READING MAGNA CARTA

TEXTUALIST OR ORIGINALIST?

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DEBATES CONCERNING THE PROPER METHOD for reading legal texts did not begin in the modern era. In fact, they have been going on in our legal tradition for hundreds of years. One of the oldest, and most consequential, debates concerns the meaning of Magna Carta, the "big charter," reluctantly granted by King John in 1215 in response to the demands of his rebellious barons.[1] Many of its provisions, called chapters, resolved disputes that quickly became dated – very dated. For instance, chapter 50 required the King to deprive the grasping kinsmen of one of his favorites, Gerard de Athyes, of their offices. Welsh hostages that the King was holding were to be surrendered immediately (c. 58), and negotiations were to begin concerning certain Scottish hostages (c. 59). Other chapters of great significance at the time addressed the abuse of the feudal incident of relief, a payment levied upon inheritance (cc. 2 & 3). But relief went out with the Statute of Tenures in 1660.[2]

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[1] For the text of Magna Carta (1215), see *Magna Carta and the Rule of Law* 389 (Daniel Barstow Magraw, Andrea Martinez, and Roy E. Brownell II eds., 2014). Magna Carta, it seems, first got its name because it was "big" in comparison with the smaller Carta de Foresta (1217). See W.L. Warren, *King John* 237 n. (1961).

[2] 12 Car. 2, c. 24 (1660).

There were also chapters with a remarkably modern look: removing obstacles to navigation on major waterways (c. 33), standardizing weights and measures (c. 35), protecting merchants in time of war and prohibiting illegal tolls (c. 41) – making England the largest common market in Europe at the time and, comparatively, one of the best places to do business. But what made Magna Carta famous and earned it the grander title of the "Great Charter" or, even more magnificently, the "Great Charter of Liberty," were chapters of more general application, chapters that could be read centuries later and given contemporary meanings. Feudal charges had to be determined by the "common counsel of the kingdom" (c. 14), which could be restated years later as "no taxation without representation." Fines could not be excessive but had to be "in proportion to the measure of the offense" (cc. 20-22) – "let the punishment fit the crime." The King had to pay for supplies that he requisitioned (c. 28) – the government could not take private property for public purposes "without just compensation." Above all, what made the charter Great were the chapters that provided that no "free man" was to suffer the loss of his liberty or property "except by the lawful judgment of his peers or by the law of the land (*per legem terrae*)" (c. 39) – later claimed to guarantee trial by jury and "due process of law" – and that the King would not "sell, or deny, or delay justice to anyone" (c. 40), now known as "equal protection of the law."

Neither party in 1215 seems to have believed that the crisis was really over. Unwilling to trust the King's solemn promises, the barons included a crude means to enforce the agreement in what they obviously thought was the likely event of the King's faithlessness. If he failed to keep his word, a group of 25 barons were authorized to seize his "castles, lands, and possessions" and hold them until he did (c. 61). On the King's side, John did not accept his defeat as final. For him, it was merely an expedient to gain time to rally his forces. Once out of the barons' control, John appealed to the Pope, who quickly absolved him from the obligation of the oath he had sworn under duress.

Whatever hopes they entertained, none of the barons could have expected that what they did then would be celebrated hundreds of years later. For them, it was simply another, rather extreme attempt to resolve some quite specific problems that had developed in their relationship with the King. In fact, it was only a series of fortuitous events that kept the promises

of Magna Carta alive. John and the Pope soon died. John's heir and successor as King was nine years old, and therefore subject to regents, who were anxious to secure the barons' allegiance and avoid foreign (that is, French) involvement. In 1216 they re-issued Magna Carta, trimmed of a few of its chapters, including the enforcement provisions.[3] In 1217 they issued it again,[4] and in 1225 King Henry III issued it in his own name.[5] Periodically over the remainder of the century the charter was reaffirmed until a final and definitive confirmation in 1297 by King John's grandson Edward I.[6]

Thereafter, Magna Carta slipped into comparative obscurity. What brought it back to life was the constitutional struggle that broke out in the seventeenth century between king and parliament. The magic was worked principally by Sir Edward Coke – lawyer, judge, antiquarian, and brilliant polemicist. Thanks to blindness, perhaps willful blindness, to its feudal context, Coke pressed the Great Charter into service against the absolutist claims of the Stuart monarchs. When the royalists struck back, they relied on the scholarship of Robert Brady, Cambridge professor and historian, who dismissed Magna Carta as a dusty irrelevance.[7] As summarized by a modern historian, Brady stood "for the principle with which we are so familiar at the present day – namely, that a document like the Charter has to be interpreted according to the form and structure of the society in which it had its origin."[8]

But it was Coke's textualist reading that won the day and became the received tradition. In the next century, Sir William Blackstone in his influential *Commentaries on the Laws of England* celebrated the "great charter of liberties, which was obtained, sword in hand, from king John."[9] As read by Blackstone, Magna Carta "protected every individual of the nation in

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[3] *Magna Carta and the Rule of Law* at 405.

[4] *Id.* at 413.

[5] *Id.* at 425.

[6] *Id.* at 433.

[7] See Herbert Butterfield, *The Englishman and his History* 76 (1944) (quoting Robert Brady, *Introduction to the Old English History* (1684)).

[8] Herbert Butterfield, *Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries* 23 (1969).

[9] 1 William Blackstone, *Commentaries on the Laws of England* 123 (1765). The citation is to the Oxford Edition of Blackstone, reprinting the first edition (Wilfrid Prest gen. ed., 2016).

the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[10] It was this understanding of Magna Carta that inspired the American Revolutionaries, who thought that they were carrying on the barons' struggle against royal tyranny.[11]

A revival of the originalist reading of Magna Carta had to wait until the early twentieth century. In a brief article in 1905 the distinguished academic lawyer Edward Jenks debunked "The Myth of Magna Carta."[12] Rejecting the glamorous image of Coke and Blackstone, Jenks dismissed what happened in 1215 as "a melodramatic and somewhat tawdry scene in a turgid and unwholesome drama . . . when a conspiracy of self-seeking and reckless barons wrung from a worthless monarch the concession of feudal privileges."[13]

Also in 1905, an exhaustive commentary on the text of Magna Carta by William Sharp McKechnie reached the same general conclusion.[14] Coke's reading of the charter was, according to McKechnie, "entirely uncritical and unhistorical." Seemingly "unconscious of the great changes" that had occurred since 1215, Coke ignored the original meaning of Magna Carta and treated its various clauses merely "as occasions for expounding the law as it stood, not at the beginning of the thirteenth century, but in his own day."[15] McKechnie did recognize that revisionist scholarship like his ran the risk of undermining "traditional interpretations which, even when based on insecure historical foundations, are shown in the sequel to have proved of supreme value in the battle of freedom."[16] Or, in the less diplomatic phrase of Philip Kurland, Magna Carta's traditional interpretations are based on a "noble lie."[17]

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[10] 4 Blackstone, *Commentaries* 423-24 (1769).

[11] See, e.g., Alexander Hamilton, "Federalist No. 84," in *The Federalist* 534 (Benjamin Fletcher Wright ed., 1966).

[12] Edward Jenks, "The Myth of Magna Carta," 4 *Independent Rev.* 260 (1905).

[13] *Id.* at 272.

[14] William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* (1905).

[15] *Id.* at 208.

[16] *Id.* at ix (commenting on Jenks, "The Myth of Magna Carta").

[17] Philip B. Kurland, "Magna Carta and Constitutionalism in the United States: The Noble Lie,"

Inevitably, the wheel of historical interpretation turned once again. In 1964 Professor J.C. Holt in his own magisterial study of the Great Charter conceded that McKechnie's magnum opus was "a learned work of scholarship," but – in an eerie echo of McKechnie's criticism of Coke – dismissed it as the work of a lawyer "concerned with pursuing the provisions of the Charter through subsequent legal developments."[18] Describing his own approach as that of "a historian and not a lawyer,"[19] Holt concluded that Coke's history is "not quite so insecure as either Brady or the modern critics would suggest." But it is, he warned, "to pursue a will-o'-the-wisp" – suppositions and guesswork? – to assume that "the exact contemporary sense of Magna Carta can be established as a canon whereby Coke and all other 'false' interpreters can be judged."[20] Robert Brady had his own agenda, the opposite of Coke's.[21]

Although Magna Carta has by now receded too far into the past for us to be confident of its exact meaning, it can hardly be doubted that an originalist reading would establish (or re-establish) it as a thoroughly medieval document. But the American Revolutionaries did not read it that way. By the eighteenth century Magna Carta had acquired a meaning based on its text as read by Coke and his followers, not on its historical context. When state constitution-makers adopted as their own the chapters of Magna Carta which provided that no one was to suffer the loss of liberty or property except "by the law of the land"[22] and that justice would be administered without "favor, denial, or delay,"[23] they were adopting the words of Magna Carta as they understood them. And when the Fifth

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in *The Great Charter: Four Essays on Magna Carta and the History of Our Liberty* 49 (Erwin N. Griswold ed., 1965).

[18] J.C. Holt, *Magna Carta* xvi (3d ed. by George Garnett and John Hudson 2015).

[19] *Id.* at xvi.

[20] *Id.* at 36.

[21] See Herbert Butterfield, *Magna Carta in the Historiography of the Sixteenth and Seventeenth Centuries* 22, 25 (1969) (Brady "made a full-scale attack on the view of history which the common lawyers had developed . . . [but] Brady carried his historical revision too far . . . .").

[22] Md. Const. of 1776, Declaration of Rights sec. 21; N.C. Const. of 1776, Declaration of Rights sec. 12.

[23] N.C. Const. of 1868, Declaration of Rights, sec. 35.

Amendment to the U.S. Constitution guaranteed "due process of law," the words were Coke's rendering of Magna Carta's *per legem terrae*.[24]

But Coke had one more magic trick to perform. He convinced the common lawyers that Magna Carta was "for the most part declaratory of the principal grounds of the fundamental laws of England."[25] In consequence, many of the protections sourced to the charter did not in fact depend upon a text after all. This is one reason the English constitution has remained unwritten to this day. As Britain's highest court explained in 2019: "Although the United Kingdom does not have a single document entitled 'The Constitution,' it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practices."[26] This escape from the tyranny of the text has its advantages. As the British government instructs would-be immigrants, "an unwritten constitution allows for more flexibility and better government."[27]

At first, American colonists were content to rely on this unwritten constitution. While their royal charters established the institutions of government, the common law functioned as their bill of rights. But as abuses by their colonial overlords accumulated, the colonists realized that they could not rely on traditional safeguards. Colonial judges, unlike the life-tenured judges in England,[28] served at the pleasure of the Crown – a tenure one lawyer described in a celebrated case from 1735 as "a disagreeable tenure to any officer, but a dangerous one in the case of a judge."[29] In des-

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[24] Coke derived the phrase "due process of law" from a statute in Law French, the venerable language of English law for three centuries following the Norman Conquest. 2 Edward Coke, *Institutes of the Laws of England* 50 (1648) (citing 25 Edward 3, st. 5, c. 4 (1350): *'en due manere ou process fait sur brief original a la commune lei.'*). See 1 William Holdsworth, *A History of English Law* 59-63 (7th ed. 1956).

[25] See 1 Blackstone, *Commentaries* 123-24 (citing 2 Coke, *Institutes* preface). And in fact, when King Edward I confirmed Magna Carta in 1297, he decreed that the "charter of liberties" be accepted as "common law."

[26] R. (on the application of Miller) v. The Prime Minister, [2019] UKSC 41.

[27] *Life in the United Kingdom: A Guide for New Residents* (3d ed. 2017).

[28] English judges secured tenure during good behavior by the Act of Settlement, 12 & 13 Will. 3, c. 2, § 3 (1701).

[29] James Alexander, *A Brief Narrative of the Case and Trial of John Peter Zenger* 84 (Stanley Nider Katz ed. 1963). See also Declaration of Independence (1776) (The King "has made Judges dependent on his Will alone for the tenure of their offices, and the amount and

peration, the colonists reached the same conclusion as the barons in 1215: they wanted their rights in writing.

Ironically – the ironies of history are never ending – by spelling out their fundamental rights in state and federal constitutions, the Americans were beginning again the debate that has raged for centuries over Magna Carta: Which matters most – text or context? While much more is known about the intentions of the drafters of American constitutions than about those of the barons who demanded Magna Carta, certainty seems almost as elusive. If learned judges today cannot agree about the meaning of words in a statute adopted during their lifetime, how much more uncertainty must surround a document drafted over two centuries ago.[30]

Reading the Constitution: textualist or originalist?

payment of their salaries.").

[30] See, e.g., Bostock v. Clayton County Georgia, 140 S. Ct. 1731 (2020) (construing the Civil Rights Act of 1964).