greatest English constitutional historian of Victorian era.³

Not surprisingly too, this story produced a counterstory in the succeeding generation.⁴ King John was more sinned against than sinning. He tried to bring order to an unruly England; he was interested in the details of administration. The rebellious barons were a group of reactionaries who wanted to return England to the days of the anarchy under King Stephen. Magna Carta, whether Langton was its draftsman or not, was a reactionary document. It can only be understood in feudal terms. Its value in later political debate, both at the end of the thirteenth century and most notably in the seventeenth, was a combination of symbolism, misunderstood history, and misinterpreted language.

Modern historians tend to be more cautious, avoiding either the extremes of Stubbs's view or those of the revisionists who

3. 1 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND: ITS ORIGIN AND DEVELOPMENT* 551–83 (5th ed. 1891); 2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND: ITS ORIGIN AND DEVELOPMENT* 1–165 (4th ed. 1887). As is frequently the case, reading Stubbs exposes a view more subtle than my caricatures of it in the text. For example, the way in which Stubbs divides his discussion of the Charter makes fairly clear that he thought, as do many modern historians, that what happened after John's death had more lasting importance than did the adoption of the Charter in 1215.

For Stubbs's assessment of John's character, we can do no better than to repeat the quotations that Janet Loengard has recently gathered together: "[T]here is nothing in him which for a single moment calls out our better sentiments; in his prosperity there is nothing that we can admire and in his adversity nothing that we can pity. . . . John has neither grace nor splendour, strength nor patriotism. His history stamps him as a worse man than many who have done much more harm. . . ." And again: "he is savage, filthy, and blasphemous in his wrath. . . ." William Stubbs, *Preface*, in 2 *MEMORIALE FRATRIS WALTERI DE COVENTRIA: THE HISTORICAL COLLECTIONS OF WALTER OF COVENTRY* xi, xv (William Stubbs ed., 1872), *quoted in* Janet S. Loengard, *Introduction to MAGNA CARTA AND THE ENGLAND OF KING JOHN* 1, 3 n.6 (Janet S. Loengard ed., 2010).

4. *E.g.*, SIDNEY PAINTER, *THE REIGN OF KING JOHN* (1949). Painter, who died in 1960, would not have disagreed with Christopher Robin about the character of King John. Painter described John as "an able but completely unscrupulous and opportunistic king." Sidney Painter, *Magna Carta*, 53 *AM. HIST. REV.* 42, 42 (1947). His view, however, of the basically anachronistic nature of the Charter is ably described in brief compass in this article. (An expanded version of the paper, which he later quite radically edited for publication, may be found at Nicolas Vincent, *More From the Painter Archive: Two Lost Articles on Magna Carta*, MAGNA CARTA PROJECT (Apr. 2015), http://magnacarta.cmp.uea.ac.uk/read/feature_of_the_month/Apr_2015_3 [<http://perma.cc/682E-TSTA>]). W. L. WARREN, *KING JOHN* (1978) [hereinafter WARREN, *KING JOHN*], was written at the height of the revisionist movement. HOLT, *KING JOHN*, note 2 *supra*, summarizes the findings of the revisionist movement and is already moving beyond it. The basically feudal character of the Charter was emphasized as early as W. S. MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, WITH AN HISTORICAL INTRODUCTION* (2d ed. 1914) and even more trenchantly in Edward Jenks, *The Myth of Magna Carta*, 4 *INDEP. REV.* 260, 260–73 (1904).

characterized the last generation of historians.⁵ What I would like to do in this paper is give the readers enough information to make up their own minds. I would also like to offer an interpretation of the Charter that allows us to say that, despite some egregious errors in detail on both sides, both Stubbs and the revisionists were in some sense right.

The overall picture of what happened is reasonably clear, although many of the details are not. For example, the four surviving original copies of the Charter are all dated at Runnymede, 15 June 1215, but it is not clear that is the correct date of the Charter. It may be the date when the king and the barons agreed to compromise on a charter of liberties, the details of which were worked out in the following days.⁶

The Character of King John and the Making of the 1215 Charter

Let us begin with the character of King John, for much depends on our assessment of him.⁷ King John began his reign in 1199 as king of England, duke of Normandy, and lord of much of western France. He lost Normandy and the rest of northwestern France in battle in 1203, and he never recovered it. Particularly disastrous was his attempt to recover it in 1214, which resulted in a crushing defeat of his allies at the battle of Bouvines. To the men of his day that may well have been his most important deficiency. John was probably not

5. For different, but nonetheless compatible views—in that they steer a middle ground between my caricatures of the views of preceding generations of historians—see the magisterial account of Professor Sir James Holt (d. 2014), J. C. HOLT, *MAGNA CARTA* (George Garnett & John Hudson eds., 3d ed. 2015) [hereinafter HOLT, *MAGNA CARTA*], and, equally magisterial, DAVID CARPENTER, *MAGNA CARTA* (2015) [hereinafter CARPENTER, *MAGNA CARTA*].

6. This was Holt's view, but the suggestion can be found at least as far back as Davis's edition of Stubbs's *Select Charters*. WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST* 285 (H. W. C. Davis ed., rev. 9th ed. 1913) [hereinafter STUBBS, *SELECT CHARTERS*]. Holt's view is now supported by his students Garnett and Hudson, *Introduction* to HOLT, *MAGNA CARTA*, note 5 *supra*, at 1, 25–31. Carpenter argues for the date that is on the document. David Carpenter, *The Dating and Making of Magna Carta*, in *THE REIGN OF HENRY III*, at 1, 1 (1966). He maintains this position in CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 361–66.

7. For why an assessment of the character of John is necessary, see text between notes 67 and 68 *infra*. A short and eminently readable biography with a review of the historiography may be found in Gillingham, note 2 *supra*. Gillingham himself might be regarded as a “re-revisionist”: John was pretty bad. Book-length biographies include WARREN, *KING JOHN*, note 4 *supra*, and RALPH V. TURNER, *KING JOHN* (1994). For those who wish to pursue the question of John's character into more recent literature, see Loengard, note 3 *supra*, at 2–5 and the literature cited in nn. 7–11, especially KING JOHN: *NEW INTERPRETATIONS* (S. D. Church ed., 1999).

a coward, but he was not the athlete that his brother Richard had been. Leadership in battle at the beginning of the thirteenth century depended on athletics, personal physical prowess. Athletes don't like losers. If the team loses, the coach gets fired.⁸

But there was more to it than that. Although King John probably was not the arch-villain that some of the chroniclers make him out to be, he was not, as Christopher Robin says, a good man. He was, and is, widely believed to have had his nephew Arthur murdered; perhaps he killed him himself.⁹ He was probably responsible for having Maud de Briouse and her son starved to death. One reason for their murder seems to have been that Maud knew too much about Arthur's death.¹⁰ The same pattern was followed in the case of Peter of Wakefield, a millenarian heretic, whose prediction of the end to come included a prediction of the king's death. Not only was Peter executed but also his son, who had nothing to do with his father's predictions.¹¹ John may have attempted to seduce, perhaps rape would be a better term, the daughter of Robert fitz Walter. Robert, though himself not a candidate for sanctity, became a leader of the baronial opposition to him.¹²

But he was not all bad. He was able to inspire great loyalty in his household. He did devote himself to the details of administration, something that England sorely needed after Richard I. When John died in 1216 he still was leading an army; he had his supporters.¹³ His misdeeds would certainly have disqualified him for the position of bishop of Oxford in Victorian England (and, I would hope, today), but judged against the standards of his own time he was better than some and no worse than many.

Why then did he get such bad press? Because most of the chroniclers of John's time were monks, and for them John's worst act was his dispute with Pope Innocent III concerning the appointment of Stephen Langton to the see of Canterbury.¹⁴ This dispute led to

8. The comparison with Richard is particularly telling in WARREN, KING JOHN, note 4 *supra*, at 59–60, 62–63.

9. TURNER, note 7 *supra*, at 13; WARREN, KING JOHN, note 4 *supra*, at 82–83.

10. TURNER, note 7 *supra*, at 13; WARREN, KING JOHN, note 4 *supra*, at 185–87.

11. TURNER, note 7 *supra*, at 13.

12. *Id.* at 216 retells the story without committing to its truth. WARREN, KING JOHN, note 4 *supra*, at 230, does not believe it.

13. Numerous authors have made this point. *See, e.g.*, Gillingham, note 2 *supra*, at 167, and sources cited therein.

14. John Gillingham has emphasized that not all of the chroniclers of John were monks. This makes the account of the “Anonymous of Béthune,” whose author may have been a clerk, but who writes in French and espouses secular values, particularly important. Our impression of John is not improved by reading the Anonymous. *See generally* John

England being laid under a papal interdict from 1208 to 1213. The pope excommunicated John in 1209 and deposed him in 1213 (but the letters of deposition were never published), and in a remarkable reversal accepted his offer of homage in the same year and became his feudal lord. The years of the interdict were a bad period for the church in England, particularly for the monasteries, but the evidence suggests that many Englishmen supported John in his struggle with the pope, or, at least, did not actively oppose him. Neither the interdict nor John's relations with the Church were of central importance to Magna Carta.¹⁵

That, in turn, would suggest that Stephen Langton, who was not himself experienced in English political affairs, is an unlikely candidate for the draftsman of Magna Carta. He probably attempted to mediate between the barons and the king. He certainly got into trouble with the pope for having been too favorable to the barons. But except for clauses in favor of the church that were added to the beginning and end of the Charter after the barons had presented their petition, probably early in June of 1215, Langton was probably not directly involved in writing the Charter.¹⁶ Would that we knew who was, but we don't.

Gillingham, *The Anonymous of Béthune, King John and Magna Carta*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN*, note 3 *supra*, at 27, 27.

15. Pope Innocent III quashed the election of John de Gray, bishop of Norwich, John's candidate, on the ground that the election was uncanonical, and then persuaded the monks of Canterbury to elect Stephen Langton. Langton was unacceptable to John, because he had spent too much time as a professor in Paris. A brief account of the dispute may be found in Gillingham, note 2 *supra*, at 163. The fullest account is C. R. CHENEY, *POPE INNOCENT III AND ENGLAND* (Päpste und Papsttum [Popes and Papacy] Band 9, 1976).

16. For a much more nuanced account, see D. A. Carpenter, *Archbishop Langton and Magna Carta: His Contribution, His Doubts and His Hypocrisy*, 126 *ENG. HIST. REV.* 1041, 1041 (2011), with substantial criticism of the view of John W. Baldwin, *Master Stephen Langton, Future Archbishop of Canterbury: The Paris Schools and Magna Carta*, 123 *ENG. HIST. REV.* 811, 836 (2008), which attempts to restore the centrality of Langton's role on the basis, among other things, of his teaching at Paris prior to becoming archbishop, and the "Unknown Charter." Prior to Baldwin, David d'Avray also called attention to Langton's political teaching in *Magna Carta: Its Background in Stephen Langton's Academic Exegesis and Its Episcopal Reception*, 38 *STUDI MEDIEVALI* 423, 423–38 (1997). For what the information is worth (and it's not much), I find Carpenter's argument that Langton was not involved in the drafting of the Articles of the Barons powerful (Baldwin would probably not have disagreed), the connection between Langton and the "Unknown Charter" problematical (Baldwin and Carpenter disagree on this), but the context of Langton's general ideas helpful in "explaining" the Charter and particularly Langton's role in the reissue of 1225 (Carpenter does not seem to disagree). See note 75 *infra* and accompanying text for further information.

Rebellion had been in the wind at least as early as 1212. Its leaders seem to have been Robert fitz Walter, just mentioned, and Eustace de Vesci, who also claimed to have a personal grievance against the king.¹⁷ In 1213 and 1214 John was involved in a grand coalition with the Holy Roman Emperor and the count of Flanders against Philip Augustus, the king of France. John was attempting to recover Normandy. John's allies were crushingly defeated at the battle of Bouvines in 1214. The unusually heavy taxation that preceded John's French campaign, John's increasingly erratic attempts to coerce and cajole the baronage into supporting him, the defeat at Bouvines, and the hope that the pope would support them probably combined in January of 1215 to bring a large group of barons into open confrontation with John in demanding reforms. In early May of 1215 the barons *defied* John.¹⁸ That is a technical term. It means to withdraw feudal allegiance from one's lord on the ground that one's lord has seriously wronged one. The barons were operating in a world that they knew. In mid-May they captured London. In June of 1215, they forced John to agree to the Great Charter. In August of 1215 the pope relieved John of his oath to obey the Charter, on the ground—among others and not without support in the events—that the oath had been taken under duress. Shortly thereafter the pope died. The last year of John's life was spent in battle with the barons, the more extreme of whom had invited Louis, the son of King Louis VII of France (and later himself King Louis VIII), to become king of England.¹⁹

The moderates got control of the government after John's death in 1216. Under the leadership of William the Marshall, the earl of Pembroke, they reissued the Charter in 1216 in the name of the ten-year-old king, Henry III. They issued it again in 1217. Henry III issued it in his own name in 1225. Each time it was reissued the Charter was changed, not drastically, but enough to show that varying political and administrative settlements were at work. Had the process of reissuing the Charter with changes continued the Charter might have become a constitutional document in the real sense, but in 1297, after a dispute between Edward I and his barons, the 1225

17. For the full story, see J. C. HOLT, *THE NORTHERNERS: A STUDY IN THE REIGN OF KING JOHN* 80 (1992).

18. For a modern British judge's explanation of these events, see Lord Judge [Igor Judge, Baron Judge], *Magna Carta*, in *MAGNA CARTA, RELIGION AND THE RULE OF LAW* 19, 25 (Robin Griffith-Jones & Mark Hill eds., 2015).

19. The most recent account of these events is CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 274–309, 373–411, but the stripped-down version in the text can be supported from any of the standard accounts.

Charter was confirmed and the text fixed.²⁰ Until the second quarter of the fifteenth century, every king reconfirmed the Charter as it stood. Today, four of its provisions are still law in England (cc. 1, 9, 29, and the last clause of the 1225 Charter as confirmed in 1297, sometimes numbered 37). The rest have been repealed by statute, many of quite recent vintage, despite the “constitutional” status of the document.²¹

The Text of the Charter

Because the Charter became so much a symbol over the subsequent centuries, it is hard to understand it in its context. It certainly is not “An Act Declaring the Rights and Liberties of the Subject” as the English Bill of Rights was called in 1689, nor, as Stubbs would have it, is “[t]he whole of the Constitutional History of England . . . a commentary on this charter”²² The Charter is not, however, an attempt by the barons to turn back the clock, to go back to the bad old days of King Stephen in the mid-twelfth century or even the good old days of King Henry I at the beginning of the twelfth century.

In order to show why this is so, we ought to look more closely at the Charter itself.²³ The order of the clauses seems jumbled, and we can understand it better if we regroup them²⁴:

20. Still the best account of the thirteenth-century history of the Charter is FAITH THOMPSON, *THE FIRST CENTURY OF MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT* (1925). For the reissues in 1216, 1217, and 1225, see CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 404–29.

21. 10(1) HALSBURY’S STATUTES OF ENGLAND AND WALES 81–84 (4th ed. 2013).

22. Compare STUBBS, *SELECT CHARTERS*, note 6 *supra*, at 291, with WILLIAM STUBBS, *SELECT CHARTERS AND OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY FROM THE EARLIEST TIMES TO THE REIGN OF EDWARD THE FIRST* 296 (8th ed. 1900) (the last edition to appear in Stubbs’s lifetime, where the same quotation is found).

23. Magna Carta is written in Latin. It is not particularly difficult Latin, and the reader who has any understanding of Latin at all really should use the original text. The most recent edition of the 1215 Charter, with a careful collation of the four surviving originals, is in CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 36–69. Holt’s edition may be found in HOLT, *MAGNA CARTA*, note 5 *supra*, at 378–98. Carpenter’s edition is to be preferred, though the differences are not great. Holt’s also includes the 1225 Charter, *id.* at 420–28. Both cited editions of the 1215 Charter include a translation. I prefer Carpenter’s; it is more literal, but, once more, the differences are not great. I cannot recommend the translation most commonly used in the United States: SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 115–26 (Carl Stephenson & Frederick George Marcham eds., 1972). Anyone who translates “*dos*” in c. 7 as “dowry” cannot be trusted. The Stephenson and Marcham translation does, however, attempt to show how various clauses of the 1215 Charter were modified in subsequent reissues.

Four of the clauses of the 1215 Charter deal with the church (cc. 1, 22, 42, 46),²⁵ of which the most important is the first clause, a general guarantee of the liberties of the church²⁶:

[We i]n the first place, have granted to God and by this our present charter have confirmed, for us and our heirs in perpetuity, that the English church is to be free, and is to have its rights in whole and its liberties unharmed, *and we wish it so to be observed; which is manifest from this, namely that the liberty of elections, which is deemed to be of the greatest importance and most necessary for the English church, by our free and spontaneous will, before the discord moved between us*

Still, the only complete clause-by-clause commentary on the 1215 Charter is MCKECHNIE, note 4 *supra*, at 184–480. It was a remarkable work of scholarship in its time, and it has lasted far too long. Both Holt and, particularly, Carpenter comment on all the clauses. One must, however, use the indices to find the commentary, which is scattered throughout both books. A website, known as “The Magna Carta Project,” on which a number of scholars, including Carpenter, are collaborating, is designed to replace McKechnie once and for all, but as of this writing (5 Sept. 2015) commentary is available on only twenty-eight of the sixty chapters. *Magna Carta 1215*, MAGNA CARTA PROJECT, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215 [<http://perma.cc/TP3M-EHNE>] [hereinafter *Magna Carta Project*].

24. Organizing the Charter is not for the faint of heart. Not only does it involve imposing categories on the material that almost certainly were not in the minds of the drafters, but it also involves committing one’s self to a single category when many clauses splay over modern categories. This organization is my own. Carpenter has a very different one, one more faithful to the organization of the Charter. CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 25–32. A topical analysis closer to, but not the same as, mine may be found on the *Magna Carta Project*, note 23 *supra*. I have taken this opportunity to revise somewhat my organization, which I have been peddling to English Legal History classes for many years.

25. *Magna Carta Project*, note 23 *supra*, agrees with my characterization, and adds c. 60 and “Suffix B” (otherwise known as c. 63). I don’t disagree, but have chosen to categorize everything that appears after c. 59 as dealing with the administration of the Charter, rather than substantive provisions.

26. *In primis concessisse deo et hac presenti carta nostra confirmasse, pro nobis et heredibus nostris in perpetuum, quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illesas; et ita volumus observari quod apparet ex eo quod libertatem electionum, que maxima et magis necessaria reputatur ecclesie Anglicane, mera et spontanea voluntate, ante discordiam inter nos et Barones nostros motam, concessimus et carta nostra confirmavimus, et eam obtinuimus a Domino Papa Innocentio tercio confirmari; quam et nos observabimus et ab heredibus nostris in perpetuum bona fide volumus observari.*

CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 38. The large boldface capital at the beginning of the Latin is the way that Carpenter indicates that there was a large capital in the original. Marking these produces an organization of the Charter that is somewhat different from the modern clause numbers. The translation in the text is from *id.* at 39, with the word in brackets added to make it make sense (the main verb is in what is now described as the “prologue”); the italics, here and throughout, indicate what was not carried over into subsequent reissues.

and our barons, we granted and confirmed by our charter, and obtained its confirmation from the lord pope, Innocent the third, which we shall both observe and wish to be observed by our heirs in perpetuity in good faith.

Guarantee of the peace of the church was in the first clause in the English coronation oath in the tenth century, and it remained a part of the coronation oath throughout the Middle Ages and beyond.²⁷ This guarantee clause, however, is broader.²⁸ It has possible parallels in what has come to be known as the “Coronation Charter” of Henry I.²⁹ The provision in the 1215 Charter about liberty of election of bishops did not survive into the 1216 Charter, and the system actually used for election of bishops throughout the Middle Ages gave the king more say in the choice.³⁰

Two of the provisions deal with cities, citizens, burgesses, and boroughs (cc. 13, 41), and another five deal with commercial matters (cc. 9, 10, 11, 33, 35).³¹ Of these, probably the most important are the guarantees of the liberties of the city of London and other towns, and the attempt to impose a uniform system of weights and measures.³²

And the city of London is to have all its ancient liberties and free customs, *by both land and water.*

27. 1 FELIX LIEBERMANN, *DIE GESETZE DER ANGELSACHSEN* [The Laws of the Anglo-Saxons] 214–17 (1903); 1 THE STATUTES OF THE REALM 108 (London 1810).

28. The general principle appears again in what Holt and Carpenter call “c. 63”: “Quare volumus et firmiter praecipimus quod Anglicana ecclesia libera sit . . .” CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 68; HOLT, *MAGNA CARTA*, note 5 *supra*, at 398.

29. In the recent critical edition by Richard Sharpe, *Henry I's Coronation Charter*, EARLY ENG. LAWS PROJECT (2016), <http://www.earlyenglishlaws.ac.uk/laws/texts/hn-cor/view/#edition,1/translation,1> [<http://perma.cc/7R7U-SGSA>] (note references and variants omitted): “ego respectu dei et amore quem erga uos <omnes> habeo, sanctam dei ecclesiam in primis liberam facio, ita quod nec [eam] uendam nec ad firmam ponam, nec mortuo archiepiscopo seu episcopo siue abbate aliquid accipiam de dominio ecclesie uel de hominibus eius donec successor in eam ingrediatur.” Garnet and Hudson note the parallel of “in primis” and the first words of c. 1. HOLT, *MAGNA CARTA*, note 5 *supra*, at 17–18.

30. For the system that was in use later on, see KATHERINE HARVEY, *EPISCOPAL APPOINTMENTS IN ENGLAND, c. 1214–1344: FROM EPISCOPAL ELECTION TO PAPAL PROVISION* (2014); *see generally* W. A. PANTIN, *THE ENGLISH CHURCH IN THE FOURTEENTH CENTURY* (1955).

31. *Magna Carta Project*, note 23 *supra*, categorizes differently: “Miscellaneous”: c. 13; “Trade”: cc. 33, 35, 41; “Money”: c. 9; “Jews”: cc. 10, 11.

32. *Et civitas Londoniarum habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas.*

Preterea volumus et concedimus quod omnes alie civitates, et burgi, et ville, et portus, habeant omnes libertates et liberas consuetudines suas.

CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 42, 44; translation in *id.* at 43, 45.

In addition, we wish and grant that all other cities and boroughs, and villas and ports, have all their liberties and free customs.

The guarantee of the liberties of London and other towns seems rather vague, but many cities and towns by this time, and certainly London,³³ had their own borough charters.

The attempt to impose a uniform system of weights and measures is found in clause 35³⁴:

There is to be one measure of wine through all our kingdom, and one measure of ale, and one measure of corn, namely the quarter of London, and one width of tinted cloths, and russets and haubergets, namely two ells within the borders. Moreover, for weights it is to be as for measures.

This clause was not an immediate success, but the principle was an important one, to be worked out over the centuries.³⁵

Nineteen of the provisions deal with feudal relationships between the king and his tenants-in-chief, of which eleven clauses deal with relief, primer seisin, and the king's wardship of widows and infant heirs (cc. 2, 3, 4, 5, 6, 7, 8, 37, 43, 44, 53), and eight deal with levying feudal scutages (payments in lieu of personal military service) and aids (cc. 12, 14, 15, 16, 26, 27, 29, 32).³⁶ There are so many of these that choosing examples is hard. Let us focus on clause 2, fixing reliefs for earldoms and baronies. It was at the head of the Articles of the Barons³⁷:

33. See BRITISH BOROUGH CHARTERS, 1042–1216 (Adolphus Ballard ed., 1913). Ballard did not edit the charters, but organized their contents, relying on previous editions or, in some cases, manuscripts. See his list of sources, *id.* at xxvi–xxxiii.

34. Una mensura vini sit per totum regnum nostrum, et una mensura cervisie, et una mensura bladi, scilicet Quartarium Londoniense, et una latitudo pannorum tinctorum et Russetorum et Halbergettorum, scilicet due ulne infra listas. De ponderibus autem sit ut de mensuris.

CARPENTER, MAGNA CARTA, note 5 *supra*, at 50; translation in *id.* at 51.

35. See, e.g., the so-called *Assise of Weights and Measures*, in 1 THE STATUTES OF THE REALM 204–05 (London 1810) (of uncertain date, but probably late thirteenth or early fourteenth century); Stat. 14 Edw. 3, stat. 1, c. 12 (1340), in *supra* 1 THE STATUTES OF THE REALM, at 285; Stat. 25 Edw. 3, stat. 5, cc. 9–10 (1352), in *supra* 1 THE STATUTES OF THE REALM, at 321–22.

36. *Magna Carta Project*, note 23 *supra*, is largely in accord, dividing my subcategories somewhat differently between “Feudal” and “Money,” and putting four clauses into more specific categories: “Feudal”: cc. 2, 3, 4, 5, 6, 16, 29, 32, 37, 43; “Money”: cc. 12, 14, 15, 26, 27; “Women”: cc. 7, 8; “Forest”: cc. 44, 53.

37. Si quis comitum vel baronum nostrorum, sive aliorum tenentium de nobis in capite per servicium militare, mortuus fuerit, et cum decesserit heres suus plene etatis fuerit et relevium debeat, habeat hereditatem

If any of our earls or barons, or others holding from us in chief by knight service, dies and when he dies his heir is of full age and owes relief, he is to have his inheritance by the ancient relief; namely the heir or heirs of an earl for a whole barony of an earl by a hundred pounds; the heir or heirs of a baron for a whole barony by a hundred pounds; the heir or heirs of a knight for the whole fee of a knight by a hundred shillings at most; and who owes less is to give less according to the ancient custom of fees.

One hundred shillings for a knight's fee was already pretty standard. Prior to the Charter, however, baronies and earldoms were assessed at what the traffic would bear and sometimes at what it wouldn't bear. The earls and barons, particularly the earls, were clearly the winners in this clause.³⁸

Twenty of the provisions deal with the administration of justice (cc. 17, 18, 19, 20, 21, 24, 34, 36, 38, 39, 40, 44, 45, 52, 54, 55, 56, 57, 58, 59), including the famous due process clause (c. 39, later 29).³⁹ We will deal with some of these in more detail shortly.

Eleven of the provisions deal with miscellaneous administrative matters (cc. 23 [distraint for repair of bridges and dikes], 25 [fixing amount of farms], 28 [seizure of foodstuffs for the king], 30 [seizure of animals for king's service], 31 [seizure of wood for royal works], 47 [forests], 48 (forests), 49 [hostages], 50 [removal of named ministers and their relatives], 51 [removal of foreign knights and soldiers], 53 [adjusting forest boundaries]).⁴⁰

The final clause, or clauses, depending on whose numbering you use (cc. 60–63 in Holt's and Carpenter's numbering; c. 60 in Stubbs's), deals with the administration of the Charter.

suam per antiquum relevium; Scilicet heres vel heredes comitis de Baronia comitis integra per centum Libras; heres vel heredes baronis de Baronia integra per centum Libras; heres vel heredes militis de feodo militis integro per centum solidos ad plus; et qui minus debuerit minus det secundum antiquam consuetudinem feodorum.

CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 38; translation in *id.* at 39.

38. CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 213–14; HOLT, *MAGNA CARTA*, note 5 *supra*, at 256–57.

39. *Magna Carta Project*, note 23 *supra*, is largely in accord, placing four chapters in more specific categories, and duplicating four chapters: “Justice”: cc. 17, 18, 19, 20, 21, 24, 34, 36, 38, 39, 40, 52, 54, 55, 56, 57 (to which it adds c. 22, duplicated in “Church”, and c. 32, duplicated in “Feudal”); “Forest”: c. 44; “King's officers”: c. 45; “Wales and Scotland”: cc. 58, 59 (where cc. 56, 57 are duplicated).

40. *Magna Carta Project*, note 23 *supra*, divides these among less anachronistic categories: “Miscellaneous”: cc. 23, 49; “Money”: c. 25; “King's officers”: cc. 28, 30, 31, 50, 51; “Forest”: cc. 47, 48, 53.

The Place of Magna Carta in English Constitutional History

Clearly this is not a bill of rights in either the modern or in the seventeenth-century sense. Very few of the clauses are on that level of generality. The vast majority assume a social and legal system for which we have no better a term than “feudal” and that can only be understood in that context.⁴¹ In this context it is an anachronism to think in terms of individual rights against the state, and the notion of a bill of rights is dependent on that idea. Within this context, the clauses of the Charter state principles and make “fixes.”

If we leave out the matters personal to John (of which there are relatively few: the release of hostages, the return of wrongfully obtained land and fines, the expulsion of foreign soldiers and ministers, specific dealings with the Welsh and Scots) and the method of enforcement, none of which survived into the 1216 Charter, this is not a revolutionary document.⁴² Nor, in my view or in that of most modern commentators, such as Holt and Carpenter, is it a reactionary document.

To test this view, let us look at the topic about which there are more clauses than any other: justice. If the barons had been trying to restore the situation as it had existed before the time of John’s father, Henry II, they certainly would have tried to dismantle the system of justice that had been instituted by the assizes of Henry II, particularly the assizes of novel disseisin and *mort d’ancestor*, which were substantially interfering with the power of the barons’ courts. In the case of the former, the aggrieved party had direct (and rapid) access to the central royal courts if he claimed to have been disseised by the lord “unjustly and without a judgment” and, in the case of the latter, similar access was allowed to the central royal courts if the claim was that his immediate ancestor had been seised on the day of his death

41. Like many medieval historians, I have become uncomfortable with using the term “feudal.” See, e.g., SUSAN REYNOLDS, *FIEFS AND VASSALS: THE MEDIEVAL EVIDENCE REINTERPRETED* 1–3 (1994). We have, however, no better term to describe the social, legal, and governmental structure of England at the turn of the thirteenth century. That structure is why, as the next sentence in the text suggests, we cannot imagine the Charter as creating individual rights against the state.

42. *MAGNA CARTA* (1215), c. 49 (release of hostages), c. 50 (named ministers and their relatives), c. 51 (foreign knights and soldiers), c. 52 (wrongfully obtained land), c. 55 (wrongfully obtained fines), cc. 56–59 (specific dealings with the Welsh and Scots). The method of enforcement (cc. 60–63) was quite radical. It called for a council of twenty-five barons who would sit as a kind of appellate court over the king’s judgments. Had this continued, England would have had a quite different form of government throughout the rest of the Middle Ages. For further information see note 70 *infra*.

and that someone else was now on the land.⁴³ The Charter not only does not seek to upset the assizes, but clause 18 insists that the assizes be taken four times a year in each county.⁴⁴ Clause 17 not only does not seek to upset the central royal courts but creates a branch of them at a fixed place, normally at Westminster, presumably so that litigants might find them easily.⁴⁵ Clause 24 ensures a monopoly of serious criminal cases to the central royal courts.⁴⁶ Clause 34 could be

43. For *mort d'ancestor* and novel disseisin, see THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL 149–57, 167–70 (doubled) (G. D. G. Hall, 2d ed. 1993) [hereinafter GLANVILL]. For what Henry II did (and for what he was trying and not trying to do), see S. F. C. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM: THE MAITLAND LECTURES GIVEN IN 1972 (1976) [hereinafter MILSOM, LEGAL FRAMEWORK]. Many readers find this book difficult. It can be approached through the long review by Robert C. Palmer, 79 MICH. L. REV. 1130 (1981). The late S. F. C. Milsom has his critics. I remain attracted to the power of Milsom's vision while recognizing that his abstract scheme was not always applied. The best collection of evidence of the messiness of the reality is found in 2 JOHN HUDSON, THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 871–1216, chs. 21–24 (2012) [hereinafter 2 HUDSON, OXFORD HISTORY], with references to his earlier work. We will return to Henry's changes and Milsom's ideas about them in the text and note 68 *infra*.

44. *Recognitiones de nova dissaisina, de morte antecessoris, et de ultima presentatione, non capiantur nisi in suis comitatibus et hoc modo.*

Nos, vel, si extra regnum fuerimus, capitalis Justiciarius noster, mittemus duos justiciarios per unumquemque comitatum per quattuor vices in anno, qui, cum quattuor militibus cuiuslibet comitatus electis per comitatum, capiant in comitatu et in die et loco comitatus assisas predictas.

Recognitions of novel disseisin, *mort d'ancestor*, and *of darrein presentment*, are not to be taken unless in their counties and in this way.

We or, if we are out of our kingdom, our chief justiciar shall send two justices through each county *four times a year, who, with four knights of each county, elected by the county court are to take the aforesaid assizes, in the county court and on the day and in the place of the county court.*

CARPENTER, MAGNA CARTA, note 5 *supra*, at 44, 46; translation in *id.* at 45, 47. The demand that the assizes be held four times a year in every county was unrealistic. It was reduced to once a year in the 1217 reissue, and not even this was always achieved.

45. *Communia placita non sequantur curiam nostram sed teneantur in aliquot certo loco.*

Common pleas are not to follow our court but are to be held in some specified place.

Id. at 44; translation in *id.* at 45.

46. *Nullus vicecomes, Constabularius, Coronatores, vel alii ballivi nostri, teneant placita corone nostre.*

No sheriff, constable, coroners or other of our bailiffs are to hold pleas of our crown.

interpreted as being in opposition to the reforms of Henry II,⁴⁷ but subsequent events strongly suggest that it was directed at a much narrower aim: the issuance of a generalized precipe writ, what *Glanvill* calls the “writ of first summons,”⁴⁸ without a statement in the writ as to why jurisdiction in the central royal courts is appropriate in the first instance. Such generalized writs ceased to be issued after the Charter, to be replaced by the writ of right *in capite*, the writ of right *quia dominus remisit curiam*, and a proliferation of writs of entry.⁴⁹

Id. at 46; translation in *id.* at 47. The awkward mixture of singulars and plurals was carried over into the 1225 reissue. This may be an indication that we are going to find substantive changes, authorized at some high level, not merely editorial changes, in the reissues.

47. Breve quod vocatur precipe decetero non fiat alicui de aliquo tenemento unde liber homo possit amittere curiam suam.

The writ which is called precipe is not to be made out henceforth to anyone for any tenement whereby a free man could lose his court.

Id. at 50; translation in *id.* at 51.

48. For *Glanvill*'s writ *de prima summonitione facienda*, see GLANVILL, note 43 *supra*, at 5, and the brief but learned note on the nine writs precipe in the treatise, *id.* at 179–80.

49. The origins of this interpretation go back before Michael T. Clanchy's *Magna Carta, Clause Thirty-Four*, 79 ENG. HIST. REV. 542 (1964), which had just appeared when Hall wrote his note on writs precipe. GLANVILL, note 43 *supra*, at 179–80. Clanchy's brief article, however, has all of the elements just outlined in the text. The idea was developed extensively in MILSOM, LEGAL FRAMEWORK, note 43 *supra*. The puzzle is how to explain the fact that when men who had been instrumental in having c. 34 put in the Charter got control of the government during the minority of Henry III and reissued the Charter three times, all with this clause, they nonetheless not only allowed the Chancery to continue to issue writs precipe returnable in the central royal courts, but also allowed such writs to proliferate in numerous forms of writs of entry—and nobody seemed to object.

The answer would seem to be that all the forms of writs precipe after 1216 that are returnable in the central royal courts contain within them an explanation of why jurisdiction in the central royal courts is appropriate without referral to the court of the lord of whom the demandant (plaintiff) claims to hold. This is obvious in the case of the writ of right *in capite*. The demandant claims to hold of the king in chief, and the court in which the writ ought to be returned is the central royal court. It is only slightly less obvious in the case where the lord has remitted his court (*quia dominus remisit curiam*). There is not much point having a writ returned in a court where the holder of the court has already said that he cannot or will not hear the case.

Explanation of the writs of entry is more complicated. The key here, at least in Milsom's view, is that writs of entry involve “downward-looking claims.” Unlike the writ of right, novel disseisin, and *mort d'ancestor*, all of which can, and in Milsom's view normally do, involve a claim by a demandant that his lord has done him wrong, writs of entry involve a claim by the lord that the tenant (defendant), having entered, perhaps rightfully, now no longer belongs there: He was a tenant for a term of years and his term has expired (*ad terminum qui preterit*); he was granted the land by the demandant's husband whom she could not resist during his lifetime (*cui in vita resistere non possit*); he was granted the land by the demandant's father, who was insane at the time (*dum non compos mentis*). Central royal court jurisdiction is appropriate in these cases because the demandant lord has chosen, by bringing the writ, not to proceed in his or her own court. This explanation covers almost all, though perhaps not quite all, of the writs of entry.

With this in mind let us look at the most famous clause in the Charter (c. 39)⁵⁰:

No free man [*Nullus liber homo*] is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go against him, nor will we send against him, save by the lawful judgement of his peers or by the law of the land.

There is much that is unclear about this clause, but we can say with reasonable confidence that “lawful judgement of his peers” does not mean jury trial. Petty juries for criminal cases were unknown in England at the time of Magna Carta. They did become a feature of

I remain of the view that this is the most plausible general explanation of why writs *precipe* proliferate after 1216. Entry *sur disseisin* is a problem that probably requires another explanation, as does the development of the writ *nuper obiit*. The latter seems to be an evasion of the clause because it does not use the *precipe* form. For more details, see S. F. C. Milsom, *Inheritance by Women*, in *ON THE LAWS AND CUSTOMS OF ENGLAND* 60, 72–78 (Morris S. Arnold et al. eds., 1981). Milsom’s general explanation for why the lord chooses to bring the case in the central royal courts—that the availability of novel disseisin means that if he ousts the tenant he will immediately be sued by the ousted tenant and will be unable, for procedural reasons, to justify his action—may not cover all the reasons why lords chose to bring writs of entry. It almost certainly explains some, perhaps a great many, of them. Finally, Milsom may have chosen a bad example to illustrate his basic point about novel disseisin, the case of the Countess Amice. MILSOM, *LEGAL FRAMEWORK*, note 43 *supra*, at 45–47. It may be that the politics of that case were such that during the reign of King John there was no way in which the countess could have won. See Paul R. Hyams, *Warranty and Good Lordship in Twelfth Century England*, 5 *LAW & HIST. REV.* 437, 494–96 (1987). Or it may be that the countess did not go through all the right procedural steps. See 2 HUDSON, *OXFORD HISTORY*, note 43 *supra*, 643–44. See generally *id.* at 559–60, 851, which raise issues that cannot be dealt with here.

Holt’s interpretation of c. 34 emphasizes a different point, one not incompatible with this one. HOLT, *MAGNA CARTA*, note 5 *supra*, at ch. 5. Holt emphasizes the unpredictability of claims to hold in chief prior to Magna Carta. Whether John would hear the claim and what he would do if he did was a matter of politics not law. The development of the writ of right *in capite* after 1216 gave those claiming to hold in chief the same writ of course with a fixed fee that had been available on the same terms for those who claimed to hold of them for more than half a century. Holt certainly has examples of John acting in an arbitrary fashion toward those who claimed to hold of him. Holt did not, however, go through the plea rolls systematically looking for claims to hold in chief that were probably initiated by *Glanvill*’s writ of first summons, nor did he come to grips with what happened after Magna Carta with cases brought under the new form of *precipe in capite*, particularly where the tenant claimed royal warranty. Holt’s argument is plausible. I’m not sure that it is quite proved, and perhaps granted the state of the evidence, it cannot be.

50. *Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlaghetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mitemus, nisi per legale iudicium parium suorum vel per legem terre.*

CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 52; translation in *id.* at 53.

criminal trials shortly after John's death, but the way in which that happened shows that Magna Carta had nothing to do with it.⁵¹ We would, I think, be closer to the mark if we remembered that the court of the king in John's time was still conceived of as a feudal court, a court for those who held land from him, the tenants-in-chief. Before a great lord, including the king, acted against one of his tenants, he was supposed to consult with, perhaps even obtain the judgment of, the tenant's peers, i.e., the co-tenants of the tenant whom the lord believed had done wrong.⁵² But if this is the procedure to be followed with tenants-in-chief, what, then, of those who were not tenants-in-chief, for the clause speaks of all free men? For these there were various procedures, established by the "law of the land," of which the most important was that laid down in Henry the Second's Assize of Clarendon of 1166.⁵³ That assize established the ancestor of our grand jury procedure. It is not the least of the ironies of Magna Carta interpretation that the phrase that is normally taken to refer to jury procedure does not; it refers to something more like the modern "due process," and the phrase which does refer to jury procedure, or at least to its ancestor, is now taken as referring to due process.⁵⁴ But if we stop here, we may be missing the point. Does clause 39 represent a commitment to what we would call the rule of law in a feudal context? One certainly may think that it does.

51. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 5, 73, 505–08 (4th ed. 2002). There was some experimentation with the use of sworn verdicts of neighbors in criminal cases prior to the Fourth Lateran Council of 1215. This experimentation probably made it easier for England to accept the decision of the council that the clergy were not to participate in ordeals and to move, instead, to the use of the petty jury. See Roger D. Groot, *The Early-Thirteenth-Century Criminal Jury*, in TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800, at 3 (J. S. Cockburn & T. A. Green eds., 1988); Roger D. Groot, *The Jury in Private Criminal Prosecutions Before 1215*, 27 AM. J. LEGAL HIST. 113 (1983).

52. See the references collected note 54 *infra*.

53. STUBBS, SELECT CHARTERS, note 6 *supra*, at 170–73.

54. This interpretation was first suggested to me by J. E. A. JOLLIFFE, THE CONSTITUTIONAL HISTORY OF MEDIEVAL ENGLAND FROM THE ENGLISH SETTLEMENT TO 1485, at 253–54 (4th ed. 1961) [hereinafter JOLLIFFE, CONSTITUTIONAL HISTORY]. More recent work has convinced me that it is probably right, though we should remember that the *vel* of the Latin is conjunctive ("either or both"). Hudson suggests that the clause gave tenants-in-chief something that ordinary people already had by "the law of land," at least as a legal matter. 2 HUDSON, OXFORD HISTORY, note 43 *supra*, at 852. Holt is unconvinced that the clause accomplished anything, at least in the short run. HOLT, MAGNA CARTA, note 5 *supra*, at 276–79. The history of the idea of *iudicium parium* is old, deep, and obscure. We would certainly be wrong if we confined its use to the feudal courts of lords judging their tenants. See CARPENTER, MAGNA CARTA, note 5 *supra*, at 251–52; 2 HUDSON, OXFORD HISTORY, note 43 *supra*, at 417, 570, 851–52; PETER COSS, LORDSHIP, KNIGHTHOOD, AND LOCALITY: A STUDY IN ENGLISH SOCIETY, C. 1180–C. 1280, at 8 (1991).

So what shall we say about Magna Carta? Is it, as historians of the last generation were inclined to believe, simply an illustration of one of those documents that was pulled out of context and subjected to ever-increasingly anachronistic interpretation in order to make it solve problems that it was never designed to solve? We may point to three characteristics of the document and of the events that surround it that suggest, if they do not dictate, the developments that were to come:

First, there are few references in the Charter to individual grievances. In this it stands in marked contrast to the settlements that the king, or those speaking in his name, had consented to before 1215. There is, for example, the so-called Treaty of Winchester of 1153, which brought Henry II to the throne, or the settlement of 1191, made during Richard the First's reign between John and the king's chief justiciar.⁵⁵ Each of these is characterized by, on the one hand, individual details (so-and-so is to get this castle) and, on the other hand, the broadest of generalities (justice and right ought to prevail, evil customs should be rooted out). Magna Carta, by contrast, operates at a middle level of detail. The death duty for an earldom will be £100, not the earl of Arundel will pay a £100 or all charges will be reasonable.⁵⁶ Finding the right level of generality is an essential if there is to be a rule of law.⁵⁷ The drafters of Magna Carta did not succeed in every clause, but they made a good start. In this regard, we might focus on the happy fortuity of the phrase *nullus liber homo*, "no free man," in the due process clause.⁵⁸ It can hardly be thought that

55. The Treaty of Winchester may be found in 3 REGESTA REGUM ANGLONORMANORUM [Records of the Anglo-Norman Kings] 97–99 (1968), translated in 2 ENGLISH HISTORICAL DOCUMENTS 436–39 (David C. Douglas & George W. Greenaway eds., 2d ed. 1981); the Settlement of 1191 in 3 CHRONICA MAGISTRI ROGERI DE HOUEDENE [Chronicles of Master Roger of Hoveden] 135–37 (W. Stubbs ed., 1870), translated in 3 ENGLISH HISTORICAL DOCUMENTS 66–67 (David C. Douglas & Harry Rothwell eds., 1975). Neither of these documents is included in STUBBS, SELECT CHARTERS, note 6 *supra*; he apparently did not regard them as "constitutional." He did include the Coronation Charter of Henry I, which has some claim to being regarded as a predecessor to Magna Carta in the way in which it is phrased and the topics that it covers. *Id.* at 117–19; see also note 61 *infra*. He also included the two Coronation Charters of Stephen and that of Henry II. Stubbs regarded them as referring back to the charter of Henry I, but in their wording they are mostly broad, and quite vague, generalities. STUBBS, SELECT CHARTERS, note 6 *supra*, at 142–44, 157.

56. MAGNA CARTA, c. 2 (1215).

57. This characteristic of dealing with the middle level of generality was enhanced in the subsequent reissues when all the clauses specific to John were removed (cc. 49, 50, 51, 52, 55, 56, 57, 58, 59), and the provisions concerning the forest, which were scattered and not particularly coherent in the 1215 Charter (cc. 44, 47, 48, 53), were incorporated in a separate and more comprehensive Forest Charter.

58. MAGNA CARTA, c. 39 (1215); note 50 *supra* and accompanying text.

the barons were particularly concerned with every free peasant in England, but the fragmentation of feudal tenures had meant that the greatest baron might hold some land quite far down in the feudal chain. When forced to generalize, the barons perceived that they had a common interest with all free men in the kingdom.⁵⁹

Second, the process that led to the Charter was like that of a parliamentary petition. The barons proposed a written series of articles. The king, after some negotiation, accepted at least some of them, and the whole was issued in a public document. We must be careful. Magna Carta was not a parliamentary statute. Parliament, even in the broad sense of the ancestor of the institution that England has today, does not appear until toward the end of Henry the Third's reign in the 1250s.⁶⁰ Nonetheless, the process that was used in 1215 seems to foreshadow that of parliamentary petition.⁶¹

Third, the barons seem to have been confronting a problem for which we have no better term than the relationship of sovereignty and

59. This interpretation obviously depends on what we imagine the barons thought "*liber homo*" meant. The term clearly goes deeper into the society than the knights, barons, and earls who feature so prominently in the Charter. Whether it was intended to deal only with those who held land by free tenure or whether it was intended to deal only with those who were personally free is unclear. In 1217 the disseisin clause was amended to exclude those, of whatever personal status, who held by unfree tenure. As a very rough estimate, we might imagine that about half the population, perhaps a bit less, was not included among *liberi homines*. See CARPENTER, *MAGNA CARTA*, note 5 *supra*, at 107–15, who emphasizes how much the barons were protecting their rights over the unfree.

60. Of a large literature on this topic, the one that I still find convincing about the date is G. O. SAYLES, *THE KING'S PARLIAMENT OF ENGLAND* (New York, 1974).

61. This argument is made, with considerably more subtlety, in J. C. Holt, *Magna Carta and the Origins of Statute Law*, 15 *STUDIA GRATIANA* 487 (1972), reprinted in J. C. HOLT, *MAGNA CARTA AND MEDIEVAL GOVERNMENT* 289, 289–307 (1985) [hereinafter HOLT, *MAGNA CARTA AND MEDIEVAL GOVERNMENT*]. How close the analogy is depends on how we characterize the various surviving preliminary documents for Magna Carta, when we date them, and when we imagine that they might have been used. Holt's introduction to his edition of the "Articles of the Barons" gives a good sense of the complexities involved. HOLT, *MAGNA CARTA*, note 5 *supra*, at 356–59; the original of the Articles may be viewed online at BRITISH LIBR., http://www.bl.uk/manuscripts/FullDisplay.aspx?Source=BrowseScribes&letter=A&ref=Add_MS_4838 [<http://perma.cc/W9MA-LU9U>]. This is not a problem that we are going to solve in a footnote. Suffice it to say here that the simple analogy, that the Articles are the petition and the official copy of the Charter the statute, works only in a quite extended sense. The Articles purport to be something to which the king has already agreed (and which he sealed), not a petition that the king agree to something. If we move back further in the chain of preliminary documents to the "Unknown Charter," we encounter the same problem. This curious document combines an imperfect transcription of the Coronation Oath of Henry I and a series of clauses in the same format as the Coronation Oath that are said to have been agreed to by John; *The Unknown Charter*, in HOLT, *MAGNA CARTA*, note 5 *supra*, at 345–55 app. 4 (edited with an introduction).

the rule of law. They would have understood neither term.⁶² Let us pose a question that they would have understood: How do you make the lord who has no lord follow the law? The problem was certainly not solved by Magna Carta, but a perception of the problem may be there.

It has even been suggested that there are some remarkable parallels in the intellectual background surrounding the Charter and that surrounding the confrontation between James I and, particularly, Charles I and Parliament in the seventeenth century.⁶³ I can only recite a few of them here:

(1) Both efforts seem to have begun with considerable interest in the “ancient law,” i.e., Anglo-Saxon law, law that antedated the Norman Conquest. A number of manuscripts of the *Leges Edwardi Confessoris* and the *Leges Henrici Primi* date from the end of the twelfth century. These could not possibly have been relevant for contemporary legal purposes, but they may have been relevant to an ongoing political debate.⁶⁴

(2) Constitutional thought in the seventeenth century was characterized, at least in some circles, by the story of the Norman yoke, the story that the Normans destroyed the pristine liberty of the Anglo-Saxons. There are some striking parallels to this story in chronicle accounts roughly contemporary with Magna Carta.⁶⁵

(3) Magna Carta appears at the beginning of statute books in the seventeenth century. It had been there since the beginning of the fourteenth. In the early thirteenth century, it appears at the end of books of collections of royal coronation charters. In the one case we have the beginning of a process; in the other an end. Neither is quite right but both show the importance attached to the document.⁶⁶

(4) Magna Carta speaks of “custom.” In the thirteenth and seventeenth centuries, as today, “custom” can mean “tallage,” like

62. That does not mean that no one at the time could have understood the problem more theoretically. As is well known, the treatise called *Bracton*, most of which seems to have been written within twenty years of the date of Magna Carta, has a number of passages that pose the problem quite starkly, though, of course, it does not use the terms “sovereignty” and “rule of law.” 2 BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIE, fols. 7a, 34a–34b, 55b–56a, 107a–107b, translated in 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 33, 109–10, 166–67, 304–06 (G. Woodbine ed., S. Thorne trans., 1968) [hereinafter 2 BRACTON].

63. Most of this is derived from J. C. HOLT, *The Origins of the Constitutional Tradition in England*, in HOLT, MAGNA CARTA AND MEDIEVAL GOVERNMENT, note 61 *supra*, at 1–22.

64. See HOLT, *supra* note 63, at 12–18.

65. See *id.* at 3–12.

66. See *id.* at 14–15, 18–19.

the customs that you have to pay when you bring goods into the country from abroad. “Custom” also means customary law or practice. These two ideas came together in Magna Carta. In the debates in the seventeenth century they came together again over the king’s power to levy customs outside of Parliament.⁶⁷

I promised at the beginning that I would try to suggest a meaning for Magna Carta that would say that both Stubbs and the revisionists of the last generation were right. There is far less agreement among historians about this than there is about what I said previously, but let me close by at least offering it. Stubbs exaggerated the evils of King John. This made it easier for him to see the connection between the events of 1215 and those of 1642. A dramatically bad king produced something totally out of the context of the time. The revisionists exaggerated John’s good qualities. This made it easier for them to see Magna Carta as a basically feudal document and hence irrelevant to the events of 1642. Modern historians see John as a middling-run bad king and agree with the previous generation that we must interpret the Charter in the light of the conceptual economy of the time, not that of 1642. The question is does that deprive us of any continuity, except in the broad sense that we have just suggested?

It has recently been suggested, partly as a result of our new understanding of Magna Carta, that Henry II was not trying to destroy lords’ courts, much less “the feudal system,” whatever that might mean.⁶⁸ His vision, in this view, was much narrower. He offered an appellate jurisdiction in his courts in order to enforce a body of customary rules that everyone agreed were what the lords’ courts ought to be following but which sometimes they failed to follow. In short, all that Henry II was trying to do was to make the system work in its own terms, to make the barons obey the rules as all agreed they were. Everyone agreed that someone should not be disseised “unjustly and without a judgment,” to quote the language of the assize of novel disseisin.⁶⁹ The question was how to prevent that from

67. See *id.* 19–21. Holt is too cautious to draw the connection with the debate over customs on imports in the seventeenth century, but the possibility of a connection seems to be there.

68. What follows is a crude attempt to summarize the views of S. F. C. Milsom. They deserve better than this, and perhaps the best way to get at them is to read his most abstract statement of them: *A NATURAL HISTORY OF THE COMMON LAW* (2003) and two papers that he wrote at the end of his career when he finally came out and said more explicitly what his disagreements were with F. W. Maitland, *Maitland*, 60 *CAMB. L.J.* 265 (2001); S. F. C. Milsom, ‘*Pollock and Maitland: A Lawyer’s Retrospect*, in *THE HISTORY OF ENGLISH LAW: CENTENARY ESSAYS ON “POLLOCK AND MAITLAND”* 243 (1996).

69. GLANVILL, note 43 *supra*, at 167.

happening. Now if this was Henry's purpose, then Magna Carta becomes more understandable. The barons are saying to the king, "You are making us obey the rules; you have to obey the rules too."

The problem was devising a mechanism for making this happen, and such a mechanism was hard to come by in the feudal world.⁷⁰ So just as Henry the Second's attempt to make the feudal world work in its own terms had unintended consequences, so too the barons' attempts to make the feudal world work in its own terms from their point of view was to have unintended consequences. It took five centuries to work it out, but once posed the problem would not go away. Thus, Stubbs was not totally wrong in seeing Magna Carta as having something to do with Parliament or even "the whole of English constitutional history." What he was wrong about was thinking that the barons saw what he, with the advantage of hindsight, saw.

Magna Carta in a Wider Contemporary Context

There is a final point about Magna Carta suggested by the most recent work: Stubbs and many more recent historians saw Magna Carta as a uniquely English document. They did not look very far. Between 1183 and 1283 the following charters of liberties were proposed or adopted on the European Continent⁷¹:

- Treaty of Constance (1183)
- Charter of Alfonso IX of León (1188)
- Draft charter of Peter II of Aragon (1205)
- Charter of Frederick II (1220)

70. The mechanism that they did choose was a council of twenty-five barons who would act as a kind of appellate court or board of directors over the king (c. 61). This didn't work, and it was abandoned in the 1216 reissue. It may, however, be what is being referred to in a mysterious passage in *Bracton* where the author says that if the king is "without a bridle," the earls and barons ought to put a bridle on him. 2 BRACTON, note 62 *supra*, at 110 ("Et ideo si rex fuerit sine fræno, id est sine lege, debent [comites et barones] ei frænum apponere . . ."). Similar mechanisms were tried at the time of the Barons' Wars in the mid-thirteenth century and with the Ordinances of 1311. Neither of these mechanisms worked either, and the ultimate solution, if such it can be called, proved to be a combination of parliament and the permanent or semi-permanent bureaucracy. (The bibliography on this topic is very large, particularly if we reach for "the ultimate solution" in the Tudor and Stuart periods or beyond. One way of getting at it is to start with the older "constitutional" histories, e.g., JOLLIFFE, *CONSTITUTIONAL HISTORY*, note 54 *supra*, and DAVID LINDSAY KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485* (9th ed. 1969), and then fill in with the "Further Reading" suggested in MARTIN LOUGHLIN, *THE BRITISH CONSTITUTION: A VERY SHORT INTRODUCTION* (2013)).

71. This list is drawn from HOLT, *MAGNA CARTA*, note 5 *supra*, at 50–52.

“Golden Bull” of Hungary (1222)
 Charter of Henry VII of Germany (1231)
 Charters after the Sicilian Vespers (1282–83)

More controversially, R. H. Helmholz has gone through the provisions of Magna Carta and has argued that no fewer than forty of the sixty-three provisions, almost two-thirds, are “congruent” with the learned law, the Roman and canon law formally taught in what were rapidly becoming universities.⁷² “Congruent” is the word that he uses.⁷³ In a few cases the terminology used is that of Roman and canon law; in other cases there are ideas that appear in Roman and canon law and are not found in native English sources before 1215; in many cases it is an idea that can be found in both types of sources, some quite specific some more general. An example of shared terminology might be the guarantee of the *libertas ecclesiae*, found in clauses 1 and 60, and the specific guarantee of freedom of ecclesiastical elections found in clause 1. An example of the ideas appearing in Roman and canon law but not in earlier English sources might be the notion found in clause 9 that one must proceed against the principal debtor before proceeding against his sureties. An example of a specific idea shared by Roman and English law might be the removal of obstructions to navigation in the Thames and Medway (c. 33), found in London charters prior to 1215, but extended to the whole kingdom in Magna Carta. An example of a more general shared idea might be the commitment to due process in clause 39.

I have said that Helmholz’s ideas are controversial. Some of the criticisms seem to me to mistake his point. It is certainly true that the fact that clause 9 is not phrased in the way in which similar ideas are found in texts of Roman and canon law is some evidence that it is not directly and consciously borrowed from those laws, but the same author who makes this point goes on to show that a decretal letter directed to England had incorporated the same doctrine.⁷⁴ Ideas can influence shorn of the texts in which they are incorporated,

72. Richard H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297, 355, 358, 363 (1999).

73. *Id.*

74. Thomas J. McSweeney, *Magna Carta, Civil Law, and Canon Law*, in *MAGNA CARTA AND THE RULE OF LAW* 287–91, 302–04 (Daniel Barstow Magraw et al. eds., 2014). The author’s statement on the last page that there are no surviving English church court records from the time of Magna Carta is not quite right. See *SELECT CASES FROM THE ECCLESIASTICAL COURTS OF THE PROVINCE OF CANTERBURY* pt. A, 1–48 (N. Adams & C. Donahue eds., Selden Society no. 95, 1981). None discovered so far, however, deals with the issue that McSweeney mentions.

particularly if the gist of the idea is transmitted orally. Others seem to have taken the principal point of the article to be the suggestion in it that we might look to Langton and his *familia* as being among the people who might have brought knowledge of Roman and canon law to the negotiating table.⁷⁵ Hence, another author is at pains to limit what he describes as “influence” to a few clauses in the Charter, mostly those that concern the clergy or deal with specific canonical institutions, such as the church supervision of the distribution of chattels of the deceased.⁷⁶ He is quite right that the word “*delictum*” (c. 20), which is not in a clause concerning the clergy and is an unusual word in the technical terminology of native English law at the time, could have been derived from the Bible or be a back formation from French “*délit*,” but he fails to explain how “*appellatione remota*,” a technical term in canon law, made it into the Articles of Barons (c. 25), also a provision that does not concern the clergy.⁷⁷ (The phrase was eliminated in the parallel clause 52 of the Charter, presumably as being totally inappropriate in an English context.)

More basically, “congruence” and “influence” are not the same thing, particularly if one will see influence only where one can clearly see conscious borrowing, as Helmholz’s critics seem to be assuming. But influence and borrowing are not necessarily the same thing. Influence can be, and frequently is, mutual. Congruence and

75. My own view, which certainly could change, is that Langton was probably not directly involved in drafting Magna Carta, except for cc. 1 and 60, and he may well have seen to it that some references to him were taken out of the Articles of the Barons. See note 16 *supra*. That probably makes it unlikely that members of his *familia* were so involved. Knowledge, however, of the *ius commune* was widespread in England in this period, and that knowledge was not confined to the clergy. Geoffrey fitz Peter, the chief justiciar until his death in 1213, was very much a layman, but if he was, as many suspect, the author of *Glanvill*, he had some acquaintance with Roman and canon law and was in a position to find out more. My own suspicion, moreover, is that the actual drafting of the Charter was not done by the principal players, the men whose names appear in the Charter or who ultimately became members of the council of twenty-five, but by subordinates, some of whom could have been quite learned, perhaps more learned than their superiors. Many of these, of course, would have been clergy. This was a period in which the overlap between a clerk, in the sense of someone who writes something, and a cleric, in the sense of someone who was at least in minor orders, was almost complete.

76. John Hudson, *Magna Carta, the ius commune, and English Common Law*, in *MAGNA CARTA AND THE ENGLAND OF KING JOHN*, note 3 *supra*, at 102–05.

77. *Id.* at 104, 106, 108–10. These are not the only points that McSweeney and Hudson make, but they are the ones that take up the most space in their articles. In both cases, in my view, they support the point that the *ius commune* is probably not the only thing that explains cc. 9 and 20, but they do not seem to exclude the possibility that it is one of the things that does. It is only if one adopts a particularly rigorous form of Ockham’s Razor that one can exclude what seems to be a relevant element of context. See further the next paragraph.

influence also blend, particularly where one is dealing with higher levels of abstraction, such as the due process clause of the Charter, or the notion of majority rule (c. 61), or the idea that one authorized to hear a case might also be authorized to delegate that function (c. 55). Congruence without a hint of influence can also occur when the structures of a society and the background ideas are such that men faced with a similar problem come up with the same or similar solutions.⁷⁸ Nobody is suggesting—nor should anyone suggest—that the draft charter of Peter II of Aragon of 1205 influenced the making of Magna Carta, or that Magna Carta influenced the Golden Bull of Hungary of 1222, but the fact that three European kingdoms thought about, or adopted, charters of liberties within seventeen years of each other calls for an explanation.

The congruence is there. That would suggest, once more, that Magna Carta was very much a document of its time. It also suggests, however, that we make a serious mistake if we think that the conceptual economy of customary feudal law is the only conceptual economy of the time and the only one reflected in the document.⁷⁹

78. Helmholtz himself makes this point quite nicely in *THE IUS COMMUNE IN ENGLAND: FOUR STUDIES* 240–43 (2001).

79. A recent and still-unpublished paper by Kenneth Pennington makes the same point by carefully examining the language of the first translation of Magna Carta into French. Kenneth Pennington, *Reform in 1215: Magna Carta and the Fourth Lateran Council*, <http://scholarship.law.edu/cgi/viewcontent.cgi?article=1929&context=scholar> [<http://perma.cc/2GGD-UUS9>] (unpublished paper given at the Dartmouth College Conference on Magna Carta, Nov. 7, 2015).