6-1-2016

The Conservative Magna Carta

Mary Ziegler

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.unc.edu/nclr/vol94/iss5/11

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
INTRODUCTION

For much of American history, Magna Carta has enjoyed almost as much popularity as the Constitution. Starting in the 1980s, socially conservative movements have increasingly made Magna Carta the centerpiece of their constitutional discourse. Pro-life activists weave Magna Carta into arguments for fetal personhood and the rights of clinic picketers. Religious conservatives make Magna Carta a focal point in the case against constitutional rights to marry and for

* © 2016 Mary Ziegler.

** Mary Ziegler is the Stearns Weaver Miller Professor at Florida State University College of Law. Special thanks to the staff of the North Carolina Law Review for their help in editing this Article.

2. See infra Section I.A–B.
3. See infra Section I.A–B.
religious liberty as a valid basis for refusing service to gays and lesbians.4

By studying the recent history of these arguments, this Article explores how and why Magna Carta has become a potent symbol of conservative constitutionalism. It argues that, for conservative movements, Magna Carta works as part of a form of ultra-originalism—an argument for the importance of history and tradition in constraining judicial discretion.5 Moreover, conservatives use Magna Carta as an alternative to a progressive vision centered on the Reconstruction Amendments to the Constitution. In particular, social conservatives rely on Magna Carta to shift debate away from the liberty and equality guaranteed by the Fourteenth Amendment. As symbolized by Magna Carta, conservatives argue that American constitutional tradition rests not on expanding liberty but on resisting the tyranny of the government and the courts.

This Article proceeds in three parts. Part I canvasses the rise and spread of arguments based on Magna Carta within conservative movements. Part II analyzes the purpose of Magna Carta as a symbol for activists opposing legal abortion or gay rights, and a brief conclusion follows.

I. AN ALTERNATIVE TO THE RECONSTRUCTION AMENDMENTS

Magna Carta’s actual history is far more complicated than the account of resistance to tyranny championed by movement conservatives. After losing many of his territories in France in the early thirteenth century, King John drained many of his kingdom’s resources to try to restore what he had lost.6 In January 1215, a group of barons, angry at what they viewed as John’s abuse of power, formed a sworn association to demand satisfaction of their grievances and called for a return to the rights expressed in the charter of Henry

4. See infra Section I.C.
5. For further description of originalism, see, for example, Nelson Lund, The Second Amendment, Heller, and Originalist Jurisprudence, 56 UCLA L. REV. 1343, 1372 (2009) (“The core of originalism is the proposition that text and history impose meaningful, binding constraints on interpretive discretion . . . ”); Lawrence B. Solum, We Are All Originalists Now, in CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 4 (Robert W. Bennett & Lawrence B. Solum eds., 2011) (arguing that the fixation thesis—which holds that the textual meaning of the Constitution was fixed at the time of ratification—and the textual constraint thesis—which argues that the original meaning of the text has legal force—“are accepted by almost every originalist thinker”).
The conflict between the king and the barons threatened to turn into a civil war, and so to defuse tensions, King John agreed to limit taxes and other feudal payments to the crown, curb illegal imprisonment, and expand access to swift judgment. These agreements formed the basis of what we know today as Magna Carta. While the agreement between John and the barons quickly collapsed, Magna Carta as a symbol endured. In 1628, Sir Edward Coke, one of the most prominent jurists of his era, penned an influential account of the document’s origins and reach. Coke argued that the barons who resented John’s tyranny successfully demanded the restoration of precious common law rights. In recent years, revisionist historians have questioned Coke’s analysis, claiming that John was at least partly the victim of circumstances created by the father and brother who ruled before him. Nevertheless, Coke’s account has had tremendous staying power, making Magna Carta a symbol of the hope that “a simple piece of parchment delineating the legal limits of executive power can tame even the most oppressive tyrants.”

This Part chronicles the rise of Magna Carta as a tool in movement conservative constitutionalism. Section I.A explores the constitutional strategies of right-leaning social movements in the 1970s, using the pro-life movement as a case study of how some conservative organizations originally turned to the Fourteenth Amendment in framing their demands. Section I.B traces the reasons pro-life activists have, to some extent, turned away from this tactic and adopted Magna Carta as an alternative symbol of the cause. Studying struggles over campaign finance, same-sex marriage, and

---
7. See ARLIDGE & JUDGE, supra note 6, at xii.
8. See id.; Vernon Bogdanor, Magna Carta, the Rule of Law and the Reform of the Constitution, in MAGNA CARTA AND ITS MODERN LEGACY, supra note 1, at 23, 23–24.
9. Melton & Hazell, supra note 6, at 3.
10. For analysis of Coke’s account, see Lettow Lerner, supra note 1, at 79–80; John Witte, Jr., Towards a New Magna Carta for Early Modern England, in MAGNA CARTA, RELIGION AND THE RULE OF LAW 109, 113 (Robin Griffith-Jones & Mark Hill eds., 2015).
11. See Melton & Hazell, supra note 6, at 4. For more on Coke’s influence on the understanding and veneration of the charter, see, for example, HOLT, supra note 1, at 34 (arguing that lawyers “[l]ed by Sir Edward Coke” “have been responsible for much of [its] survival and for the residual veneration of the Charter”); PETER LINEBAUGH, THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL 78 (2008) (explaining that Coke helped to transform Magna Carta from a “medieval document rarely cited . . . into a modern constitutional law”).
12. For examples of these histories, see generally HOLT, supra note 1. See also RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES 34 (2003).
conscience-based objections, Section I.C examines the spread of conservative uses of Magna Carta in subsequent decades.

A. Roe v. Wade and Magna Carta’s Broad Pre-1980s Appeal

Magna Carta did not originally serve as a symbol for the constitutional ambitions of socially conservative movements. For much of the twentieth century, Magna Carta undeniably had a broad appeal, even if the precise influence of the charter remains hard to measure. Several American colonies borrowed from the text of the charter in writing their state constitutions, and language related to Magna Carta remains in these states’ constitutions to this day. The charter’s indirect influence is much greater. The drafters of the Bill of Rights drew on English common law and statutes rooted in Magna Carta. Often, American leaders explicitly invoked Magna Carta as a source of constitutional meaning, even when they did not refer to the charter’s text.

If Magna Carta took on any partisan resonance, it was far from obvious that the charter would later become largely associated with the American right. For much of the 1960s and 1970s, the charter instead appeared in amicus briefs justifying new procedural protections for criminal defendants. The American Civil Liberties Union (“ACLU”) frequently used Magna Carta to illuminate the dangers of overzealous criminal prosecution and to justify protections for those accused of committing a crime. In 1965, for example, the

15. Cf. Melton & Hazell, supra note 6, at 14 (explaining that Magna Carta’s influence was mostly symbolic).
16. See id. at 9–10.
17. See id. at 10.
18. See id.
19. See id. at 13. For example, at the time of the founding, both Federalists and Anti-Federalists invoked Magna Carta in support of their positions without specifically mentioning the text of the charter. See id. at 13–14. More recently, President Barack Obama focused on Magna Carta in inaugurating “Law Day,” a holiday dedicated to the rule of law. See Proclamation No. 9265, 80 Fed. Reg. 25,579 (Apr. 30, 2015).
20. For examples of the ACLU’s use of Magna Carta in the period, see Brief for ACLU, Amicus Curiae at 2, Malloy v. Hogan, 378 U.S. 1 (1964) (No. 110); Brief of the Florida Civil Liberties Union & the ACLU, Amici Curiae at 7, Hoyt v. Florida, 368 U.S. 57 (1961) (No. 31); Brief of the Northern California Branch of the ACLU as Amicus Curiae in Support of Appellant at 14, Ex parte Endo, 323 U.S. 283 (1944) (No. 70).
21. See supra note 20 and accompanying text.
organization referred to Magna Carta in challenging the constitutionality of using the death penalty in cases of statutory rape. Later, in *Klopf v. North Carolina*, a 1967 case, the ACLU pointed to Magna Carta in defending Professor Peter Klopf after he was arrested for participating in a sit-in in Chapel Hill, North Carolina. Klopf joined others in protesting the segregation of public accommodations in the state, and as a result, authorities charged him with criminal trespass. After the jury failed to reach a verdict in Klopf’s first trial, prosecutors informed him that they were suspending the proceedings against him but reserved the right to bring him to court again at any time. Before the Supreme Court, the ACLU argued that the State of North Carolina’s decision violated the right to a speedy trial “first given effect in the Magna Carta” and “cherished by . . . [the] American patriots and lawyers” who drafted the Constitution.

The NAACP drew on Magna Carta in similar ways. For example, in *Boykin v. Alabama*, the organization challenged the death sentence imposed on Earl Boykin after he pleaded guilty to five counts of robbery. State law allowed juries almost unfettered discretion in deciding on a proper punishment, and in Boykin’s case, the jury opted for the death penalty. The NAACP argued, among other things, that the statute under which Boykin was sentenced

---

25. See *Klopf*, 386 U.S. at 217. The *Klopf* Court ultimately held that North Carolina’s decision violated the right to a speedy trial. See id. at 213.
26. Id. at 213.
27. Motion of the ACLU & the ACLU of North Carolina for Leave to File a Brief as Amici Curiae & Brief Amici Curiae, supra note 24, at 12. The ACLU referenced Chapter 40 of Magna Carta in support of its position. See id. (“The right to a speedy trial is of long standing. Its basic nature is disclosed by its deep roots in the early common law. It was first given effect in the Magna Carta where it was written ‘To no one will we sell, to no one deny or delay, right or justice.’ ” (quoting MAGNA CARTA ch. 40 (1215), reprinted and translated in DAVID CARPENTER, MAGNA CARTA 52–53 (Penguin Classics 2015))).
29. See id. at 240; Brief for the NAACP Legal Defense & Educational Fund, Inc. & the National Office for the Rights of the Indigent, as Amici Curiae at 63, *Boykin*, 395 U.S. 238 (No. 642).
violated the Due Process Clause.\textsuperscript{31} Magna Carta figured centrally in this argument. The NAACP explained: “For, whatever else ‘due process of law’ may encompass, . . . [it requires] some adherence to the principle established by Magna Carta that the life and liberty of the subject should not be taken but by the law of the land.”\textsuperscript{32} At a time when the Warren Court dramatically expanded the procedural protections available to criminal defendants,\textsuperscript{33} the ACLU and NAACP insisted that the rights afforded defendants were anything but novel.

Progressive social movements made Magna Carta a valuable part of their rhetorical arsenal. It was not obvious then that burgeoning conservative groups would later downplay arguments for expanding liberty or equality under the Fourteenth Amendment. Indeed, in the 1970s, the pro-life movement—one of the pioneers of later arguments centered on Magna Carta—based its constitutional strategy on the Fourteenth Amendment.\textsuperscript{34} After the Supreme Court decided \textit{Roe v. Wade},\textsuperscript{35} Robert Destro, a prominent pro-life law professor, condemned the justices for “reject[ing] the egalitarian philosophy embodied in the Declaration of Independence and the [F]ourteenth [A]mendment.”\textsuperscript{36}

Pro-lifers argued first that the Due Process Clause recognized an implied right to life. In the mid-1970s, Americans United for Life, a leading pro-life public-interest litigation organization, argued that the right to life counted among the “natural rights” recognized in the Declaration of Independence and incorporated implicitly into the Constitution.\textsuperscript{37} The United States Catholic Conference similarly reasoned in 1976: “The granting of legal personhood . . . is . . . properly the product of a constitutional analysis

\textsuperscript{31} See Brief for the NAACP Legal Defense & Educational Fund, Inc. & the National Office for the Rights of the Indigent, as Amici Curiae, \textit{supra} note 29, at 63.

\textsuperscript{32} Id. The Court in \textit{Boykin} ultimately reversed the defendant’s conviction on other grounds, holding that the trial court erred by failing to ensure that Boykin’s guilty plea was knowing and voluntary. See \textit{Boykin}, 395 U.S. at 244.


\textsuperscript{35} 410 U.S. 113 (1973).

\textsuperscript{36} Robert A. Destro, \textit{Abortion and the Constitution: The Need for a Life-Protective Amendment}, 63 \textit{CALIF. L. REV.} 1250, 1327 (1975).

\textsuperscript{37} See \textit{ZIEGLER, supra} note 34, at 39.
which recognizes the existence of rights which must be said to be implicit . . . .”

Pro-life activists also used the Equal Protection Clause in service of their cause. Attorneys like Robert Byrn compared fetuses to discrete and insular minorities, explaining that unborn children were defenseless, subject to discrimination (in the form of abortion), and defined by a trait (residence in the womb) that they were powerless to change. Activists recognized that the Equal Protection and Due Process Clauses applied only to legal persons, and movement leaders used the Equal Protection Clause as a vehicle for proving that “the unborn child is a human being, and it is difficult to conceive of a human being who is not a person.”

The movement’s major post-Roe initiative, the push for a fetal-protective constitutional amendment, centered on the claim that the progressive Reconstruction Amendments protected an unborn child’s right to life. For example, in testifying in favor of an amendment that would have banned abortion, Joseph Witherspoon, a law professor and board member of the nation’s largest pro-life group, focused on the Thirteenth and Fourteenth Amendments. Witherspoon testified that far from merely abolishing slavery, those amendments “sought to protect every human being, including unborn children, . . . in the enjoyment of the fundamental human rights to life, liberty, and the pursuit of happiness.”

Non-lawyers frequently compared the Roe decision to Dred Scott v. Sandford, the now-notorious ruling holding that African Americans could not be citizens. However, for pro-lifers in the 1970s, a comparison to Dred Scott served not to condemn the overreaching of the courts but to connect the antiabortion cause to


40. Byrn, Abortion in Perspective, supra note 39, at 134. For more on the strategy of using the Equal Protection Clause as a vehicle for personhood arguments, see Ziegler, supra note 39, at 886–90.

41. See ZIEGLER, supra note 34, at 38–44.


43. Id.

44. 60 U.S. 393 (1857).

45. See ZIEGLER, supra note 34, at 41, 45.
the fight for abolition and racial equality. 46 Dr. John Willke, a leading abortion opponent, explained in Congress: “[At the time of Dred Scott] discrimination was on the basis of skin color; today it is on the basis of place of residence—living in the womb.”47

In the 1970s, pro-lifers’ reliance on the Reconstruction Amendments made legal and political sense. For almost a decade after Roe, neither political party had taken a clear stand on abortion.48 Pro-lifers tried to identify allies on the right and left.49 By 1980, however, the Republican Party platform included an endorsement of a fetal-protective constitutional amendment and called for the appointment of federal judges who opposed abortion.50 By contrast, the Democratic Party platform treated the right to privacy as synonymous with reproductive liberty.51 The religious right offered abortion opponents the most logical source of political influence and financial support.52

As pro-lifers came to view the Democratic Party as a political threat, it became incongruous for them to rely on an expansive interpretation of the Fourteenth Amendment. To be sure, the

46. See id. at 45.
47. Proposed Constitutional Amendments on Abortion: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, supra note 42, at 408 (testimony of Dr. John C. Willke and Barbara Willke, Cincinnati, Ohio, Right to Life Society).
49. See Ziegler, supra note 34, at 175–78.
52. See Ziegler, supra note 34, at 201–05.
movement’s previous strategy had not paid off, but the timing and nature of the movement’s shift in strategy illustrate the significance of political pressure during this period. The Court’s rejection of the movement’s Fourteenth Amendment arguments in Roe and other cases of the 1970s did nothing to immediately dissuade movement members from relying on the Fourteenth Amendment.\textsuperscript{53} When the time came to look for fresh strategies, there was nothing inevitable about the movement’s rejection of broad interpretations of the Fourteenth Amendment. Indeed, within movement circles, related interpretations of the Fourteenth Amendment recognizing an implied right to life and fetal personhood persist to this day.\textsuperscript{54}

The politics of the 1980s made it costly for pro-lifers to emphasize these arguments. Under President Ronald Reagan, the Republican Party denounced the federal courts’ broad interpretation of the Due Process and Equal Protection Clauses as a key example of judicial activism.\textsuperscript{55} In 1981, for instance, William French Smith, the attorney general during Reagan’s first term, pointed to the Court’s Fourteenth Amendment decisions as evidence of unbridled judicial activism.\textsuperscript{56} Soon, leading pro-life activists like Dr. John Willke of the National Right to Life Committee condemned Roe’s interpretation of the Fourteenth Amendment not for ignoring the unborn but for being “the most extreme example[] of ‘judicial activism’ . . . in this century.”\textsuperscript{57} While movement conservatives would still point to the Fourteenth Amendment in support of their arguments, activists criticized the Court’s interpretation of the amendment and asserted that Magna Carta illuminated a more principled reading of the constitutional text.

B. The Pro-Life Movement Turns to Magna Carta as an Alternative

As abortion opponents downplayed arguments based on the Fourteenth Amendment, some movement members began searching for an alternative symbol of the movement’s cause. In 1989, James Joseph Lynch, Jr., an attorney affiliated with a variety of California-
based antiabortion groups, first looked to Magna Carta as a supplement to existing arguments about the right to life.\textsuperscript{58} Lynch submitted briefs in a pair of cases, \textit{Ohio v. Akron Reproductive Health Services}\textsuperscript{59} and \textit{Hodgson v. Minnesota},\textsuperscript{60} in which Magna Carta figured centrally.\textsuperscript{61} Lynch insisted that Magna Carta served as guidance about the original meaning of the Fourteenth Amendment.\textsuperscript{62} “The concept to protect a person from due process in American Jurisprudence is derived from the Magna Carta,” Lynch explained.\textsuperscript{63} “The 5th Amendment prohibits the taking of life without due process of law, and it is enforced and made binding against the states by the 14th Amendment.”\textsuperscript{64} Because Magna Carta broadly defined and protected persons, as Lynch reasoned, the Fourteenth Amendment allowed abortion restrictions designed to safeguard fetal life.\textsuperscript{65} In Lynch’s view, Magna Carta revealed the meaning of personhood recognized by the Fourteenth Amendment.

Arguments involving Magna Carta became more visible after the intensification of anti-clinic violence in the late 1980s.\textsuperscript{66} As long as freestanding abortion clinics were in operation, anti-abortion picketers flocked to them to protest outside.\textsuperscript{67} However, in the late 1980s, Randall Terry, a veteran of anti-clinic pickets, called for a more organized, explicitly Christian brand of direct action protest—


\textsuperscript{60} 497 U.S. 417 (1990).

\textsuperscript{61} See supra note 58.

\textsuperscript{62} See supra note 58 and accompanying text.

\textsuperscript{63} Brief of James Joseph Lynch, \textit{Akron II}, supra note 58, at 21.

\textsuperscript{64} Id.

\textsuperscript{65} See id.


one that would block access to clinics entirely. Arguing that the “higher law” trumped the laws of man, Terry explicitly invited protestors to break local laws on trespassing. Terry’s organization, Operation Rescue, would launch major blockades designed to close abortion clinics in major urban centers. The organization became known for mass arrests of protestors, explicitly evangelical Protestant rhetoric, and claims that protestors could justifiably break trespassing laws to reject what they saw as a tyrannical Roe decision.

Inside and outside of court, self-proclaimed rescuers put Magna Carta to new rhetorical use. One prominent example surfaced when the National Organization for Women (“NOW”) sued a group of antiabortion protestors called the Pro-Life Action Network (“PLAN”) under the Racketeering Influenced and Corrupt Organizations Act (“RICO”). In NOW v. Scheidler, NOW alleged that PLAN and later Operation Rescue had organized a nationwide conspiracy to block access to abortion clinics by threatening or using violence.

---


73. 510 U.S. 249 (1994).

74. Id. at 253.
From the beginning, rescuers insisted that they had committed no criminal act in exercising their right to free speech.\textsuperscript{75} At first, these arguments seemed to make little headway. In 1994, the Court held unanimously that RICO liability did not require an economic motive.\textsuperscript{76} After a seven-week trial on remand, a jury found that the defendants had violated the civil provisions of RICO,\textsuperscript{77} and the blockaders unsuccessfully appealed to the Seventh Circuit.\textsuperscript{78} In seeking review at the Supreme Court, Catholics for Life, a direct-action group, described Magna Carta as a source of meaning for the U.S. Constitution.\textsuperscript{79} To pro-life protestors, Magna Carta stood for the basic guarantees available in any civilized society. Rescuers argued that the charter shed light not only on the original meaning of the Constitution, but also on the basic purpose of constitutional order.\textsuperscript{80} Rather than carving out evolving forms of equality or liberty, the Constitution, like Magna Carta, should stand between individual dissenters and “sheer brutal power.”\textsuperscript{81}

Ultimately, the effort to hold blockaders liable under RICO fell short.\textsuperscript{82} However, as the Scheidler litigation suggested, using Magna Carta as a rhetorical tool appealed to a variety of right-wing groups questioning the legitimacy of the federal government. Magna Carta

\textsuperscript{75} See, e.g., Nat’l Org. for Women, Inc. v. Scheidler, 968 F.2d 612, 621 (7th Cir. 1992) (relating the defendants’ First Amendment claims).
\textsuperscript{76} See Scheidler, 510 U.S. at 257.
\textsuperscript{77} Nat’l Org. for Women v. Scheidler, 396 F.3d 807, 809 (7th Cir. 2005).
\textsuperscript{78} Id. at 812–17.
\textsuperscript{80} See, e.g., Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at 14, Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357 (1997) (No. 95) (“If this decision is allowed to stand, then no protest on a public sidewalk or street is any longer protected by the First Amendment of the Federal Constitution. We will have stepped back over two hundred years in the development of civil rights, and arguably reverted to a standard of law that predated the Magna Carta. It should be noted that the Magna Carta did permit dissent and protest. Under the Pro-Choice En Banc Panel’s decision, we revert to a time when sheer brutal power ruled.”).
\textsuperscript{81} Id.
\textsuperscript{82} In 2003, the Court held that the defendants’ actions did not rise to the level of extortion under RICO. Scheidler, 537 U.S. at 397. On remand to the Seventh Circuit, NOW argued that plaintiffs’ claims under the Hobbs Act survived the Supreme Court’s 2003 decision. The Seventh Circuit remanded to the district court to consider the Hobbs Act argument, Scheidler, 396 F.3d at 811, but Scheidler and his co-defendants appealed to the Supreme Court, arguing that the Seventh Circuit had ignored the Supreme Court’s recent ruling. On appeal, Scheidler argued that the Hobbs Act did not cover nonextortive violence, and in 2006, the Supreme Court issued a unanimous opinion holding that the Act did not cover violence unrelated to extortion or robbery. See Scheidler v. Nat’l Org. for Women, 547 U.S. 9, 23 (2006).
was not solely invoked to shield conservative abortion protestors from liability; other groups with conservative aims also found reason to weave the charter into their arguments. Antigovernment groups that refused to pay taxes or recognize the authority of the federal government similarly cited Magna Carta as one of the few sources of legitimate law.83

After 2000, more mainstream conservative groups used Magna Carta as a powerful weapon in the courts. New arguments involving Magna Carta served three purposes. First, movement conservatives used the charter to identify a constitutional baseline—the most basic protections any citizen could expect. Second, Magna Carta helped to lend a kind of super-legitimacy to the rights (or definitions of rights) conservative attorneys described. Insofar as all rights emerged from history and tradition, liberties mentioned in Magna Carta enjoyed a unique pedigree. Finally, Magna Carta represented an alternative to the Reconstruction Amendments. If liberals identified the government as a protector of the liberty of the weak, conservative activists used Magna Carta to frame the government as the greatest threat to American freedom.

C. The Conservative Magna Carta in Struggles Over Campaign Finance and Marriage

The rescuers represented in Scheidler stood at the fringes of the pro-life movement. By the late 2000s, however, mainstream pro-life leaders joined other social conservatives in highlighting Magna Carta. At first, arguments involving Magna Carta appeared in the fight to repeal campaign finance regulations.84 In 2007, the American Center for Law and Justice (“ACLI”) and Focus on the Family, socially


conservative groups, incorporated a lengthy discussion of Magna Carta into their amicus curiae brief in Federal Election Commission v. Wisconsin Right to Life. That case involved a challenge to the Bipartisan Campaign Reform Act of 2002, a law preventing the use of corporate funds for certain political advertisements sixty days before an election. The ACLJ and Focus on the Family pointed to Magna Carta as a guide to the meaning of the First Amendment and its right to petition for redress of grievances. For example, in challenging a law that created a blackout period in which advertising was prohibited prior to primaries and general elections, both groups argued that Magna Carta was the source of a right to petition for redress of grievances that entitled grassroots groups to air issue advertisements.

As the campaign finance battle wore on, and as conservative lawmakers developed more aggressive conscience-based exemptions to laws on abortion, contraception, and sexual orientation discrimination, movement conservatives transformed Magna Carta into a symbol of freedom of religion as well as speech. These arguments recently attracted attention during the litigation of Burwell v. Hobby Lobby Stores. Hobby Lobby involved a challenge under the Religious Freedom Restoration Act (“RFRA”) to the contraceptive mandate of the Affordable Care Act. Congress originally passed RFRA to reinstate the interpretation of the Free Exercise Clause adopted by the Court prior to its decision in Employment Division v. Smith. Prior to Smith, the Court identified—albeit sparingly—violations of the Free Exercise Clause

86. See Wis. Right to Life, 551 U.S. at 449.
87. Brief Amici Curiae of the American Center for Law & Justice & of Focus on the Family in Support of Appellee, supra note 85, at 6–10. The Court in Wisconsin Right to Life held that the Bipartisan Campaign Finance Reform Act was unconstitutional as applied to issue ads like Wisconsin Right to Life’s. See Wis. Right to Life, 551 U.S. at 452.
88. See Brief Amici Curiae of the American Center for Law & Justice & of Focus on the Family in Support of Appellee, supra note 85, at 4–8.
89. 134 S. Ct. 2751 (2014).
90. Id. at 2759.
91. See 42 U.S.C § 2000bb-1(a) (2012) (“Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability . . . .”); § 2000bb(a)(2), (a)(4). On the purpose of RFRA, see S. REP. NO. 103-11, at 12 (1993) (stating that RFRA’s purpose was “only to overturn the Supreme Court’s decision in Smith,” not to “unsettle other areas of the law”); 139 CONG. REC. 26,178 (1993) (statement of Sen. Kennedy) (explaining that RFRA was “designed to restore the compelling interest test for deciding free exercise claims”).
when a law substantially burdened a believer’s practice of religion. In *Smith*, by contrast, the Court concluded that any neutral law of general applicability would not violate the Free Exercise Clause, even if it significantly burdened religious exercise. RFRA reinstated the substantial-burden standard, and conservative amici in *Hobby Lobby* used Magna Carta in reasoning about the meaning of religious liberty under the statute and the Constitution.

In an amicus brief in *Hobby Lobby*, a coalition of conservative groups used Magna Carta to highlight the importance of religious liberty, even for corporations. “The Puritan Revolution was conceived to be a restoration of the ancient liberties of Englishmen as laid down in Magna Carta[,]” the brief explained. “The most interesting aspect is that they used a secular legal structure, the business company, to serve their religious freedom.” For these activists, Magna Carta symbolized not only resistance to federal tyranny and the importance of tradition and history, but also the importance of religious freedom to those demanding liberty from the state.

As the struggle for marriage equality intensified in the late 2000s, social conservative groups like the ACLJ developed more elaborate uses for Magna Carta. As William Eskridge has shown, opponents of gay rights have changed their argumentative agenda considerably over time. After discounting biblical arguments against homosexuality, anti-gay activists emphasized the supposed threat that gay men posed to children. In the 1990s, in describing sexuality as a

---

92. *See generally* Thomas v. Review Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707 (1981) (holding that the plaintiff’s First Amendment rights were violated when he was denied employment benefits because he quit his job at an armament factory due to his religious beliefs, which forbade participation in weapon production); Sherbert v. Verner, 374 U.S. 398 (1963) (holding plaintiff’s First Amendment rights were violated when she was refused employment because her religious beliefs barred her from working on Saturday).
94. *See § 2000bb-1(a).* For an example of conservative arguments in this vein, *see infra* note 95 and accompanying text.
96. *Id.* at 17.
97. *Id.* at 18.
98. *See id.* In *Hobby Lobby*, the Court ultimately held that the contraceptive mandate violated RFRA. *Hobby Lobby*, 134 S. Ct. at 2785.
100. *See id.* at 1338–40.
behavioral preference rather than an immutable orientation, anti-gay groups described marriage protections as unnecessary forms of “special rights.” Over time, however, as more courts interpreted state constitutions to guarantee same-sex couples’ right to marry, anti-gay groups sought out new arguments. As it became harder and harder to identify an adequate state interest supporting marriage restrictions, activists and supportive scholars focused on the lack of support for same-sex marriage in the nation’s history and tradition.

Magna Carta has frequently appeared in these recent arguments against same-sex marriage. In *Hollingsworth v. Perry*, the first attempt to get the Supreme Court to issue a ruling on marriage equality, an opposing group of scholars argued that Magna Carta helped to show that the “Nation lacks anything resembling a deeply rooted history, legal tradition, or practice of gay marriage.”

A year later, in *Obergefell v. Hodges*, a variety of groups incorporated Magna Carta into warnings about the dangers of judicial overreaching. Historians and scholars defending existing bans emphasized that Magna Carta’s use of gendered terms to describe marriage had shaped the American Constitution. The Conservative Legal Defense and Education Fund, joined by other groups, contrasted the traditional role of marriage in society, which it argued was based on due process rights dating back to Magna Carta, with one based on a form of “social science . . . that would pervert[] the rule of law, and seduce[] judges to function as oracles.”

---

101. See id. at 1347. For examples of these “special treatment” arguments, see Gay Marriage, Civil Rights Aren’t Linked, Some Blacks Say, ST. LOUIS POST-DISPATCH, Nov. 30, 2003, at A4; Steven A. Holmes, Gay Rights Advocates Brace for Ballot Fights, N.Y. TIMES, Jan. 12, 1994, at A17.


103. See infra Part II.

104. 133 S. Ct. 2652 (2013).


107. Brief of Earl M. Maltz et al. as Amici Curiae in Support of Respondents at 12–13, Obergefell, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574). The brief relied on Article 7 of Magna Carta. See MAGNA CARTA ch. 7 (1225), reprinted and translated in J.C. HOLT, MAGNA CARTA 453 (2d ed. 1992) (“After her husband’s death, a widow shall have her marriage portion and her inheritance at once and without any hindrance . . .”)

Christian view." By ignoring so deeply rooted a tradition, the courts would be acting just as tyrannically as King John. A judge-transformed Constitution would “no longer represent[] a government of the people, by the people or for the people, but whatever nine unelected justices agree it is,” argued the International Conference. “This is not a value worthy of one’s life, given our past cost defending against arbitrary tyranny, whether it be king, prince or tyrant.”

After Obergefell, conservative movements continue to use Magna Carta as a symbol of individual, often religious resistance to governmental tyranny. Robert Knight, the former leader of the Family Research Council and a senior fellow at the conservative American Civil Rights Union, responded to Obergefell by reasoning that Magna Carta would be relevant as long as “the left’s ongoing hostility to religious freedom and its pursuit of a radically secular agenda keeps bumping up against principled opposition.” In asserting that “religious liberty [was] under attack,” the United States Conference of Catholic Bishops cited Magna Carta in justifying resistance to the contraceptive mandate of the Affordable Care Act and adoption by same-sex couples. Quin Hillyer, a conservative commentator, pointed to Magna Carta in arguing that “the battle to protect religious liberty will be a ... rallying cry for Republican primary/caucus voters in 2016.”

These arguments have resonated with some on the Court. Justice Thomas’s dissenting opinion in Obergefell relied heavily on Magna Carta—a document he presented as a definitive guide in understanding the Due Process Clauses of the Fifth and Fourteenth Amendments. Concurring in McDonald v. City of Chicago, a Second Amendment case, Justice Thomas also traced the liberties

---

110. See id. at 23–26.
111. Id. at 26.
112. Id.
covered by the Privileges and Immunities Clause back to Magna Carta.\textsuperscript{118}

Recently, Justice Scalia similarly relied on the charter in outlining a narrow view of the Due Process Clause.\textsuperscript{119} In Kerry v. Din,\textsuperscript{120} Fauzia Din, a United States citizen, argued that the government's refusal to grant a visa to her husband without adequate explanation violated the Fifth Amendment's due process guarantee.\textsuperscript{121} After Din's husband, an Afghan citizen and former Taliban official, applied for a visa at a Pakistani consulate, an official rejected the application, citing a provision of the Immigration and Nationality Act barring aliens involved in "terrorist activities" but offering no further explanation.\textsuperscript{122} Din brought suit, arguing that she had a protected liberty interest in marriage that entitled her to a more meaningful review of her husband's visa application.\textsuperscript{123} Dissenting from Scalia's plurality opinion, the Court's liberal members sided with Din, arguing that Magna Carta supported her demand for "notice of an adverse action, an opportunity to present relevant proofs and arguments...before a neutral decisionmaker, and reasoned decisionmaking."\textsuperscript{124}

In a sweeping plurality opinion, Scalia relied on the charter in concluding that Din had neither a protectable interest nor a legitimate complaint about the process surrounding her husband's visa denial.\textsuperscript{125} Scalia reached this conclusion by echoing social conservatives' understanding of Magna Carta as an authoritative guide to the limited rights protected by the Constitution. Stressing that "[t]he Due Process Clause has its origin in Magna Carta," Scalia suggested that the Due Process Clause protected nothing more than the liberties encompassed by the charter.\textsuperscript{126} Scalia's plurality opinion rejecting Din's claim made apparent that the charter can serve as a limiting principle for the Court's more conservative members, an

\begin{itemize}
\item \textsuperscript{118} \textit{Id.} at 815 (Thomas, J., concurring).
\item \textsuperscript{119} Kerry v. Din, 135 S. Ct. 2128, 2132–33 (2015) (plurality opinion).
\item \textsuperscript{120} 135 S. Ct. 2128 (2015).
\item \textsuperscript{121} \textit{See id.} at 2131.
\item \textsuperscript{122} \textit{See id.} at 2131–32. The consular official cited 8 U.S.C. § 1182(a)(3)(B) without explanation. \textit{See id.} The INA defines a terrorist activity as including representing or providing material support for a terrorist organization. \textit{See} § 1182(a)(3)(B)(i), (iii)–(vi).\textsuperscript{123}
\item \textsuperscript{123} Din, 135 S. Ct. at 2131–32.
\item \textsuperscript{124} \textit{Id.} at 2144 (Breyer, J., dissenting).
\item \textsuperscript{125} \textit{See id.} at 2132–38 (plurality opinion).
\item \textsuperscript{126} \textit{Id.} at 2132.
\end{itemize}
alternative to what Scalia called “the textually unsupportable doctrine of implied fundamental rights.”

Why have conservatives so often used Magna Carta in framing their demands? On some level, it should come as no surprise that the charter speaks to conservative constitutionalists. After all, for much of the nation’s history, judges and politicians with deeply different views have presented Magna Carta as an indispensable part of the nation’s constitutional tradition. Nevertheless, conservatives’ use of Magna Carta has changed significantly over time. Part II next considers why many conservative movements have gravitated so strongly to Magna Carta in recent years.

II. THE USES OF THE CONSERVATIVE MAGNA CARTA

There is nothing inevitable or even natural about conservative movements’ turn to Magna Carta. Indeed, Magna Carta has consistently formed part of civil libertarians’ arguments for procedural protections for criminal defendants. Justice Kennedy prominently mentioned Magna Carta in Boumediene v. Bush in striking down the Military Commissions Act of 2006 and holding that prisoners at Guantanamo Bay had habeas corpus rights. In this more familiar sense, Magna Carta stands for the importance of guaranteeing due process, even for the most unpopular outsider groups.

Magna Carta has proven surprisingly prominent in movement conservative arguments about the meaning of the Constitution. Section A explores the reasons that conservative activists and attorneys have used the charter in advancing their agenda. Section B evaluates the efficacy and accuracy of arguments involving Magna Carta that have figured centrally in conservative constitutionalism.

A. Why Conservatives Turn to Magna Carta

Why have conservative movements derived so much value from Magna Carta, and how do the new uses developed by right-wing movements differ from the ones used to expand procedural protections for criminal defendants? First, Magna Carta has figured centrally in activists’ and attorneys’ creation of a kind of ultra-
originalism.\textsuperscript{131} In an interpretive sense, conservative movements urge the courts to look to Magna Carta to understand open-textured or vague terms like “privileges and immunities” or “freedom of speech.”\textsuperscript{132} Blockaders have used Magna Carta in this way in arguing that, at a minimum, the First Amendment had to include the freedoms protected in 1215.\textsuperscript{133} So have conservative groups seeking to funnel more money into campaign advertising and to revolutionize campaign finance law.\textsuperscript{134} In this way, for some conservative movements, Magna Carta lays out the most basic protections Americans can expect.

While serving as a baseline, Magna Carta also helps to reinforce the pedigree of the constitutional rights that movement conservatives demand. Because Magna Carta referred to opposite-sex marriage only, those opposed to marriage equality described access to the traditional institution as more constitutionally significant than many other liberty interests. As arguments based on religious conscience take center stage, Magna Carta more often serves as a catalyst for the stance that the oldest, most deeply rooted rights deserve the most protection.\textsuperscript{135} As grassroots conservatives suggest, a right protected by

\begin{itemize}
  \item \textsuperscript{131} See supra note 5 and accompanying text.
  \item \textsuperscript{132} For arguments about the Privileges and Immunities Clause, see, for example, Brief Amicus Curiae of Center for Constitutional Jurisprudence in Support of Petitioners at 6–9, McDonald v. City of Chicago, 561 U.S. 742 (2006) (No. 08-1521) (“[T]he phrases ‘liberties, franchises, privileges, and immunities, . . . were identified with the basic principles the colonists found in English government—privileges of protection by governments of life, liberty, and property through the civil and criminal law and immunities from government found in documents like the Magna Carta.’” (quoting DAVID SKILLEN BOGEN, PRIVILEGES AND IMMUNITIES, at xvii (2003))). For arguments in this vein regarding the First Amendment, see, for example, Brief Amici Curiae for American Center for Law & Justice & of Focus on the Family in Support of Appellee, supra note 85, at 2, 4–11 (citing Magna Carta as an antecedent to the First Amendment right to petition for redress of grievances) For similar arguments regarding the Citizenship Clause of the Fourteenth Amendment, see, for example, Brief of Catholics for Life, Sacramento, as Amicus Curiae in Support of Petitioners and Appendix, supra note 79, at 5 nn.8–9 (arguing that Magna Carta supports citizenship for aliens).
  \item \textsuperscript{133} See generally Amicus Brief of Catholics for Life, Sacramento, as Amicus Curiae in Support of Petitioners and Appendix, supra note 79 (citing Magna Carta to argue that the preamble of the Constitution considers “personhood” to include the unborn, supporting the rights of petitioners to use reasonable force to protect human life through their First Amendment rights to publicly protest outside abortion clinics).
  \item \textsuperscript{134} Brief Amici Curiae for American Center for Law & Justice & of Focus on the Family in Support of Appellee, supra note 85, at 6–11.
  \item \textsuperscript{135} See, for example, the U.S. Conference of Catholic Bishops’ current effort to connect religious liberty to Magna Carta. U.S. CONF. OF CATH. BISHOPS, supra note 114.
\end{itemize}
Magna Carta is more significant than many others that were only recently recognized by the courts.136

Magna Carta also works as an alternative to the liberty- and equality-based traditions that progressive movements tie to the Reconstruction Amendments. In the 1970s, some conservative groups, including pro-life organizations, stressed that the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments intended to both protect disenfranchised minorities and reinvigorate traditional constitutional rights.137 In part, a variety of conservative movements claimed to fight discrimination and to represent minorities just as vulnerable as women or people of color, whether that vulnerable group included unborn children or whites susceptible to “reverse discrimination.”138 Pro-lifers presented the fetus as the next minority in line for protection under the Equal Protection Clause of the Fourteenth Amendment—similar in salient ways to racial minorities or illegitimate children.139 In *Regents of the University of California v. Bakke*,140 groups opposed to affirmative action, including the anticomunist Young Americans for Freedom, argued not that an antisubordination approach to the Fourteenth Amendment was illegitimate, but rather that Italians, Jews, and Poles deserved as much solicitude as African Americans.141

Moreover, in the 1970s, when Magna Carta played a less central role in conservative constitutional strategy, some right-leaning groups

---

136. See, e.g., Brief Amici Curiae for American Center for Law & Justice & of Focus on the Family in Support of Appellee, supra note 85, at 6–11 (pointing to Magna Carta as evidence that religious liberty is the “cherished” right in American constitutionalism); Knight, supra note 113 (calling Magna Carta “the grandfather to America’s Constitution” and arguing that the charter was “[f]ar from being a secular product”).
137. See ZIEGLER, supra note 34, at 38–46.
138. See infra notes 139–41 and accompanying text.
141. See, e.g., Brief of American Jewish Committee et al. as Amici Curiae at 41, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811) (“Moreover, while assuredly most people of color in this country are culturally ‘disadvantaged,’ not all are, nor are all whites by any stretch of the imagination properly to be considered ‘advantaged.’ Rarely if ever, for instance, have whites from poverty-stricken Appalachia been singled out as a group for preferential educational treatment. Nor has favoritism been bestowed on members of other ethnic groups which credibly can claim to have been subject to generalized societal discrimination—Italians, Poles, Jews, Greeks, Slavs—as a result of which at least some such persons bear the economic and cultural scars of prejudice and thus could be deemed entitled to preference as a form of restitution.”); Brief as Amicus Curiae Young Americans for Freedom at 10, *Bakke*, 438 U.S. 265 (No. 76-811) (“Jews, Poles, Italians, Japanese, Chinese, are all a part of the ‘majority’ now. These dissimilar groups have each endured past discrimination.”).
championed judicial recognition of rights that were at most implied in the text or history of the Constitution. For the better part of a decade after *Roe*, the United States Catholic Conference argued that the courts should use substantive due process to recognize a right to life for the unborn child. Pro-life lawyer Robert Byrn, an attorney known for serving as a guardian ad litem for all fetuses scheduled for abortion at New York hospitals, wrote that the pro-life movement had no reason to take a clear stand in debates about the courts’ activism in interpreting the Fourteenth Amendment.

By the 1980s, when the Republican Party and grassroots conservatives made condemnations of judicial activism a central part of their message, activists in groups like the pro-life movement sought out a new symbol of their commitments. Magna Carta resonated with pro-lifers and their allies partly because it fit well within the new politics of originalism—a reminder of the value of history and tradition in interpreting constitutional rights. In 1982, Solicitor General Rex Lee articulated the administration’s argument against the invention of new rights under the Fourteenth Amendment: “If an unmentioned constitutional right can be pieced together by the judiciary out of bits and scraps that bear some resemblance to a variety of other provisions in the Constitution,” Lee reasoned, “then there is little limit to the extent to which judges can substitute their own judgment for that of the legislature.” Because Magna Carta predated the Constitution, activists could easily use it in defending history and tradition as constraints on the judiciary.

As importantly, Magna Carta worked perfectly as a symbol of the dangers of big government. While some arguments based on the Fourteenth Amendment presented the government, and particularly the courts, as the protectors of those sometimes victimized by popular majorities, Magna Carta worked well in a narrative that described government as the victimizer.

In dialogue about constitutional interpretation, critics of Reagan’s new push for a jurisprudence of original intent argued that Reagan had attacked the independence of the judiciary and thereby

144. See *supra* Part I.
146. *Id.*
An independent judiciary is indispensable to the maintenance of individual rights,” The Nation argued in 1985.148 “One of the first targets, therefore, for those who would destroy or weaken liberty is the judges.”149 Magna Carta helped conservatives argue that the judiciary posed a threat to individual liberty. Reagan promised to nominate judges “who understand the danger of short-circuiting the electoral process and disenfranchising the people through judicial activism.”150 Much as King John had gutted the traditional liberties of the people through abusing his power, as conservative activists argued, liberal courts practiced a modern form of tyranny.

Magna Carta has become an even more logical tool for conservative movements spotlighting religious liberty. In the 1970s, social conservatives sometimes steered clear of the idea of religious liberty.151 Feminists often argued that pro-lifers simply sought to impose their religious views on everyone else,152 and pro-choice attorneys argued that antiabortion laws thinly veiled an expressly religious, Catholic cause in a way that contravened the Establishment Clause.153 The antiabortion movement had little reason to use religious arguments at a time when activists constantly fended off accusations of sectarian bigotry.

By contrast, in the lead-up to the Hobby Lobby litigation, arguments about religious liberty became shorthand for opposition to the contraceptive mandate.154 Activists argued that Magna Carta had recognized the importance of religious liberty, even for corporations.155 After the Hobby Lobby decision, conscience-based objections—some of them tied to Magna Carta—play a central role in

148. See id. at 610.
149. Id.
151. See infra notes 152–53 and accompanying text.
152. See ZIEGLER, supra note 34, at 167–68.
154. See, e.g., Douglas NeJaime & Reva B. Siegel, Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics, 124 YALE L.J. 2516, 2518–19 (2015) (“[R]eligious objections to being made complicit in the assertedly sinful conduct of others . . . are often raised in response to contested sexual norms, and they now represent an important part of courts' religious liberties docket.”).
155. See supra notes 95–97 and accompanying text.
the fight over same-sex marriage, abortion, and public accommodations for gays and lesbians.\textsuperscript{156}

Magna Carta often figures centrally in a conservative message anchored by concern about religious liberty and tradition. It forms part of a narrative about how religion—and often Christianity—served as a cornerstone in the creation of America and the liberties it holds dear. The Baptist Press, a publication of the Southern Baptist Conference, points to Magna Carta as proof that at a time of “escalating religious liberty issues,” “the struggle for religious liberty has been in progress for 800 years.”\textsuperscript{157} Robert Knight’s attack on \textit{Obergefell} reiterated that Magna Carta was a Christian document largely inspired by Archbishop Stephen Langston.\textsuperscript{158} “The Magna Carta is the grandfather to America’s Constitution and every other government-limiting compact,” Knight argued, “and it’s based on Christian-informed medieval concepts.”\textsuperscript{159}

Within the Court, as \textit{Din} suggests, Magna Carta also stands at the center of the debate about the legitimacy of implied fundamental rights and the boundaries of the Due Process Clause. Justice Breyer’s dissenting opinion positions the charter as compatible with procedural due process requirements that protect citizens’ implied right to marriage.\textsuperscript{160} By contrast, Scalia’s majority draws on conservative movement efforts to frame the charter as evidence of the limited rights protected by the Constitution.\textsuperscript{161} In Scalia’s view, any implied fundamental right, whether involving abortion, contraception,

\begin{itemize}
\item \textsuperscript{156} See, e.g., Paul Horwitz, \textit{The Hobby Lobby Moment}, 128 HARV. L. REV. 154, 159–60 (2014) (“Although \textit{Hobby Lobby} itself involves a controversial social issue—the status of women’s reproductive rights—much of the reason for the shift in views on accommodation involves another contested field in the American culture wars: the status of gay rights and same-sex marriage.”); NeJaime & Siegel, supra note 154, at 2542 (explaining that “concepts of complicity that shape more recent and expansive healthcare refusal laws play a growing role in religious conflicts over contraception, abortion, and same-sex marriage”); Elizabeth B. Deutsch, Note, \textit{Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act’s Nondiscrimination Mandate}, 124 YALE L.J. 2470, 2474–78 (2015) (discussing the increasing prevalence of conscience-based objections to reproductive care by religiously affiliated health care systems).
\item \textsuperscript{158} See Knight, supra note 113.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} See Kerry v. Din, 135 S. Ct. 2128, 2144 (2015) (Breyer, J., dissenting).
\item \textsuperscript{161} See id. at 2133–34 (plurality opinion).
\end{itemize}
or same-sex marriage, has nothing to do with either Magna Carta or the Due Process Clause.162

B. The Accuracy and Effectiveness of Conservative Reliance on Magna Carta

How effective or accurate are conservative claims about Magna Carta? Activists describe Magna Carta as a symbol of resistance to arbitrary governmental authority and a source for rights that still define American constitutional tradition, including religious liberty.163 Yet conservatives’ idea of Magna Carta does not directly draw on the text or the history of the charter so much as it does “Lord Coke’s metamorphosing Magna Carta from a medieval adjustment of feudal power into a constitutional document restraining arbitrary power.”164 Conservative arguments focus on the symbolism and mythology of Magna Carta rather than its actual language, but this is nothing new. Civil libertarians and civil rights activists working in the 1960s sometimes ignored the historical context and precise language of the charter, using symbolism instead to establish the pedigree of procedural protections for criminal defendants.165

Moreover, neither conservative nor progressive descriptions of Magna Carta are completely disconnected from the charter’s history. Progressive movement organizations have picked up on constitutional rights, like due process, that bear some resemblance to those set out in the charter.166 Conservative efforts to tie the charter to religious freedom have some truth to them as well. The charter did grant freedoms, rights, and liberties to the English Church, and the barons were steeped in the Christian thinking of their day, as was Stephen Langston, the Archbishop of Canterbury, who played an important part in the crafting of the charter.167 Rarely, however, do activists, state constitutions, or the federal Constitution rely on the text of the charter.168 Actors across the political spectrum mostly look to the

162. See id.
163. See supra Part I.
165. See supra notes 20–33 and accompanying text.
166. See, e.g., Melton & Hazell, supra note 6, at 9–11 (explaining the indirect influence of Magna Carta on parts of the Bill of Rights, including the Due Process Clause and the Sixth Amendment).
168. Cf. Melton & Hazell, supra note 6, at 9–11 (explaining that direct influences of the text of the charter are hard to find).
mythology that has grown up around Magna Carta rather than the charter itself.\textsuperscript{169}

If conservative arguments about Magna Carta are no more or less accurate than many others, have right-wing activists identified a particularly effective use of the charter? It is hard to find conclusive evidence to answer this question, but this Section offers some preliminary suggestions. On the one hand, Magna Carta likely works well as a rhetorical tool because of the widespread popularity of the general ethos of originalism.\textsuperscript{170} Jamal Greene, Nathan Persily, and Stephen Ansolabehere offer evidence that a majority of Americans believe that “judges ought to factor original intent into their interpretations of the Constitution” and that those who most highly value originalism “share the characteristics traditionally associated with political conservatives.”\textsuperscript{171} Because Magna Carta often appears in legal appeals to history and tradition, conservative arguments about the charter may tap into widespread conviction about the relevance of original intent. Given the value of originalism in mobilizing movement conservatives,\textsuperscript{172} arguments based on Magna Carta may also work especially well in rallying the members of different right-wing movements.

On the other hand, because of the fluidity of Magna Carta as a symbol, progressive movements will sometimes benefit just as much from invoking the charter. In this way, the fluidity of Magna Carta tracks the mutability of originalism.\textsuperscript{173} Notwithstanding a rich scholarly debate about the flaws of some forms of originalism\textsuperscript{174} and

\textsuperscript{169}. See id.

\textsuperscript{170}. On the popularity of a jurisprudence of original intent, see Michael J. Perry, \textit{Morality, Politics, and Law} 280 (1988) (“There is a sense in which we are all originalists: We all believe that constitutional adjudication should be grounded in the origin—the text that is at our origin and, indeed, is our origin.”); Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, \textit{Profiling Originalism}, 111 Colum. L. Rev. 356, 359–60 (2011) (finding that most Americans think original intent is relevant to judicial interpretation of the Constitution); Darrell A. H. Miller, \textit{Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second}, 122 Yale L.J. 852, 933 (2013) (suggesting that originalism may “now [be] the people’s methodology of choice”).

\textsuperscript{171}. Greene, Persily & Ansolabehere, supra note 170, at 360.

\textsuperscript{172}. See, e.g., Robert Post & Reva Siegel, \textit{Originalism as a Political Practice: The Right’s Living Constitution}, 75 Fordham L. Rev. 545, 546 (2006) (“Originalism remains even now a powerful vehicle for conservative mobilization . . . .”).


\textsuperscript{174}. See, e.g., Laurence H. Tribe, \textit{Comment, in A Matter of Interpretation}, supra note 173, at 65, 68–72 (describing the impossibility of determining the level of abstraction at which constitutional clauses should be read and applied); Grant S. Nelson & Robert J. Pushaw, Jr., \textit{Rethinking the Commerce Clause: Applying First Principles to
the coexistence of several brands of originalism, members of the Supreme Court who disagree on the merits of key constitutional methods invoke originalist methods. In District of Columbia v. Heller, both the principal majority and dissent pointed to original intent in support of their arguments. In Obergefell v. Hodges, Justice Kennedy’s majority and several of the dissenting opinions drew on the original intent of the Fourteenth Amendment. Magna Carta’s meaning has been equally manipulable. Thus as long as the charter serves as a particularly effective symbol in American law and politics, activists with deeply different views may be able to exploit its power.

CONCLUSION

Conservatives’ fondness for Magna Carta showcases its power in contemporary American constitutionalism. For a variety of conservative groups, Magna Carta reminds us of the importance of history and tradition, the danger of government tyranny, and the importance of religious faith as a guarantor of other liberties. Now, as was the case in a recent New York Times editorial, liberals can respond that the nation should stop revering Magna Carta and “stretch[ing] old legal texts beyond their original meaning.” Alternatively, all movements would be well served to remember how often the popular meaning of Magna Carta has changed. Indeed, in 2015, Justices Scalia and Breyer both invoked the charter in setting

\[\text{Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 IOWA L. REV. 1, 6, 101–02 (1999) (describing the failure of originalists to adhere to the original meaning of “commerce”); Peter J. Smith, Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning, 52 UCLA L. REV. 217, 286–87 (2004) (describing the “vast body of primary historical materials...that support a spectrum of constitutional meaning” and the resulting failure of originalist methodology to restrain judicial interpretation).}\]

\[\text{175. Post & Siegel, supra note 172, at 225–28 (describing different approaches to originalism).}\]

\[\text{176. 554 U.S. 570 (2008).}\]

\[\text{177. Id. at 579–83.}\]

\[\text{178. Id. at 652–66 (Stevens, J., dissenting).}\]

\[\text{179. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (“The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”)).}\]

\[\text{180. Id. at 2614 (Roberts, J., dissenting) (“There is no dispute that every State at the founding—and every State throughout our history until a dozen years ago—defined marriage in the traditional, biologically rooted way.”); id. at 2632 (Thomas, J., dissenting).}\]

out deeply different understandings of the Due Process Clause and the legitimacy of implied fundamental rights.\textsuperscript{182}

The mutability of Magna Carta helps to explain its rich and varied uses. As Jill Lepore has noted, the charter arguably seems more popular and resonant in the United States than in the United Kingdom.\textsuperscript{183} For activists, attorneys, and politicians across the political spectrum, Magna Carta has long been a flashpoint in fights about the meaning of liberty and tyranny. As long as any movement questions the role of the government in daily life, Magna Carta will still have a hold on us.

\textsuperscript{182} Compare Kerry v. Din, 135 S. Ct. 2128, 2144 (2015) (Breyer, J., dissenting), with id. at 213–34 (plurality opinion) (both invoking Magna Carta to support two opposing arguments).

\textsuperscript{183} See Lepore, supra note 1.