

LECTURE PRESENTED BY PAUL SAUNDERS TO THE NATIONAL
SOCIETY OF MAGNA CARTA DAMES AND BARONS AT THE
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*Topic: The Significance of the 1297 Magna Carta in
the Creation of the Modern England and America*

Note: At our meeting last year, we discussed the relationship between Magna Carta² and the Rule of Law, Autocracy and Democracy. Today, I propose to discuss the impact of Magna Carta generally on the creation of England and America. Specifically, we will discuss the version of Magna Carta that was used in 1297 to guide—not always with success—the English kings and the clergy and barons who were pushing back on their taxations. And we will see how that led to a renewed parliament and foundational influences far beyond England, including with respect to our own Constitution and Bill of Rights.

Today, I propose to establish four propositions:

- First, King John was a terrible King. He used arbitrary acts of will and taxation and he did not have the barons behind him. He did not provide good government and his demands for

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² I will refer herein to Magna Carta, although many of you use the phrase "Magna Charta." Throughout the 19th Century, the words Magna Charta were often used, but both Charta and Carta were pronounced with a hard "k" sound.

more money from the barons resulted in a fight for more baronial power against his arbitrary kingship.

- Second, it is true that Magna Carta spoke of the “judgment by peers” and “law of the land” but neither was clearly understood by King John or his successors and as a result, each expression was misunderstood and misused; and
- Third, as a result, the principal consequence of Magna Carta was something very few considered, i.e. the involvement of the barons. The king needed money and the barons wanted confirmation of their effort to create a great council to meet, address affairs and legislate. The barons prevailed because the Magna Carta was something that the King had conceded was in fact a rebellion or a type of enforcement whose “ordainers” were reaching for a share of the government and would result in a committee whether he wanted it or not.
- Fourth, we now know that Magna Carta was the precursor of what we today call the Rule of Law, Due Process of Law and the Law of the Land. As Lord Tom Bingham reminded us, “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future, and publicly administered in the courts.

Let us begin by recalling a few things about the Magna Carta of 1215:

- What did the barons really want? Executive reform from the barons was not a realistic topic since the so-called “dispenser” had already figured out how to control the

barons, passing it on to the king. There must have been something else that was needed? What was it and how did it come to pass? (Hint: the permanent change resulted in the legitimacy of the Commons and Lords as a source of the law.)

- We must also understand the relationships at the time between the king, the pope and God. In Matthew 16:18 of the Bible, God rules through St. Peter, and “whosoever you shall bind on earth shall be bound in heaven . . .”. Of course, the power of Peter resided in the pope, who viewed the Christian population as his own empire. For that reason, acts of kings were subject to review by the pope. According to Professor Kantorowicz, “[the emperor, i.e. the pope] is free from all laws.” And the king was subject to the laws, including canon law. Any act of a parliament that conflicted to such laws was *ipso facto* null and void.³ And in later medieval times, kings were considered the vicars of God and kings or emperors, once lawfully crowned and annointed, were *gratia Dei* (by the grace of God) and they had sworn oaths to be responsible for the welfare of the realm. Some scholars have written that kings and emperors were under the law but not subject to the law of man, but most believe that goes to far. To be sure, the king must have no peer, but in doing justice, no one should be below him. The point is that it was going to be difficult if not impossible for the barons to create a government that contained laws and due process.
- In fact, King John and his successors wrapped themselves in the “Coronation Oath” that kings and emperors took. They contained three precepts: the

³ See A.F. Pollard, The Evolution of Parliament 222, 2d Ed. 1926

Church of God and all Christian people preserve peace at all times, that the king or emperor forbid rapacity and all iniquities to all degrees, and that in all judgments he enjoin equity and mercy.” These provisions were equivalent to law codes and at least in theory, were taken seriously. Query whether the barons thought this was all they needed.

- It should be noted that Coronation Oaths were often expanded into a coronation charter of liberties. A royal charter was an oath in writing promising privileges and immunities, under penalty of God’s judgment. And the charter oath was voidable by the church or pope if they conflicted with the absolute law and supremacy of the church. This may be one reason why Pope Innocent nullified the “25 barons” part of Magna Carta.
- Second, we must understand feudalism, which was the relationship between man, lord and land and it served the king’s duty to protect the peace. Because the Anglo-Saxon period was marked with violence, feudalism served the state’s need for justice, and for that reason, kings had bodyguards. And the law and justice acted on the individual through a kin or some other individual. After the Norman Conquest, these relationships were absorbed by the feudal contract a Norman feudalism and the conqueror assumed lordship of the land.⁴
- Lords had some civil and criminal jurisdiction and most matters were dealt with in the lord’s court by local customs. It may seem familiar to you to learn that the judgment of equals was known in Latin as *judiciuim parium* or “judgment of peers.” Does that sound familiar?

⁴ See David C. Douglas, William the Conqueror, The Norman Impact Upon England (1964).

“No tenants shall lose their lands without certain or convicted fault except by custom, the constitution of our ancestors and judgment of his peers.” But was there really such a thing as the “judgment of his peers?” As we will see, that was a long time in coming.

- Third, of relevance is the proposition that a “court” was a meeting place and its function, or *curius regis* could be financial, executive, legislative or judicial. If the barons could meet with the king, perhaps they could bring about some of the changes they desired. Unfortunately, that was not likely.
- There are three other sections of Magna Carta that should be mentioned. The guarantee of independence for the Church of England, the confirmation of ancient liberties and customs of London and other towns, boroughs and ports, and the promises of the king that “no freeman shall be taken or imprisoned . . . except by the lawful judgment of his peers or by the law of the land.” It also promised “not to sell, deny or defer to any man either Justice or Right.” (NB. We know today that this was not related to what we call “due process of law” even though many may think so.)

- These facts lead us directly to the Magna Carta. Let us look briefly at its genesis. Remember that William the Conqueror invaded England in 1066 and he swore a coronation oath. His major accomplishment was the Domesday Survey and Book, which was itself an inquest or fact-finding device. And remember also that William

had two sons, Rufus (a poor king who replaced William) and Henry, who assumed kingship in 1100 and was a strong king. He promised to restore the laws of King Edward as amended by William and he promised to refrain from assessing fines for offenses at the king's mercy and instead to fine at a rate that was commensurate with the nature of the offense. All good.

- Unfortunately, Henry's nephew Stephen, who replaced him, did not do as well and in response, the barons went into revolt and renounced their oaths of homage. They were mostly concerned with taxation and Stephen needed as much of it as he could get. This might have been the beginning of Magna Carta.
- When the other Henry, Henry I's grandson, became of age, he challenged Stephen and eventually invaded England. Henry II, for his part, issued a coronation charter and promised all the liberties of his grandfather. He transformed the source and scope of medieval legal authority in the form of *assizes*, used interchangeably with "decision" or "enactment", and they were precursors to statutes. Henry created *assizes* probably in 1164. Of course, *assizes* had been around since Anglo-Saxon times.
- In 1164, Henry issued the Constitutions of Clarendon, which was a statement of "customs, liberties and dignities . . . that ought to be observed and kept in the kingdom concerning the relationship between the Crown and the Church." Chapter Nine of the Constitutions concerned the land held by the Church.

- In those days, it was common for the landholders to donate land to the Church. And certain types of land owned by the Church, known as “land held as free alms” were exempt from jurisdiction of the king’s courts. Disputes concerning land held as free alms could only be heard in the Courts of the Church, which were extensive. If there was a dispute as to whether the land was held as free alms or lay fee, Henry decreed that it was up to the royal court—not the ecclesiastical court—to decide. It was up to the *assize*, which Henry had just created, as to whether the land was held by free alms or lay fees. Henry decreed that it should be determined by the recognition of twelve lawful men through deliberation, in the presence of the king’s chief justice. Henry called this procedure *assize utrum* (the latin words for “whether”). There was a standard form that said that the twelve men should recognize under oath whether the land at issue was the lay fee of the relevant person or free alms belonging to the church. It could be argued that this was the beginning of the trial by jury, and it became a mainstay of English law.
- The relevant point of this is that by 1215, juries had already become relevant parts of the administration of justice, both civil and criminal. Juries were considered commonplace and not considered bulwarks of liberty against the crown. Rather, they were extensions of royal power allowing the crown to keep tabs on the country. And jury service was not very popular; it was onerous and many wealthy people purchased exemptions from the king.

What about the inquests?

- Was Henry's jury just a continuation of what had already been going on, or was it an institution of royal power that came from Normandy? We may never know.
- Nevertheless, these "inquests" that pulled together small groups of people sworn to tell the truth were commonplace in medieval Europe. Through them, the king could learn what rights he had over the people, for example, or who had committed crimes and he could pull together his "jury." See, for example, William the Conqueror, who used the process to create the Domesday Book, which was basically a land survey.
- As already noted, kings in those days customarily consulted with their barons in *assizes* but their input was undefined. The word means "meetings" but the phrase was used interchangeably with "decisions" or "enactments," and they were precursors to statutes. The king's power was unrestrained and that of the barons was a mere formality.
- We do know that Henry II had many assizes—centering on the royal inquest and that one of the most important was the Assize of Clarendon. At Clarendon, Henry formalized the use of a presentment jury (our grand jury) and judges would ride circuit to receive the presentments. When the presentments were finished, the accused would then defend himself either through proof, compurgation or ordeal.⁵

⁵ When the church banned ordeals, using a petit jury (i.e. trial by jury) became commonplace.

- Feudalism focused on the land, and possession of the land was a vital concept. The means by which feudalism checked injustice was either the law of distraint or *judicium parium* where the key was that the lord obtain the judgment before distraint.
- Executive reform from the barons was not a realistic topic since the so-called “dispenser” had already figured out how to control the barons, passing it on to the king. Something else was needed? What was it and how did it come to pass?(Hint: the permanent change resulted in the legitimacy of the Commons and Lords as a source of the law.)

What happened after Magna Carta was signed by King John in 1215?

- Within weeks, Pope Innocent III rejected Magna Carta. Henry’s regent, King John died within weeks and his son Henry, nine years old, was crowned Henry III. The Pope was concerned about a provision that permitted a committee of 25 barons to meet at any time and overrule the rule of the king.
- King John had been asked by Pope Innocent to annul that portion of the agreement that related to the 25 barons, and this sparked a civil war in England that lasted until John’s death in October 1216. His son Henry, then only nine years old, was later crowned Henry III when he turned 18. But while he was still nine, his regent, William Marshall, decided to issue a new version of Magna Carta that did not include the passage that offended the Pope.

- Unfortunately, after he was crowned, Henry III needed money to reclaim lands in France, just as his father Henry II did. In order to secure the money while he was at war out of England, he was forced to issue a new, shorter version of Magna Carta in 1225, when Henry had turned 18 and had assumed the throne. This was the third version of Magna Carta and did not contain the passage about the 25 barons that offended the Pope. The barons were essentially in limbo with no good way to approach the King or change his taxation requirements. It looked as if Magna Carta had come and gone.
- The next (and some say final) version of Magna Carta was the 1297 version and it was the first Magna Carta that was placed on the official legal registry of England. It could be argued that this became the first “official law of the country” and is still the “law of the country,” but as we will see, that is probably not correct for a variety of reasons.
- This version was issued by King Edward I in return for a new tax. He was deeply indebted due to his military campaigns in Scotland and Wales. In France, King Philip IV had confiscated the English-held Duchy of Gascony, causing Edward I to generate immense funding. He was also planning a campaign in Flanders.
- Edward’s reclaim of royal authority was marked by the Statute of York, which formally rescind the royal charter. Edward made a major concession: while he was campaigning abroad, his son, also named Edward, acting as regent, issued the Confirmation of the Charters

in October 1297. This confirmed yet again Magna Carta and its companion, the Charter of the Forest. And it guaranteed that no new taxes (“aids, mises nor prises”) would be levied without the “common consent of all the realm” or Parliament. This forced the king to negotiate with the powerful classes of the kingdom for any new or extraordinary taxes. The Confirmation was legally binding.

- But there was yet another version of Magna Carta. In 1300, the Royal Chancery drew up yet another version and distributed it under the King’s Seal to the counties and cathedrals of the country. The purpose was to represent the compromise that the King and the barons and the “Cinq Ports” could tolerate.⁶ A branch of one of the Cinq Ports, Faversham, received a copy of the 1300 Magna Carta “for the barons of the Port of Faversham.” That version is apparently still on permanent display in Faversham.

Was there a right to trial by jury at the time of Magna Carta?

- It is widely thought that the Magna Carta of 1215 created the trial by jury. Our Supreme Court has said so on several occasions. For example, in 2005, the Court said that “the right to trial by jury has been enshrined since the Magna Carta.”
- But that was not correct, as we all now know. Magna Carta did refer to the “judgment of his peers” but we need to look

⁶ The “Cinq Ports” (Five Ports) were a confederation of coastal towns in England that provided ships for sailors to defend England’s coast against invaders and for transportation for the King. The original “Cinq Ports” were Hastings, Romney, Hythe, Dover, and Sandwich. In return for their work, the Ports were exempt from certain taxes and custom duties and they had the rights to hold their own courts and administer justice.

beyond 1215 to see how the trial by jury actually came about.

Was there a common law jury in England at the time of Magna Carta?

- Yes. It could be argued that King Henry II (1154-1189), who lived through a civil war, decided to reform land law and criminal law. This is generally thought as the beginning of the common law although that is subject to debate. At the time, there were many local courts and Henry decided to create new procedures for his royal courts that would make them more accessible for those at the lower end of the social scale. But there was no trial by jury as we know it today.
- Henry also created the *assizes*, probably in 1164, that concerned the relationship between the Church and the crown. *Assizes* had been around since Anglo-Saxon times. In this year, Henry issued the Constitutions of Clarendon, which was a statement of “customs, liberties and dignities . . . that ought to be observed and kept in the kingdom concerning the relationship between the Crown and the Church.” Chapter Nine concerned the land held by the Church.
- In those days, it was common for the landholders to donate land to the Church. And certain types of land owned by the Church, known as “land held as free alms” were exempt from jurisdiction of the king’s courts. Disputes concerning land held as free alms could only be heard in the Courts of the Church, which were extensive. If there was a dispute as to whether the land was held as free alms or lay fee, Henry decreed that it

was up to the royal court—not the ecclesiastical court—to decide. It was up to the *assize*, which Henry had just created, to whether the land was held by free alms or lay fees, Henry decreed that it should be determined by the recognition of twelve lawful men through deliberation, in the presence of the king's chief justice. Henry called this procedure *assize utrum* (latin word for “whether”). There was a standard form that said that the twelve men should recognize under oath whether the land at issue was the lay fee of the relevant person or free alms belonging to the church. It could be argued that this was the beginning of the trial by jury, and it became a mainstay of English law.

What are the inquests and the assizes?

- All twelve persons in the inquests or *assizes* had to be male; women served in very limited circumstances. And the men had to be “free” and not subject to disabilities. The men also had to be “lawful” (*Lex* in latin, which meant that they were worthy of making an oath.)
- Most of the *assizes utrum* concerned land. For example, the jury of twelve had to decide who was the last person to die in possession of the land at issue. By the time of Magna Carta in 1215, juries were commonplace and were the primary way of deciding land cases in royal courts.
- But what about criminal cases? These were much more complicated. Henry met with his barons at Clarendon in his hunting lodge and issues the famous *Assizes of Clarendon* (not the same as the Constitution of Clarendon) that drafted local people into the administration to root out criminals. They conducted

inquiries looking for persons suspected of being robbers or murderers or thieves, and when they were found, they were turned over to the king and tried by the king's justices.

- These juries were called “juries of presentment” which was the ancestor of the modern grand jury. They did not decide guilt or innocence, they just decided who would have a trial. But the trial itself was not by a jury; it was an “ordeal of water.” When the accused was in church, he had to take an oath, in the presence of a priest, that he had not committed the crime at issue. The priest made it clear that if he had committed the crime, and had not admitted it, he would be given a test, usually a test of water. If he sank, he was adjudged innocent; if he floated, he was guilty. Those who were guilty were mutilated and those convicted of a felony were hanged.
- If the jury decided that the accused was innocent, he was “not suspected” and he would not go to trial. If he was “suspected,” he would go to the ordeal. Normally disputes were settled by trial by battle between the accuser and the accused, but trial by ordeal was available. A party who did not want to undergo the ordeal could purchase the right to a special inquest from the king. This was generally only available for the wealthy.
- The relevant point of this is that by 1215, juries had already become regular parts of the administration of justice, both civil and criminal. Juries were considered commonplace. Rather, they were extensions of royal power allowing the crown to keep tabs on the country. And jury service was not very popular; it was onerous and many wealthy people purchased exemptions from the king. It could be argued that this was the beginning

of the trial by jury, and it became a mainstay of English law.

- The relevant point of this is that by 1215, juries had already become regular parts of the administration of justice, both civil and criminal. Juries were considered commonplace and not considered bulwarks of liberty against the crown.
- And here is another relevant point: In the 1215 Magna Carta, Chapter 39 made it clear that no free man could be *“taken or imprisoned . . . except by the lawful judgment of his peers, or by the law of the land.”* Did this guarantee a right to a trial by jury? Probably not, because the word “or” is used and not “and.” In other words, there are alternatives. The accused need not be judged by his peers; he may opt for the “law of the land” instead.
- We lawyers have had a field day trying to interpret the difference between “or” and “and.” What actually was the “law of the land” in 1215? Was it the same as the law of New York? Hardly. It has been argued by scholars that the use of the latin word “*vel*” could also mean “and.” But we have seen that the juror had to be “law worthy” because that person had to swear an oath. That is not the same as the “law of the land”. And the phrase “judgment of his peers” probably does not refer to a jury at all. In medieval courts, there was typically a communal judgment. The “peers” were the people just beneath the lords. They were the fellow barons.
- It could also be argued that Article 39 meant either judgment by peers, or ordeal, or battle or any other commonly used form. In other words, as Professor

Thomas McSweeney would put it, “Magna Carta guaranteed a trial, for Chapter 39 of Magna Carta had to do with the grievances of the barons against King John.” King John was accused often of making his own decision as to who should be punished rather than putting it to the courts. Thus, it could be argued and perhaps even proven that Magna Carta was one of the first successful efforts at rejecting baronial reform, leading to their coronation oath and the 1308 declaration, taking power away from the king and giving it to the “community.”

- About five months after Magna Carta was issued, Pope Innocent III opened a general council reform the Western Church, reform canon law and granting additional rights for accused persons. Priests were prohibited from marrying and they could not participate in certain worldly occupations. Under Canon 18, they could not bestow a blessing on a purgation by means of the ordeal of boiling water or the use of cold water or the use of the red hot iron. But the importance of the priests cannot be gainsaid. Their participation was important for resolving disputes.
- But what if people suspected of serious crimes could not be tried by ordeal? Recall that in 1215, a civil war broke out between King John and the barons, and that by 1216, John was dead. His replacement was his nine-year-old son, Henry III, who was promptly crowned King. In November 1218, the first group of judges was sent out to become travelling courts. The urgent question was what should be done about the trial of felons.
- The King’s new guardians, des Roches and de Burgh, came up with a solution: Those who are suspected but not tried would be held in prison and those who were

accused of medium crimes could remain in the Kingdom if there were no suspicion of lesser crimes. Those for whom there is no suspicion would be safe and would be let loose.

- Of course, the real problem was what to do with those who were being kept in prison because of their crimes. There was no way to try them and keeping them in prison indefinitely was not in the cards. As a result, the justices began to turn to inquests, which could acquit but not convict. Some felons were ordered to pay fines, instead of being sentenced to death. There was a jury verdict in 1218 that resulted in a hanging, but the justices did not approve.

Was there no right to a jury of one's peers?

- Isn't that what Magna Carta said? What is the take-away from this?
- In short, we see that Magna Carta's "judgment of his peers" was nothing like a common law jury, at least not yet. But stay tuned. Now that the defendants had the option of putting themselves on the jury "for good and ill," he (or she?) could accept the jury or go back to prison. On a few occasions, the justices could force a jury on the defendant. Note that before 1215, if the accused was suspected by the jury, he could still take the ordeal. But after 1215, the ordeal was taken away. In addition, the justices were reluctant to use jurors to try felons.
- The justices were also reluctant to leave the question of guilt or innocence in the hands of the accused's neighbors instead of the hands of God. For that reason,

it is hard if not impossible to conclude that the accused had a right to a trial by a jury of his peers.

Can we link Magna Carta to the jury?

- Perhaps. Long after Magna Carta, many thought that the “jury of presentment” was a reflection of Chapter 39 and the procedural guarantees of Chapter 29. In fact, in 1351, parliament expanded Chapter 29, adding that *“from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deed be done, or by process made by writ original at the common law.”*
- The authors related this passage into the Magna Carta’s “law of the land” language but not to the “judgment of his peers” language. In fact, the “law of the land” language had taken on a broader meaning, that of the procedural forms followed in the king’s courts. This was confirmed in the statute of 1354, which again amended the guarantee of Chapter 29 to *“no man, of whatever estate or condition he may be, shall be put out of his land or tenement, nor be taken or imprisoned, or disinherited, without being brought to answer by due process of law.”* This also expanded the coverage of Chapter 29 from any “free man” to any “man, of whatever estate or condition he may be.” Of perhaps more significance, it also specified that the “law of the land” was a right to be tried by the proper procedure, which included the jury of presentment. And as far as we know, this statute was the first ever to use the phrase “due process of law” which became so important in the US constitution and traditions.

The 1297 Version of Magna Carta

- Before we get into the details, let us take a brief look at the fundamentals. It seems clear that significance of the 1297 version, writ large, was to establish some fundamental legal and democratic principles, including limitations on monarchical powers, individual liberties and due process. This version—which was an official statute—solidified concepts such as no taxation without consent and the right to justice. As we have seen in last year’s presentation, it formed the cornerstone of the Anglo-American legal tradition and it established movements for liberty. Now some details:
 - Limits on Royal Power: Magna Carta was a response to a tyrannical king and forced the monarch to recognize the rights and liberties of citizens, not just the feudal nobility;
 - Due Process and Justice: Even though what we today all “due process” did not exist at the time of Magna Carta (discussed further below), Magna Carta recognized the right to “not be sold, denied, or delayed right or justice;”
 - No Taxation Without Consent: The king could not levy taxes from the realm without the common agreement of the community.
 - Revocation of the Wool Tax: The king was forced to completely revoke it because, as he conceded, it was burdensome to “the greater part of the community.”

- The Creation of a Binding Precedent: The *Confirmatio Cartarum* was placed on the Statute Roll and became a permanent, fundamental law. This caused the principles of limited taxation from being a disputed political agreement into a legally binding statute.
- Strengthening Parliament's Role: The document made it clear that Parliament was now the legitimate body for authorizing royal taxation and it ultimately led to Parliament gaining the exclusive power to levy taxes. This was done with "the common assent of all the realm."
- And finally, A guarantee against future custom: The king would not be allowed to claim that previous taxations established a new precedent and the confirmation explicitly stated that the king could not turn recent aids and tasks "into a custom." This could be interpreted as meaning that there would not be similar taxes in the future, although that is not clear.

What is the significance of the 1297 Magna Carta document?

- This document came into existence due to the efforts of King Edward I. There were of course several earlier efforts, but this was perhaps the most important, since it essentially rewrote the key parts of Magna Carta.
- Let us look at just a few examples of the differences between and additions to Magna Carta that were contained in the document of 1297:
 1. "The English Church is to be free and to have all its rights fully and its liberties entirely. . . We furthermore

grant and give to all the freemen of our realm for ourselves and our heirs in perpetuity the liberties written below . . .”

2. “Heirs are to be married without disparagement.”
3. “A widow, after the death of her husband is immediately and without any difficulty to have her marriage portion and her inheritance . . .” .
4. “Neither we nor our bailiffs will seize any land or rent for any debt as long as the existing chattels of the debtor suffice for the payment of the debt . . .” .
5. “The City of London is to have all its ancient liberties and customs . . .” .
6. “A freeman is not to be amerced for a small offense save in accordance with the manner of the offense, and for a major offense according to its magnitude . . .” .
7. “No sheriff, constable, coroner or any other of our bailiffs is to hold pleas of our crown.”
8. “If anyone holding a lay fee from us should die, and our sheriff or bailiff shows our letters patent containing our summons for a debt that the dead man owed us . . . our sheriff is permitted to attach and enroll all the goods and chattels of the dead man found lying in fee, to the balance of the said debt . . . so that nothing is to

be removed thence until the debt that remains is paid to us . . . “.

9. “We shall not hold the lands of those convicted of felony save for a year and a day, whereafter such land is to be restored to the lords of the fees.”
10. “There is to be a single measure for wine throughout our realm and a single measure for ale and a single measure for corn” (Sorry!)
11. “Henceforth there is to be nothing given for a writ of inquest from the person seeking an inquest of life or member but such a writ is to be given freely and is not to be denied.”
12. *“No freeman is to be taken or imprisoned or disseised of this free tenement or his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no-one will we sell or deny or delay right or justice.”*
13. “No-one is to be taken or imprisoned on the appeal of woman for the death of anyone save for the death of that woman’s husband.”
14. “No country court is to be held save from month to month” .

15. "Scutage furthermore is to be taken as it is used to be in the time of King Henry our grandfather and all liberties and free customs shall be preserved to archbishops, bishops, abbots, priors, Templars, Hospitalliers, etc."
16. "The aforesaid charter is to be firmly and inviolably observed in all and each of its articles in perpetuity, including any articles contained in the same charter which by chance have not to date been observed."

What we can see from this description of the 1297 version of Magna Carta is the significance of justice and courts but very little of what the original barons actually wanted. They knew that King John was one of the worst monarchs ever, and was in dire financial straits. He extorted money from the barons and otherwise paid almost no attention to them. In fact, in 1212, the barons even tried to assassinate him. This obviously provoked a civil war, in which the barons took London, forcing the king to Windsor Castle (he then moved to Staines, not far from today's Heathrow Airport). Did the barons ever get what they wanted?

- At Runnymede, the barons succeeded in giving the king a document known today as the Articles of the Barons. The purpose was to curtail the powers of the king, not to create programs such as trials by jury and the like. When the king decided to accept the Articles, peace was declared and the barons swore their allegiance once more to the king.

- Magna Carta had not been made a part of the law and the king agreed to it only because he had no choice. It is clear by hindsight that he had no intention of going along with what he had agreed to, and as we have seen, a few days later he asked Pope Innocent to annul the Magna Carta. In August 1215, the Pope agreed—at least with respect to the portion about the “25 barons”—and a civil war broke out again.

This didn't last long because on October 18 or 19, 1216, King John died. A revised version of Magna Carta was soon promulgated in November.

But the significance of Magna Carta was lost. A new king was put in place and the barons became afterthoughts. Neither the new king nor, apparently anyone else, undertook to carry out what Magna Carta proposed. This was not, as many have opined, the point in which the rights of free men were guaranteed. The real purpose of Magna Carta was to protect the nobility and keep them away from the king, to appease the barons and to end the civil war. There were no concerns about laws, trials by jury or *assizes*. The barons wanted the king to leave them alone and to stop taxing them, nothing more. The barons did not think about the peasantry, making up about 80 percent of the population, or attempts to bind the king to the rule of law. These were day-to-day issues that didn't concern the barons.

Today, we look upon Magna Carta as the US Supreme Court does, as the icon of democracy and as a document of liberty. How did we get there?

- The 1297 Magna Carta was written by a group of barons who were concerned about protecting their rights and property against a tyrannical king. We have seen that such concerns did not work after the original Magna Carta, but they surely did after 1297. For that reason, King Edward I realized that it was important to allow the barons to add new laws to Magna Carta and it was also incorporated into statute.
- Nevertheless, for a variety of reasons, the 1297 Magna Carta languished for many years and was essentially forgotten. It was not resurrected until Sir Edward Coke decided to re-examine it. At the time, Coke was generally thought of as the most knowledgeable lawyer and law professor in England and his most important publication was the “Institutes of the Laws of England.” He declared that the English laws were “the best inheritance” that the subjects have. And he wrote the first and most comprehensive account of the importance of Magna Carta and its legacy.
- Unfortunately, King Charles I essentially disregarded common law and Magna Carta and continued to raise taxes by royal prerogative. This resulted in an unsuccessful attempt by Parliament, in 1628, to re-affirm the rights of Magna Carta but even after the civil wars, the restored monarchy ignored Magna Carta. Coke was not pleased.
- But in time, after King James II was overthrown for William and Mary, Magna Carta came back to the forefront. This occurred primarily through statute, primarily the English Bill of Rights of 1689, which established free elections and freedom of speech within

Parliament and curbed the abuse of prerogative power. In short, Magna Carta now contained the ancient rights and liberties that many believed it always had.

- From the 17th Century onward, Magna Carta was associated with British liberty and freedom and with opposing autocratic and corrupt rule.
- And during the 18th and 19th centuries, the most important clauses of Magna Carta were thought to be “trial by jury” and “no taxation without representation.”
- As we now know, they were not important and in fact were not even a part of Magna Carta. However, that did not stop the members of the so-called “Chartist” movement that urged the creation of a “People’s Charter” or a Magna Carta for the masses. The Chartists complained that the nobility got what their rights protected in 1215, while the middle classes had to wait until the 1832 Reform Act. They were not successful.
- Beginning with the Reform Act, the statute book containing Magna Carta was changed at least three times, in 1829, 1863, and 1879. By the end of the Century, most of the clauses of Magna Carta had been repealed, primarily during Queen Victoria’s reign. In 1966, there was an attempt by Parliament to erase redundant legislation and most of the rest of Magna Carta was erased.
- At the moment in England, only 30 or 40 words from the original document are still in legal usage. They include the first clause on the Church, clause 13 on the rights of the City of London, and the famous clauses 39 and 40

on the general rights of free men. As we will see in a moment, however, Magna Carta came back to life with the drafting of the US Constitution and the US Bill of Rights. We turn to those below.

The 1297 Significance of Magna Carta and the Lawyers: The Coming Back to Life

My good friend and colleague, former Chief Justice of the British Supreme Court, Lord Jonathan Sumption, has spend much of his personal time trying to understand the significance of Magna Carta, which soon became a chapter in the constitutional history of eighteenth century America.

- First, Lord Sumption considered two views of Magna Charta: the lawyer's view and the historian's view.
 - The lawyer's view is that Magna Charta is a major constitutional document, the foundation of the rule of law and the liberty of the subject in England;
 - The historian's view emphasizes self-interested motives of the barons and is generally skeptical about the charter's constitutional significance.
 - Sumption concludes that "The lawyers have been more successful in propagating their views than the historians."
- To Lord Sumption, Magna Carta was important not as a medieval document but rather as a "chapter in the Constitutional history of the seventeenth century England and eighteenth century America."

- Law is an “independently significant aider and constrainer of the exercise of power in society.” The exercise of power is thought of as the central problem and for that reason, the rule of law as a tempering power is part of the solution. Power is arbitrary when it is not adequately controlled and the grounds for its exercise are unspecified and untestable. That is the problem. The rule of law stands as the beacon to be invoked when the power-wielders seek to evade its constraints. For that reason, Magna Carta was seen as a contribution to the rule of law.
- The take-away is that something happened between 1215 and 2012 to give Magna Carta its significance. “It is not irrelevant that Magna Carta was a legal document generated within a developing legal tradition and interpreted and reinterpreted by lawyers over centuries.”⁷ As Martin Krygier has written, “We should celebrate the contribution of Magna Carta to the rule of law tradition, without which it wouldn’t have existed, which made of it what it has become, but to which it gave argument, momentum and heft that was both symbolic and real.”⁸
- In other words, Magna Carta was an important factor in the work of the Members of the Inner Temple in London who traveled to the New World to create courts and to create what we today call the “law of the land.” When the lawyers were looking for a law to use in their new land, they turned almost immediately to Magna Carta. They were also familiar with the Charter of Liberties.

⁷ M. Krygier, *Magna Carta and the Rule of Law Tradition*, Parliament House, Canberra, October 30, 2015.

⁸ Ibid.

Was Magna Carta a precursor of the “Due Process of Law” ?

- Almost certainly yes. Let us look at some history. In many ways, the US Constitution inherited aspects of the English Constitution as viewed through the colonial experience. The Constitution provided for three independent and supreme branches of government. However, there was no Bill of Rights on the table even though several states demanded one. When the Bill of Rights was ratified, it was primarily to limit the federal government in favor of the states and local governments. Of relevance here is that the US Bill of Rights largely copied from the English Bill of Rights and English law in various degrees.
- Let us focus on the Fifth Amendment and in particular the “due process of law.” In important part, the Fifth Amendment provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law . . .”.
- In England, “due process of law” was the opposite of *per voluntatem*—the opposite of the abuses generating Magna Carta: arbitrary arresting, imprisoning, exiling, and disseidin. “Due process of law” was a shorthand for legal procedures such as indictment and presentment. As Professor Thomas Burrell would put it, “due process of law and the law of the land were not what the law ought to be but what it was.”⁹ Due process had meanings against the king and other actors but never against the

⁹ Thomas Burrell, *Magna Carta and Due Process of Law: The Road to American Judicial Activism*, Common Consent Press, 2016.

common consent of the Lords and Commons. But it was hard to bring that concept across the Atlantic.

- Alexander Hamilton, for one, did not agree and one time, he claimed that the phrase “law of the land” meant the process of presentment or indictment, not legislation. His muse was Lord Coke who, Hamilton claimed, thought that the passage referred to those two, not trial by jury. Coke had claimed, he said, that the phrase referred only to process or proceedings, never to an act of the legislature.
- By contrast, the colonists understood that their “law of the land” provisions meant their own law or English statute or common law, as modified. For that reason, New York colonists incorporated the due process clause of the Magna Carta into its 1683 Charter of Liberties.
- Hamilton’s statement about due process confused the first seventy-five years of law-of-land and due process adjudication. What did they mean? Did they create restrictions against arbitrary actions by branches other than legislatures? By contrast, England’s laws of the land were legislatively a part—but not the whole. And the US’s due process meant something other than the common law provisions, which were also provided for in the same Fifth Amendment. Any ambiguity would be construed consistent with the common law. Using the English tradition, US courts would find that a state’s “law of the land” was the constitution, state positive law and common law, in that order. Not everybody agreed, including the US Supreme Court, which associated Magna Carta not with arbitrary executive or judicial action without the rule of law but as a check against all government, even enacted law. Basically, the Supreme

Court held “the words of Magna Carta . . . were intended to secure the individual from the arbitrary exercise of the powers of government . . .”.

- Many states took up the Magna Carta’s “law of the land” phrase as a clearly intended general law. For example, some said that “the meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.” Unfortunately, Webster and Hamilton did not go along. For them, the power of law did not rest with the legislatures, but with the courts and their judges. This ultimately became the substantive understanding of due process.
- The Supreme Court was not so sure. “Equal protection of the law” became “protection of equal laws” and the Court interchanged due process and equal protection, so that the Equal Protection Clause would be the same as the substantive Due Process clause. This meant that in place of the people and representative government, the Court determined its own ideal of fairness, equality and the like. Fortunately, in *Brown v. Board of Education*, the Court held that “in the field of public education, the doctrine of ‘separate but equal’ has no place.”
- For its part, the English Parliament developed parliamentary sovereignty along with the reduction of the king. No longer could the king suspend or dispense with the law. And the Americans celebrated the Glorious Revolution along with their English brethren.
- What about the rule of law in England? The original concept was that the terms “arbitrary” or “tyranny” were

terms that described the king's deprivation without the rule of law. The king was a tyrant because he ignored the will of the barons and the law of the land. And as the Lockean maxim says, "common consent purges tyranny."

- The American courts mixed "due process of law" and "law of the land" with the common law and constitutional supremacy. They misunderstood Coke without appreciating his broader points or context, which was "arbitrary *royal* action." Unlike England, the Americans created a judicial state where the Supreme Court decides whether validly enacted legislation is unconstitutional under ambiguous tests. Does this remind you of the tyrant king suspending and dispensing with the law, deciding questions of reason and necessity *per voluntatem*? The rule of law in the US has now become a standard of fundamental reasonableness capable of infinite expansion not by legislatures but by judges.¹⁰
- For its part, various enforcement mechanisms, such as those in Chapter 61 of Magna Carta, were really types of rebellion or enforcement in the form of judgment and distraint; Chapter 61 never materialized and the king's promises were not kept. And if a matter arose in litigation and there was a gap between the baron and the king, the judge would be bound by the royal interests.
- In 1258, the barons sought control of the king's council but that was insufficient. The barons needed more and they found it in the Ordinances and in Parliament, where Ordinances sought to revitalize Parliament as a baronial

¹⁰ See generally, Thomas Burrell, *Magna Carta and Due Process*, *supra*.

center for reform and justice for individuals. The Ordainers gave themselves permission to review and if necessary clarify the Magna Carta's provisions. They also attempted to reign in the king's expenditures for personal use and they wanted a partnership with the king but King Edward II declined.

- King Edward also took revenge against the baronial rebels. The barons concluded that Edward was not fulfilling his obligations and in 1326, there was a rebellion led by Queen Isabella and the Earl of March against Edward. They tried to depose him in Parliament and, facing deposition, he abdicated his throne in 1327 in favor of his son, Edward III. Parliament changed from ministers and judges to lords and peers. Petitions changed from private judicial complaints to common taxation, accountability and political matters.
- We have seen that Magna Carta became a pillar of the English Constitution—a body of fundamental law emerging from various and successive political struggles that ultimately demoted the monarchy, established the High Court of Parliament and secured the liberties of the Englishmen.
- In America, commentators trace the US Constitution to the English Constitution and Magna Carta, but the Americans quickly turn away from participatory government to the notion of “due process of law” which means different things to different people and unfortunately is no longer compatible with the origin of due process in medieval English history.¹¹

¹¹ Thomas Burrell, *supra*.

Was Magna Carta also a precursor of the Rule of Law?

- Perhaps. Let us see what the late Lord Tom Bingham of Cornhill had to say about this, just to be sure.
- Lord Bingham reminded us that the British colonists brought to America one priceless asset: the law of England, which, of course, included Magna Carta. For them, Magna Carta provided a gold standard of proper government behavior. But the colonists outstripped their English cousins in one respect: they invested Magna Carta with the status of a higher law, one which could not be broken. This is Magna Carta at work.
- As we now understand, the core of the existing principle of the Rule of Law, reflected indirectly in Magna Carta when it refers to the “law of the land,” is that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.
- As Lord Bingham put it in his book *Lives of the Law*,¹² “*The Rule of Law requires compliance by the state with its obligations in international as in national law. Here we step out of the confines of Magna Carta. It was directed to the exercise of power by the King within his realm, not with relations between one state and another. But the Rule of Law cannot stop short at national boundaries because the problems we face in our world today—climate change, financial regulation, crime, migration—do not stop short at national boundaries. The lesson, however, is the same. As kings are subject to the law*

¹² Oxford University Press, 2011.

and not above it at home, so states are subject to the law and not above it in their relations with other states. On acceptance of this lesson, it might be thought, depend the peace and prosperity of the world. It is not a lesson which Magna Carta taught, but it is an extension of the principle which Magna Carta so memorably gave to posterity around the world.

- It can thus be seen that whatever its text reveals, it is now taken for granted that Magna Carta was responsible for the jury of one's peers, the rule of law and the due process of law, all three of which are fundamental to the futures of the United Kingdom and the United States.

LORD BINGHAM'S COMMENTS REFLECTED WHAT WE IN THE UNITED STATES NOW BELIEVE MAGNA CARTA STOOD FOR—AND STANDS FOR TODAY—OUR FUTURE, IF, IN THE WORDS OF BENJAMIN FRANKLIN, "WE CAN KEEP IT."

TO WHICH I CAN ONLY ADD, **QUOD ERAT DEMONSTRANDUM**

Paul C. Saunders